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WHEN: Tuesday, February 12, 2013
9 a.m.–12:30 p.m.

WHERE: Office of the Federal Register
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A cumulative list of the parts affected this month can be found in the Reader Aids section at the end of this issue.

Rules and Regulations

Federal Register
Vol. 78, No. 20
Wednesday, January 30, 2013

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 25

[Docket No. FAA–2012–1199; Special Conditions No. 25–476–SC]

Special Conditions: Embraer S.A., Model EMB–550 Airplanes; Flight Envelope Protection: Performance Credit for Automatic Takeoff Thrust Control System (ATTCS) During Go-Around

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special conditions.

SUMMARY: These special conditions are issued for the Embraer S.A. Model EMB–550 airplane. This airplane will have a novel or unusual design feature associated with the use of an Automatic Takeoff Thrust Control System (ATTCS) during go-around. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: *Effective Date:* March 1, 2013.

FOR FURTHER INFORMATION CONTACT: Joe Jacobsen, FAA, Airplane and Flight Crew Interface Branch, ANM–111, Transport Airplane Directorate, Aircraft Certification Service, 1601 Lind Avenue SW., Renton, Washington 98057–3356; telephone 425–227–2011; facsimile 425–227–1149.

SUPPLEMENTARY INFORMATION:

Background

On May 14, 2009, Embraer S.A. applied for a type certificate for their new Model EMB–550 airplane. The Model EMB–550 airplane is the first of a new family of jet airplanes designed for corporate flight, fractional, charter, and private owner operations. The aircraft has a conventional configuration with low wing and T-tail empennage. The primary structure is metal with composite empennage and control surfaces. The Model EMB–550 airplane is designed for 8 passengers, with a maximum of 12 passengers. It is equipped with two Honeywell HTF7500–E medium bypass ratio turbofan engines mounted on aft fuselage pylons. Each engine produces approximately 6,540 pounds of thrust for normal takeoff. The primary flight controls consist of hydraulically powered fly-by-wire elevators, ailerons and rudder, controlled by the pilot or copilot sidestick.

Embraer S.A. has incorporated an ATTCS function into the engine of the Model EMB–550 airplane. It has a full authority digital electronic control system architecture. Embraer S.A. proposed allowing performance credit for this function during go-arounds to show compliance with the requirements of § 25.121(d) for approach climb performance. Since the airworthiness requirements do not contain appropriate safety standards for approach climb performance using ATTCS, special conditions are required to establish a level of safety equivalent to that of the regulations.

Part 25 appendix I contains standards for use of ATTCS during takeoff. These special conditions establish standards to extend the use of ATTCS to the go-around phase.

Type Certification Basis

Under the provisions of Title 14, Code of Federal Regulations (14 CFR) 21.17, Embraer S.A. must show that the Model EMB–550 airplane meets the applicable provisions of part 25, as amended by Amendments 25–1 through 25–127 thereto.

If the Administrator finds that the applicable airworthiness regulations (i.e., 14 CFR part 25) do not contain adequate or appropriate safety standards for the Model EMB–550 airplane because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.16.

Special conditions are initially applicable to the model for which they are issued. Should the type certificate for that model be amended later to include any other model that incorporates the same or similar novel or unusual design feature, the special conditions would also apply to the other model under § 21.101.

In addition to the applicable airworthiness regulations and special conditions, the Model EMB–550 airplane must comply with the fuel vent and exhaust emission requirements of 14 CFR part 34 and the noise certification requirements of 14 CFR part 36 and the FAA must issue a finding of regulatory adequacy under § 611 of Public Law 92–574, the ''Noise Control Act of 1972.''

The FAA issues special conditions, as defined in 14 CFR 11.19, in accordance with § 11.38, and they become part of the type-certification basis under § 21.17(a)(2).

Novel or Unusual Design Features

The Embraer S.A. Model EMB–550 airplane has an ATTCS that is used for both takeoff and go-around functions.

Section 25.904 and part 25 appendix I refer to operations of ATTCS only during takeoff. The Embraer S.A. Model EMB–550 airplane also provides for use of ATTCS for go-arounds. As a result, if an engine failure occurs during a go-around, the remaining engine automatically applies maximum go-around thrust. In addition, in the case of an approach with one engine already inoperative, if it is necessary to perform a go-around, the operating engine automatically applies maximum go-around thrust.

These special conditions are intended to ensure that the ATTCS functions correctly and meets expected performance requirements during go-arounds when the airplane is limited by weight, altitude, and/or temperature during an approach.

Discussion

Since current airworthiness requirements do not contain safety standards to allow credit for ATTCS in determining approach climb performance, these special conditions are required to establish a level of safety equivalent to that of the regulations. The definition of a critical time interval for the approach climb case similar to the critical time interval for takeoff defined in part 25 appendix I is of primary importance. During an approach climb, it must be extremely improbable to violate a flight path based on the climb gradient requirement of § 25.121(d).

This climb gradient requirement implies a minimum one-engine-inoperative flight path capability with the airplane in the approach configuration. The engine may have been inoperative before initiating the go-around, or it may become inoperative during the go-around. The definition of the critical time interval must consider both possibilities.

The propulsive thrust used to determine compliance with the approach climb requirements of § 25.121(d) is limited to the lesser of:

- The thrust provided by the ATTCS, or
- 111% of the thrust resulting from the initial thrust setting with the ATTCS failing to perform its uptrim function and without action by the flightcrew to reset thrust.

This requirement serves to limit the adverse performance effects of a combined engine and ATTCS failure, and ensures adequate performance of an all-engines-operating go-around.

Discussion of Comments

Notice of proposed special conditions No. 25–12–06–SC for the Embraer S.A. Model EMB–550 airplanes was published in the **Federal Register** on November 9, 2012, (77 FR 67309). No substantitve comments were received, and the special conditions are adopted as proposed.

Applicability

As discussed above, these special conditions are applicable to the Embraer S.A. Model EMB–550 airplane. Should Embraer S.A. apply at a later date for a change to the type certificate to include another model incorporating the same novel or unusual design feature, the special conditions would apply to that model as well.

Conclusion

This action affects only certain novel or unusual design features on one model of airplanes. It is not a rule of general applicability.

List of Subjects in 14 CFR Part 25

Aircraft, Aviation safety, Reporting and recordkeeping requirements.

The authority citation for these special conditions is as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701, 44702, 44704.

The Special Conditions

Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued as part of the type certification basis for Embraer S.A. Model EMB–550 airplanes.

1. The Model EMB–550 airplane must comply with the requirements of 14 CFR 25.904 and appendix I to 14 CFR part 25 and the following requirements pertaining to the go-around phase of flight:

2. Definitions

a. Takeoff/go-around (TOGA): Throttle lever in takeoff or go-around position.

b. Automatic takeoff thrust control system (ATTCS): The ATTCS in Model EMB–550 airplanes is defined as the entire automatic system available during takeoff and in go-around mode, including all devices, both mechanical and electrical, that sense engine failure, transmit signals, actuate fuel controls or power levers (or increase engine power by other means on operating engines to achieve scheduled thrust or power increase), and furnish cockpit information on system operation.

c. Critical time interval: The definition of the critical time interval in 14 CFR appendix I 25.2(b) must be expanded to include the following:

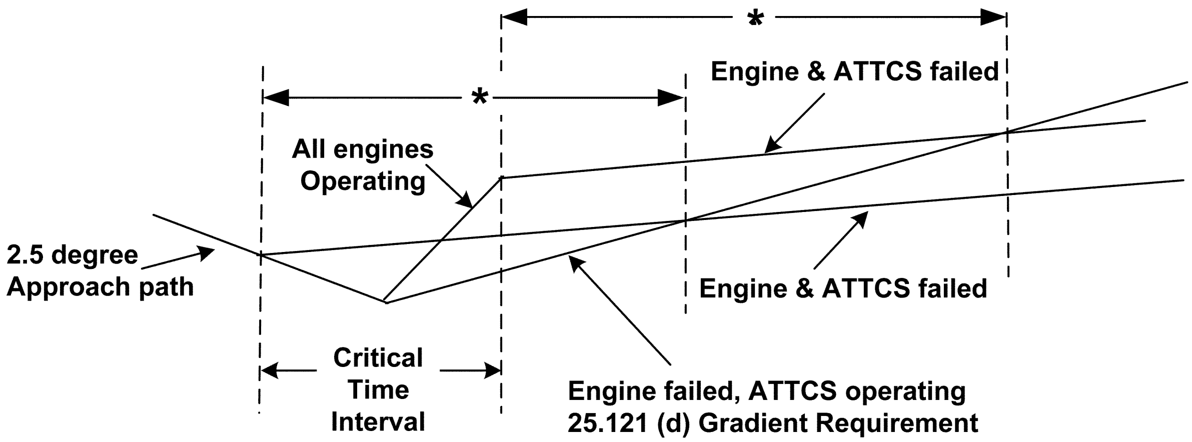
(1) When conducting an approach for landing using ATTCS, the critical time interval is defined as follows:

(i) The critical time interval *begins* at a point on a 2.5 degree approach glide path from which, assuming a simultaneous engine and ATTCS failure, the resulting approach climb flight path intersects a flight path originating at a later point on the same approach path corresponding that corresponds to the 14 CFR part 25 one-engine-inoperative approach climb gradient. The period of time from the point of simultaneous engine and ATTCS failure to the intersection of these flight paths must be no shorter than the time interval used in evaluating the critical time interval for takeoff beginning from the point of simultaneous engine and ATTCS failure and ending upon reaching a height of 400 feet.

(ii) The critical time interval *ends* at the point on a minimum performance, all-engines-operating go-around flight path from which, assuming a simultaneous engine and ATTCS failure, the resulting minimum approach climb flight path intersects a flight path corresponding to the 14 CFR part 25 minimum one-engine-inoperative approach climb gradient. The all-engines-operating go-around flight path and the 14 CFR part 25 one-engine-inoperative approach climb gradient flight path originate from a common point on a 2.5 degree approach path. The period of time from the point of simultaneous engine and ATTCS failure to the intersection of these flight paths must be no shorter than the time interval used in evaluating the critical time interval for the takeoff beginning from the point of simultaneous engine and ATTCS failure and ending upon reaching a height of 400 feet.

(2) The critical time interval must be determined at the altitude resulting in the longest critical time interval for which one-engine-inoperative approach climb performance data are presented in the airplane flight manual (AFM).

(3) The critical time interval is illustrated in the following figure:



*** The engine and ATTCS failed time interval must be no shorter than the time interval from the point of simultaneous engine and ATTCS failure to a height of 400 feet used to comply with I25.2(b) for ATTCS use during takeoff.**

3. Performance and system reliability requirements: The applicant must comply with the performance and ATTCS reliability requirements as follows:

a. An ATTCS failure or a combination of failures in the ATTCS during the critical time interval:

(1) Must not prevent the insertion of the maximum approved go-around thrust or power, or must be shown to be a remote event.

(2) Must not result in a significant loss or reduction in thrust or power, or must be shown to be an extremely improbable event.

b. The concurrent existence of an ATTCS failure and an engine failure during the critical time interval must be shown to be extremely improbable.

c. All applicable performance requirements of 14 CFR part 25 must be met with an engine failure occurring at the most critical point during go-around with the ATTCS functioning.

d. The probability analysis must include consideration of ATTCS failure occurring after the time at which the flightcrew last verifies that the ATTCS is in a condition to operate until the beginning of the critical time interval.

e. The propulsive thrust obtained from the operating engine after failure of the critical engine during a go-around used to show compliance with the one-engine-inoperative climb requirements of § 25.121(d) may not be greater than the lesser of:

(1) The actual propulsive thrust resulting from the initial setting of power or thrust controls with the ATTCS functioning; or

(2) 111% of the propulsive thrust resulting from the initial setting of power or thrust controls with the ATTCS failing to reset thrust or power and without any action by the flightcrew to reset thrust or power.

4. Thrust setting

a. The initial go-around thrust setting on each engine at the beginning of the go-around phase may not be less than any of the following:

(1) That required to permit normal operation of all safety-related systems and equipment dependent upon engine thrust or power lever position; or

(2) That shown to be free of hazardous engine response characteristics and not to result in any unsafe aircraft operating or handling characteristics when thrust or power is advanced from the initial go-around position to the maximum approved power setting.

b. For approval to use an ATTCS for go-arounds, the thrust setting procedure must be the same for go-arounds initiated with all engines operating as for go-around initiated with one engine inoperative.

5. Powerplant controls

a. In addition to the requirements of § 25.1141, no single failure or malfunction, or probable combination thereof, of the ATTCS, including associated systems, may cause the failure of any powerplant function necessary for safety.

b. The ATTCS must be designed to:

(1) Apply thrust or power on the operating engine(s), following any one-engine failure during a go-around, to achieve the maximum approved go-around thrust without exceeding the engine operating limits;

(2) Permit manual decrease or increase in thrust or power up to the maximum go-around thrust approved for the airplane under the existing conditions through the use of the power lever. For airplanes equipped with limiters that automatically prevent the engine operating limits from being exceeded under existing ambient conditions, other means may be used to increase the thrust in the event of an ATTCS failure, provided that the means:

(i) Is located on or forward of the power levers;

(ii) Is easily identified and operated under all operating conditions by a single action of either pilot with the hand that is normally used to actuate the power levers; and

(iii) Meets the requirements of § 25.777(a), (b), and (c).

(3) Provide a means to verify to the flightcrew before beginning an approach for landing that the ATTCS is in a condition to operate (unless it can be demonstrated that an ATTCS failure combined with an engine failure during an entire flight is extremely improbable); and

(4) Provide a means for the flightcrew to deactivate the automatic function. This means must be designed to prevent inadvertent deactivation.

6. Powerplant instruments: In addition to the requirements of § 25.1305:

a. A means must be provided to indicate when the ATTCS is in the armed or ready condition; and

b. If the inherent flight characteristics of the airplane do not provide adequate warning that an engine has failed, a warning system that is independent of the ATTCS must be provided to give the pilot a clear warning of any engine failure during a go-around.

Issued in Renton, Washington, on January 24, 2013.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2013–01928 Filed 1–29–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 25

[Docket No. FAA–2012–0699; Special Conditions No. 25–474–SC]

Special Conditions: Airbus, Model A318–112 Airplane (S/N 3238); Certification of Cooktops

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special conditions.

SUMMARY: These special conditions are issued for the Airbus Model A318–112 airplane, serial number (S/N) 3238. This airplane, as modified by Fokker Services B.V., will have a novel or unusual design feature associated with a cooktop installation. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: *Effective Date:* January 24, 2013.

FOR FURTHER INFORMATION CONTACT: Dan Jacquet, FAA, Airframe and Cabin Safety Branch, ANM–115, Transport Airplane Directorate, Aircraft Certification Service, 1601 Lind Avenue SW., Renton, Washington 98057–3356; telephone 425–227–2676; facsimile 425–227–1100; email *daniel.jacquet@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

On January 12, 2010, Fokker Services B.V. applied for a supplemental type certificate for an interior conversion on an Airbus Model A318–112 airplane, S/N 3238. The Airbus Model A318–112 airplane is a large, transport-category airplane powered by two CFM56–5B9/P engines, with a basic maximum takeoff weight of 130,071 pounds.

At the time of the notice of proposed special conditions No. 25–12–02–SC, Fokker Services B.V. requested certification to convert an Airbus Model A318–112 (S/N 3238) to a corporate jet, operating for both common carriage and private use. As of this publication, Fokker Services B.V. requested certification for common carriage only. The aircraft will now be certified for a maximum of 8 crew and 19 passengers and limited to common carriage only. The aircraft will be subdivided into an entrance way, executive lounge, two private lounges, and a private bathroom. The entry will include the installation of two wet galleys. One of the galleys will include the installation of two combined cooktop pan units. The addition of a cooktop to this interior conversion can lead to hazards to both the occupants and the aircraft. Special consideration is needed to address the safety standards associated with this installation.

Type Certification Basis

Under the provisions of Title 14, Code of Federal Regulations (14 CFR) 21.101, Fokker Services B.V. must show that the Airbus Model A318–112 (S/N 3238) airplane, as changed, continues to meet the applicable provisions of the regulations incorporated by reference in Type Certificate No. A28NM or the applicable regulations in effect on the date of application for the change. The regulations incorporated by reference in the type certificate are commonly referred to as the ''original type certification basis.'' The regulations incorporated by reference in Type Certificate No. A28NM are 14 CFR part 25, as amended by Amendments 25–1 through 25–56, with reversions to earlier amendments, voluntary compliance to later amendments, special conditions, equivalent safety findings, and exemptions listed in the type certificate data sheet.

If the Administrator finds that the applicable airworthiness regulations (i.e., 14 CFR part 25) do not contain adequate or appropriate safety standards for the Airbus Model A318–112 (S/N 3238) because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.16.

Special conditions are initially applicable to the model for which they are issued. Should the applicant apply for a supplemental type certificate to modify any other model included on the same type certificate to incorporate the same novel or unusual design feature, the special conditions would also apply to the other model under § 21.101.

In addition to the applicable airworthiness regulations and special conditions, the Airbus Model A318–112 (S/N 3238) must comply with the fuel vent and exhaust emission requirements of 14 CFR part 34 and the noise certification requirements of 14 CFR part 36.

The FAA issues special conditions, as defined in 14 CFR 11.19, in accordance with § 11.38, and they become part of the type-certification basis under § 21.101.

Novel or Unusual Design Features

The Airbus Model A318–112 airplane, S/N 3238, will incorporate the following novel or unusual design feature: Cooktops in the passenger cabin. Cooktops introduce high heat, smoke, and the possibility of fire into the passenger cabin environment. The current airworthiness standards of part 25 do not contain adequate or appropriate safety standards to protect the airplane and its occupants from these potential hazards. The applicant's proposed system is considered to be a novel or unusual design feature.

Discussion

Currently, ovens are the prevailing means of heating food on airplanes. Ovens are characterized by an enclosure that contains both the heat source and the food being heated. The hazards presented by ovens are thus inherently limited and are well understood through years of service experience. Cooktops, on the other hand, are characterized by exposed heat sources and the presence of relatively unrestrained hot cookware and heated food. These may represent unprecedented hazards to both the occupants and the airplane.

Cooktops could have serious passenger and aircraft safety implications if appropriate requirements are not established for their installation and use. The requirements identified in these proposed special conditions are in addition to those considerations identified in Advisory Circular (AC) 20–168, *Certification Guidance for Installation of Non-Essential, Non-Required Aircraft Cabin Systems and Equipment (CS&E),* and those in AC 25–17A, *Transport Airplane Cabin Interiors Crashworthiness Handbook.* The intent of these proposed special conditions is to provide a level of safety that is consistent with that on similar aircraft without cooktops.

In similar cooktop installations, the FAA has required a deployable cover and a means to automatically shut off the power when the cover was in use. In lieu of these requirements, the cooktop installation in this Airbus A318–112 (S/N 3238) will have a lid and a timer that is not covered by the lid. The timer switches the heating elements on and off, has a maximum time of 20 minutes, and is still accessible when the lid is closed. The cabin crew will be instructed on its use. In addition to the lid and timer, the applicant will supply a fire blanket that is 1,100 by 1,100 mm (catalogue no. SAP–967–T). The fire blanket meets the requirements of British Standard BS 6575:1965. These specifications contain the requirements for flexibility, heat, electrical resistance, and fire extinguishing including cooking oil fires for light duty and heavy duty (industrial) applications.

For this cooktop installation, the FAA requires evidence that with the cooktop lid closed, the temperature set on ''high,'' and the timer at maximum, the cooktop will maintain safe operation and will not create a hazardous condition even with cooking oil in the cooktop.

Discussion of Comments

Notice of proposed special conditions No. 25–12–02–SC for the Airbus Model A318–112 airplane (S/N 3238) was published in the **Federal Register** on August 28, 2012 (77 FR 51944–51946). No comments were received, and the special conditions are adopted as proposed.

Applicability

As discussed above, these special conditions are applicable to the Airbus Model A318–112 (S/N 3238). Should Fokker Services B.V. apply at a later date for a supplemental type certificate to modify any other model included on Type Certificate No. A28NM to incorporate the same novel or unusual design feature, these special conditions would apply to that model as well.

Under standard practice, the effective date of final special conditions would be 30 days after the date of publication in the **Federal Register**; however, as the certification date for the Airbus Model A318–112 airplane (S/N 3238) is imminent, the FAA finds that good cause exists to make these special conditions effective upon issuance.

Conclusion

This action affects only certain novel or unusual design features on one model of airplane. It is not a rule of general applicability and affects only the applicant who applied to the FAA for approval of these features on the airplane.

List of Subjects in 14 CFR Part 25

Aircraft, Aviation safety, Reporting and recordkeeping requirements.

The authority citation for these special conditions is as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701, 44702, 44704.

The Special Conditions

Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued as part of the type certification basis for the Airbus Model A318–112 airplane, serial number 3238, modified by Fokker Services B.V.

Cooktop installations with electrically powered burners must comply with the following criteria:

1. Means, such as conspicuous burner-on indicators, physical barriers, or handholds, must be installed to minimize the potential for inadvertent personnel contact with hot surfaces of both the cooktop and cookware. Conditions of turbulence must be considered.

2. Sufficient design means must be included to restrain cookware while in place on the cooktop, as well as representative contents, e.g., soup, sauces, etc., from the effects of flight loads and turbulence. Restraints must be provided to preclude hazardous movement of cookware and contents. These restraints must accommodate any cookware that is identified for use with the cooktop. Restraints must be designed to be easily utilized and effective in service. The cookware restraint system should also be designed so that it will not be easily disabled, thus rendering it unusable. Placarding must be installed which prohibits the use of cookware that cannot be accommodated by the restraint system.

3. Placarding must be installed that prohibits the use of cooktops (i.e., power on any burner) during taxi, takeoff, and landing.

4. Means must be provided to address the possibility of a fire occurring on or in the immediate vicinity of the cooktop. Two acceptable means of complying with this requirement are as follows:

a. Placarding must be installed that prohibits any burner from being powered when the cooktop is unattended, which would prohibit a single person from cooking on the cooktop and intermittently serving food to passengers while any burner is powered; a fire detector must be installed in the vicinity of the cooktop that provides an audible warning in the passenger cabin; and a fire extinguisher of appropriate size and extinguishing agent must be installed in the immediate vicinity of the cooktop. Access to the extinguisher must not be blocked by a fire on or around the cooktop. One of the fire extinguishers required by § 25.851 may be used to satisfy this requirement. If this is not possible, then the extinguisher in the galley area would be additional; or,

b. An automatic, thermally activated, fire-suppression system must be installed to extinguish a fire at the cooktop and immediately adjacent surfaces. The agent used in the system must be an approved, total-flooding agent suitable for use in an occupied area. The fire-suppression system must have a manual override. The automatic activation of the fire-suppression system must also automatically shut off power to the cooktop.

5. The surfaces of the galley surrounding the cooktop, which would be exposed to a fire on the cooktop surface or in cookware on the cooktop, must be constructed of materials that comply with the flammability requirements of 14 CFR part 25, appendix F, part III. This requirement is in addition to the flammability requirements typically required of the materials in these galley surfaces. During the selection of these materials, consideration must also be given to ensure that the flammability characteristics of the materials will not be adversely affected by the use of cleaning agents and utensils used to remove cooking stains.

6. The cooktop ventilation system ducting must be protected by a flame arrestor. In addition, procedures and time intervals must be established and included in the instructions for continued airworthiness to inspect and clean or replace the ventilation system to prevent a fire hazard from the accumulation of flammable oils. [Note: The applicant may find additional useful information in the Society of Automotive Engineers, Aerospace Recommended Practice 85, Rev. E, entitled, ''Air Conditioning Systems for Subsonic Airplanes,'' dated August 1, 1991.]

7. Means must be provided to contain spilled foods or fluids in a manner that prevents the creation of a slipping hazard to occupants, and that will not lead to the loss of structural strength due to corrosion.

8. Cooktop installations must provide adequate space for the user to immediately escape a hazardous cooktop condition.

9. A means to shut off power to the cooktop must be provided at the galley containing the cooktop and in the cockpit. If additional switches are introduced in the cockpit, revisions to smoke or fire emergency procedures of the airplane flight manual (AFM) will be required.

10. Cooktop installations must incorporate a timer that will switch the

heating elements off after a maximum time of 20 minutes.

11. Instructions for the cabin crew to ensure safe operation of the cooktop lid and timer must be provided.

12. Evidence must be provided that with the cooktop lid closed, the temperature set on ''high,'' and the timer at maximum, the cooktop will maintain safe operation and will not create a hazardous condition even with cooking oil in the cooktop.

Issued in Renton, Washington, on January 24, 2013.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2013–01939 Filed 1–29–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–0183; Directorate Identifier 2011–NM–131–AD; Amendment 39–17328; AD 2013–02–07]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for certain The Boeing Company Model 737–600, –700, –700C, –800, –900, and –900ER series airplanes. This AD was prompted by reports from the manufacturer that center overhead stowage (COS) boxes could fall from their supports under forward load levels less than the 9 g forward load requirements as defined by certain regulations. This AD requires modifying COS boxes by installing new brackets, stiffeners, and hardware as needed. We are issuing this AD to prevent detachment of COS boxes at forward load levels less than 9 g during an emergency landing, which would cause injury to passengers and/or crew, and could impede subsequent rapid evacuation.

DATES: This AD is effective March 6, 2013.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in the AD as of March 6, 2013.

ADDRESSES: For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, WA 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; Internet *https://www.myboeingfleet.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The address for the Docket Office (phone: 800–647–5527) is Document Management Facility, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Sarah Piccola, Aerospace Engineer, Cabin Safety and Environmental Systems Branch, ANM–150S, FAA, Seattle ACO, 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: 425–917–6483; fax: 425–917–6590; email: *sarah.piccola@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. That NPRM published in the **Federal Register** on February 27, 2012 (77 FR 11416). That NPRM proposed to require modifying COS boxes by installing new brackets, stiffeners, and hardware as needed.

Comments

We gave the public the opportunity to participate in developing this AD. The following presents the comments received on the proposal (77 FR 11416, February 27, 2012) and the FAA's response to each comment. United Airlines and two private citizens support the NPRM. Aviation Partners Boeing stated that the installation of winglets per Supplemental Type Certificate (STC) ST00830SE does not affect the actions specified in the NPRM or Boeing Special Attention Service Bulletin 737–25–1641, Revision 1, dated August 8, 2011.

Request To Revise the Compliance Time

American Airlines requested that we extend the compliance time in the NPRM (77 FR 11416, February 27, 2012) from 60 months to 72 months to align with the heavy maintenance program driven by the Model 737 Maintenance Review Board.

We do not agree with extending the compliance time to 72 months, because an operator has experienced an event where the COS box did not remain fully attached. An increase in compliance time is not in the interest of public safety. We have not changed the final rule regarding this issue. In developing an appropriate compliance time for this action, we considered the safety implications, parts availability, and normal maintenance schedules for the timely accomplishment of the modification. In consideration of these items, as well as the reports where the COS box did not remain fully attached, we have determined that a 60-month compliance time will ensure an acceptable level of safety and allow the modifications to be done during scheduled maintenance intervals for most affected operators. We have not changed the AD in this regard.

Request To Revise Language

Boeing requested that we clarify the language of the NPRM (77 FR 11416, February 27, 2012) and replace the words ''other products of this same type design'' in the paragraph ''FAA's Determination,'' with the words ''the Boeing 737 Next Generation (737NG) airplane prior to L/N 3518 excluding Boeing Sky Interior (BSI).'' Boeing considered the existing language too general and confusing for operators.

We disagree with changing the AD. This standard language contained under ''FAA's Determination'' is in all proposed airworthiness directives to show adherence to Part 39 of the Federal Aviation Regulations (14 CFR 39), and is not restated in the final rule.

Request To Revise Maximum Load

Arkefly Airlines suggested that Boeing give the option to reduce the maximum load to a load that would meet the 9 g requirement without modification. The commenter suggested this could be incorporated by installing a placard with the new (reduced) maximum load.

We disagree because the customer COS box configuration has already been taken into account. This AD addresses optional COS boxes. These boxes typically contain life rafts, palletized equipment, or miscellaneous equipment. Boeing based its original design on the customer configurations and has determined that the design does not meet the 9 g load requirement. We have not changed the AD in this regard.

Actions Since Previous NPRM (77 FR 11416, February 27, 2012) Was Issued

The previous NPRM (77 FR 11416, February 27, 2012) referred to Boeing Special Attention Service Bulletin 737–25–1641, Revision 1, dated August 8, 2011, as the appropriate source of service information for accomplishing the required actions. Since we issued the previous NPRM, we have reviewed Boeing Special Attention Service Bulletin 737–25–1641, Revision 2, dated November 20, 2012, which made minor changes to part numbering of materials; added no additional work required by Boeing Special Attention Service Bulletin 737–25–1641, Revision 1, dated August 8, 2011; and both added and deleted airplanes from Group 2 airplanes. The added airplanes are not in the U.S. registry. We revised paragraphs (c) and (g) of this AD to refer to Boeing Special Attention Service Bulletin 737–25–1641, Revision 2, dated November 20, 2012, and revised paragraph (h) to give credit for work performed before the effective date of the AD using Boeing Special Attention Service Bulletin 737–25–1641, Revision 1, dated August 8, 2011.

Conclusion

We reviewed the relevant data, considered the comments received, and determined that air safety and the public interest require adopting the AD with the changes described previously and minor editorial changes. We have determined that these minor changes:

- Are consistent with the intent that was proposed in the NPRM (77 FR 11416, February 27, 2012) for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM (77 FR 11416, February 27, 2012).

Costs of Compliance

We estimate that this AD affects 526 airplanes of U.S. registry.

We estimate the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Modification	31 work-hours × $85 per hour = $2,635	$6,118	$8,753	$4,604,078

According to the manufacturer, some of the costs of this AD may be covered under warranty, thereby reducing the cost impact on affected individuals. We do not control warranty coverage for affected individuals. As a result, we have included all costs in our cost estimate.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. Subtitle VII: Aviation Programs, describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701: ''General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

This AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that this AD:

(1) Is not a ''significant regulatory action'' under Executive Order 12866,

(2) Is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979),

(3) Will not affect intrastate aviation in Alaska, and

(4) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new airworthiness directive (AD):

2013–02–07 The Boeing Company: Amendment 39–17328; Docket No. FAA–2012–0183; Directorate Identifier 2011–NM–131–AD.

(a) Effective Date

This AD is effective March 6, 2013.

(b) Affected ADs

None.

(c) Applicability

This AD applies to The Boeing Company Model 737–600, –700, –700C, –800, –900, and –900ER series airplanes, certificated in any category, as identified in Boeing Special Attention Service Bulletin 737–25–1641, Revision 1, dated August 8, 2011, as revised by Boeing Special Attention Service Bulletin 737–25–1641, Revision 2, dated November 20, 2012.

(d) Subject

Joint Aircraft System Component (JASC)/Air Transport Association (ATA) of America Code 25: Equipment/Furnishings.

(e) Unsafe Condition

This AD was prompted by reports from the manufacturer that center overhead stowage (COS) boxes could fall from their supports under forward load levels less than the 9 g forward load requirements as defined by Federal Aviation Regulations. We are issuing this AD to prevent detachment of COS boxes at forward load levels less than 9 g during an emergency landing, which would cause injury to passengers and/or crew, and could impede subsequent rapid evacuation.

(f) Compliance

Comply with this AD within the compliance times specified, unless already done.

(g) Modification and Installation of COS Boxes

Within 60 months after the effective date of this AD, modify the COS boxes in accordance with the Accomplishment Instructions of Boeing Special Attention Service Bulletin 737–25–1641, Revision 2, dated November 20, 2012.

(h) Credit for Previous Actions

This paragraph provides credit for the modification required by paragraph (g) of this AD, if the modification was performed before the effective date of this AD using Boeing Special Attention Service Bulletin 737–25–1641, dated May 13, 2011, which is not incorporated by reference in this AD; or Boeing Special Attention Service Bulletin 737–25–1641, Revision 1, dated August 8, 2011.

(i) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Seattle Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ACO, send it to the attention of the person identified in the Related Information section of this AD. Information may be emailed to: *9-ANM-Seattle-ACO-AMOC-Requests@faa.gov.*

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(3) An AMOC that provides an acceptable level of safety may be used for any repair required by this AD if it is approved by the Boeing Commercial Airplanes Organization Designation Authorization (ODA) that has been authorized by the Manager, Seattle Aircraft Certification Office, to make those findings.

(j) Related Information

(1) For more information about this AD, contact Sarah Piccola, Aerospace Engineer, Cabin Safety and Environmental Systems Branch, ANM–150S, FAA, Seattle ACO, 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: 425–917–6483; fax: 425–917–6590; email: *sarah.piccola@faa.gov.*

(2) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, Washington 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; Internet *https://www.myboeingfleet.com.*

(k) Material Incorporated by Reference

(1) The Director of the Federal Register approved the incorporation by reference (IBR) of the service information listed in this paragraph under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) You must use this service information as applicable to do the actions required by this AD, unless the AD specifies otherwise.

(i) Boeing Special Attention Service Bulletin 737–25–1641, Revision 1, dated August 8, 2011.

(ii) Boeing Special Attention Service Bulletin 737–25–1641, Revision 2, dated November 20, 2012.

(3) For The Boeing Company service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P. O. Box 3707, MC 2H–65, Seattle, WA 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; Internet *https://www.myboeingfleet.com.*

(4) You may view this service information at FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

(5) You may view this service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued in Renton, Washington, on January 18, 2013.

Michael Kaszycki,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2013–01718 Filed 1–29–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2011–0258; Directorate Identifier 2010–NM–191–AD; Amendment 39–17326; AD 2013–02–05]

RIN 2120–AA64

Airworthiness Directives; the Boeing Company

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for certain The Boeing Company Model 737–600, –700, –700C, –800, –900, and –900ER series airplanes. This AD requires, for certain airplanes, installing two warning level indicator lights on each of the P1–3 and P3–1 instrument panels in the flight compartment. This AD also requires, for certain airplanes, replacing the existing P5–16 and P5–10 panels; and, for certain airplanes, replacing the basic P5–16 panel with a high altitude landing P5–16 panel. Additionally, this AD requires revising the airplane flight manual to remove certain requirements of previous AD actions, and to advise the flightcrew of certain changes. This AD was prompted by a design change in the cabin altitude warning system that would address the identified unsafe condition. We are issuing this AD to prevent failure of the flightcrew to recognize and react to a valid cabin altitude warning horn, which could result in incapacitation of the flightcrew due to hypoxia (a lack of oxygen in the body), and consequent loss of control of the airplane.

DATES: This AD is effective March 6, 2013.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in the AD as of March 6, 2013.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in the AD as of November 7, 2012 (77 FR 60296, October 3, 2012).

ADDRESSES: For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, Washington 98124–2207; telephone 206–544–5000, extension 1, fax 206–766–5680; Internet *https://www.myboeingfleet.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The address for the Docket Office (phone: 800–647–5527) is Document Management Facility, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Jeffrey W. Palmer, Aerospace Engineer, Systems and Equipment Branch, ANM–130S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue SW., Renton, Washington 98057–3356; phone: (425) 917–6472; fax: (425) 917–6590; email: *jeffrey.w.palmer@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

We issued a supplemental notice of proposed rulemaking (SNPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. The SNPRM published in the **Federal Register** on August 27, 2012 (77 FR 51724). The original NPRM (76 FR 16579, March 24, 2011) proposed to require, for certain airplanes, installing two warning level indicator lights on each of the P1–3 and P3–1 instrument panels in the flight compartment. The original NPRM also proposed to require revising the airplane flight manual (AFM) to remove certain requirements of previous AD actions, and to advise the flightcrew of the following changes: revised non-normal procedures to use when a cabin altitude warning or rapid depressurization occurs, and revised cabin pressurization procedures for normal operations. The SNPRM proposed to add airplanes to the applicability; add airplanes to the installation requirement, including, for certain airplanes, replacing the existing P5–16 and P5–10 panels; and, for certain airplanes, replacing the basic P5–16 panel with a high altitude landing P5–16 panel.

Comments

We gave the public the opportunity to participate in developing this AD. The following presents the comments received on the proposal (77 FR 51724, August 27, 2012) and the FAA's response to each comment.

Request To Exclude Airplanes With Certain Variable Numbers From Paragraph (i) of the SNPRM (77 FR 51724, August 27, 2012)

Boeing asked that paragraph (i) of the SNPRM (77 FR 51724, August 27, 2012) be changed to exclude airplanes with certain variable numbers, instead of excluding Groups 24, 25, and 27 through 33 airplanes identified in Boeing Alert Service Bulletin 737–31A1332, Revision 3, dated March 28, 2012. Boeing stated that excluding credit for Groups 24, 25, and 27 through 33 airplanes excludes credit for approximately 655 Model 737NG airplanes on which the actions specified in Boeing Alert Service Bulletin 737–31A1332, Revision 1, dated June 24, 2010; or Revision 2, dated August 18, 2011; might have been accomplished previously. Boeing also noted that there is a conflict between these service bulletin revisions for the Model 737NG airplanes having line numbers 1 through 740 inclusive and included in the applicability specified in AD 2009–16–07, Amendment 39–15990 (74 FR 41607, August 18, 2009), which was referred to under ''Related Rulemaking'' in the SNPRM. Boeing stated that only 87 airplanes having certain variable numbers have an actual conflict. Boeing also stated that the overlap between groups may be isolated to airplanes on which certain actions in the referenced service information were done, and if those airplanes have not had the overlap between groups, credit should be given for accomplishing this service information.

We agree that replacing Groups 24, 25, and 27 through 33 airplanes identified in Boeing Alert Service Bulletin 737–31A1332, Revision 3, dated March 28, 2012, with the specified airplane variable numbers more clearly identifies the airplanes that should be excluded in paragraphs (i)(1) and (i)(2) of this AD. This change excludes a smaller group of airplanes from those credit paragraphs. We have changed paragraphs (i)(1) and (i)(2) of this AD accordingly.

We do not agree with giving credit for airplanes on which certain actions have been done and that might not overlap between groups. Doing so would require additional research into the detailed maintenance history of each affected airplane, which would unduly delay issuance of this AD. Operators of the affected airplanes may request approval of an alternative method of compliance (AMOC) under the provisions of paragraph (m) of this AD if substantiating data are provided. We have made no change to the AD in this regard.

Request To Correct AFM Reference to Target Speed

Delta Airlines (DAL) asked that the target speed identified in paragraph (j)(2)(iv) of the SNPRM (77 FR 51724, August 27, 2012) be corrected. DAL stated that if an emergency descent is required, the target speed in the SNPRM is given as ''MO/MMO''; however, in the original NPRM (76 FR 16579, March 24, 2011), the correct target speed was given as ''VMO/MMO.'' DAL noted that the current target speed of ''MO/MMO'' is incorrect and should be changed back to ''VMO/MMO.''

We agree that the published version of the target speed identified in paragraph (j)(2)(iv) of the SNPRM (77 FR 51724, August 27, 2012) is incorrect. The correct target speed, ''VMO/MMO,'' is specified in paragraph (j)(2)(iv) of this AD.

Request To Include Revised Service Information

United Airlines (UA) asked that the SNPRM (77 FR 51724, August 27, 2012) include Revision 4 of Boeing Alert Service Bulletin 737–31A1332. UA stated that Boeing is in the process of revising Boeing Alert Service Bulletin 737–31A1332, Revision 3, dated March 28, 2012, and added that it has reviewed the preliminary release of Revision 4.

We do not agree to include Revision 4 of Boeing Alert Service Bulletin 737–31A1332 in this AD because it has not yet been issued. We do not consider that delaying this action until after the manufacturer revises the service bulletin is warranted. We also cannot use the phrase, ''or later FAA-approved revisions,'' in an AD when referring to the service document because doing so violates Office of the Federal Register (OFR) regulations for approval of materials ''incorporated by reference'' in rules.

To allow operators to use later revisions of the referenced document (issued after publication of the AD), either we must revise the AD to reference specific later revisions, or operators must request approval to use later revisions as an AMOC with this AD under the provisions of paragraph (m) of this AD. However, once Revision 4 of Boeing Alert Service Bulletin 737–31A1332 is released, we will consider issuing a global AMOC to allow operators to use that revision for accomplishing the requirements of this AD. We have not changed the AD in this regard.

Request To Clarify Component Service Bulletin References

DAL asked that the final rule clarify that the rework specified in the BAE Systems component service bulletins identified in certain notes in Boeing Alert Service Bulletin 737–31A1332, Revision 3, dated March 28, 2012, does not have to be done by using every component service bulletin listed. DAL added that by specifying only those component service bulletins applicable to the dash number part being reworked, the intent of the notes would not have to be interpreted.

We agree to provide clarification. Operators may refer to the part numbers identified in Section 1.A., ''Planning Information—Effectivity,'' of the service information specified in note rows (a) and (b) of Figure 1 and note rows (a) and (b) of Figure 2 of Boeing Alert Service Bulletin 737–31A1332, Revision 3, dated March 28, 2012, to determine which service information may be used as guidance for rework of a given panel. We have added a new Note 1 to paragraph (g) of this AD (and reidentified subsequent notes) to provide clarification.

Request To Add Repair Language to AMOC Paragraph

Boeing asked that repair approval by a Boeing Commercial Airplanes

Organization Designation Authorization (ODA) be added to the AMOC language in paragraph (m) of the SNPRM (77 FR 51724, August 27, 2012). Boeing stated that this delegation of authority to approve an AMOC for any repair should be included in the AD.

We agree with the commenter for the reason provided. We have added a new paragraph (m)(3) to this AD to include the standard ODA repair delegation of authority language.

Conclusion

We reviewed the relevant data, considered the comments received, and determined that air safety and the public interest require adopting the AD with the changes described previously. We determined that these changes will not increase the economic burden on any operator or increase the scope of the AD.

Costs of Compliance

We estimate that this AD affects 870 airplanes of U.S. registry. The following table provides the estimated costs for U.S. operators to comply with this AD.

TABLE—ESTIMATED COSTS

Action	Work hours	Average labor rate per hour	Parts	Cost per product	Number of U.S.-registered airplanes	Fleet cost
Installation of warning indicator lights.	Between 34 and 84	$85	Between $2,172 and $5,238.	Between $5,062 and $12,378.	870	Between $4,403,940 and $10,768,860.
AFM revision	2	85	$0	$170	870	$147,900.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, Section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701, ''General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We have determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that this AD:

(1) Is not a ''significant regulatory action'' under Executive Order 12866,

(2) Is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979),

(3) Will not affect intrastate aviation in Alaska, and

(4) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new airworthiness directive (AD):

2013–02–05 The Boeing Company: Amendment 39–17326; Docket No. FAA–2011–0258; Directorate Identifier 2010–NM–191–AD.

(a) Effective Date

This airworthiness directive (AD) is effective March 6, 2013.

(b) Affected ADs

This AD affects the ADs identified in paragraphs (b)(1), (b)(2), and (b)(3) of this AD. This AD does not supersede the requirements of these ADs.

(1) AD 2003–14–08, Amendment 39–13227 (68 FR 41519, July 14, 2003).

(2) AD 2006–13–13, Amendment 39–14666 (71 FR 35781, June 22, 2006; corrected July 3, 2006 (71 FR 37980)).

(3) AD 2008–23–07, Amendment 39–15728 (73 FR 66512, November 10, 2008).

(c) Applicability

This AD applies to The Boeing Company Model 737–600, –700, –700C, –800, –900, and –900ER series airplanes, certificated in any category, as identified in Boeing Alert Service Bulletin 737–31A1332, Revision 3, dated March 28, 2012.

(d) Subject

Air Transport Association (ATA) of America Code 31, Instruments.

(e) Unsafe Condition

This AD was prompted by a design change in the cabin altitude warning system that would address the identified unsafe condition. We are issuing this AD to prevent failure of the flightcrew to recognize and react to a valid cabin altitude warning horn, which could result in incapacitation of the flightcrew due to hypoxia (a lack of oxygen in the body), and consequent loss of control of the airplane.

(f) Compliance

Comply with this AD within the compliance times specified, unless already done.

(g) Installation

Within 36 months after the effective date of this AD: Install two warning level indicator lights on each of the P1–3 and P3–1 instrument panels in the flight compartment, and, as applicable, replace the existing P5–16 and P5–10 panels, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 737–31A1332, Revision 3, dated March 28, 2012.

Note 1 to paragraph (g) of this AD: Note rows (a) and (b) of Figures 1 and 2 of Boeing Alert Service Bulletin 737–31A1332, Revision 3, dated March 28, 2012, provide additional guidance for reworking the P1–3 and P3–1 panels to new part numbers. Section 1.A., ''Planning Information—Effectivity,'' of the documents specified in those note rows identify part numbers to which those documents apply.

(h) Concurrent Requirements

For Group 21, Configuration 2 airplanes, as identified in Boeing Alert Service Bulletin 737–31A1332, Revision 3, dated March 28, 2012: Prior to or concurrently with doing the actions required by paragraph (g) of this AD, replace the basic P5–16 panel with a high altitude landing P5–16 panel, in accordance with the Accomplishment Instructions of Boeing Service Bulletin 737–21–1171, dated February 12, 2009.

(i) Credit for Previous Actions

(1) For Group 1 airplanes identified in Boeing Alert Service Bulletin 737–31A1332, Revision 1, dated June 24, 2010; except airplanes having variable numbers YA001 through YA019 inclusive, YA201 through YA203 inclusive, YA231 through YA242 inclusive, YA251, YA252, YA271, YA272, YA301, YA302, YA311, YA312, YA501 through YA508 inclusive, YA541, YA701, YA702, YC001 through YC007 inclusive, YC051, YC052, YC101, YC102, YC111, YC121, YC301, YC302, YC321 through YC330 inclusive, YC381, YC401 through YC403 inclusive, YC501, YC502, and YE001 through YE003 inclusive: This paragraph provides credit for the actions required by paragraph (g) of this AD, if those actions were performed before the effective date of this AD using Boeing Alert Service Bulletin 737–31A1332, Revision 1, dated June 24, 2010.

(2) For airplanes identified in Boeing Alert Service Bulletin 737–31A1332, Revision 2, dated August 18, 2011; except airplanes identified in paragraph (i)(3) of this AD and airplanes having variable numbers YA001 through YA019 inclusive, YA201 through YA203 inclusive, YA231 through YA242 inclusive, YA251, YA252, YA271, YA272, YA301, YA302, YA311, YA312, YA501 through YA508 inclusive, YA541, YA701, YA702, YC001 through YC007 inclusive, YC051, YC052, YC101, YC102, YC111, YC121, YC301, YC302, YC321 through YC330 inclusive, YC381, YC401 through YC403 inclusive, YC501, YC502, and YE001 through YE003 inclusive: This paragraph provides credit for the actions required by paragraph (g) of this AD, if those actions were performed before the effective date of this AD using Boeing Alert Service Bulletin 737–31A1332, Revision 2, dated August 18, 2011.

(3) For Group 21, Configuration 2 airplanes identified in Boeing Alert Service Bulletin 737–31A1332, Revision 3, dated March 28, 2012: This paragraph provides credit for the actions required by paragraph (g) of this AD, if those actions were performed before the effective date of this AD using Boeing Alert Service Bulletin 737–31A1332, Revision 2, dated August 18, 2011, and provided that the actions specified in Boeing Service Bulletin 737–21–1171, dated February 12, 2009, were accomplished prior to or concurrently with the actions specified in Boeing Alert Service Bulletin 737–31A1332, Revision 2, dated August 18, 2011.

(j) Airplane Flight Manual (AFM) Revisions

Within 36 months after the effective date of this AD, and after doing the installation required by paragraph (g) of this AD, do the actions specified in paragraphs (j)(1), (j)(2), and (j)(3) of this AD.

(1) Revise the Limitations Section of the applicable Boeing 737 AFM by doing the following action: Delete the ''CABIN ALTITUDE WARNING TAKEOFF BRIEFING'' added by AD 2008–23–07, Amendment 39–15728 (73 FR 66512, November 10, 2008).

(2) Revise the Non-Normal Procedures Section of the applicable Boeing 737 AFM by doing the actions specified in paragraphs (j)(2)(i), (j)(2)(ii), (j)(2)(iii), and (j)(2)(iv) of this AD.

(i) Delete the procedure titled ''WARNING HORN—CABIN ALTITUDE OR CONFIGURATION RECALL'' added by AD 2006–13–13, Amendment 39–14666 (71 FR 35781, June 22, 2006; corrected July 3, 2006 (71 FR 37980). If the title of this procedure has been changed according to FAA Alternative Method of Compliance (AMOC) Letter 130S–09–134a, dated April 28, 2009, delete the procedure that was approved according to that AMOC letter.

(ii) Delete the procedure titled ''CABIN ALTITUDE WARNING OR RAPID DEPRESSURIZATION'' added by AD 2003–14–08, Amendment 39–13227 (68 FR 41519, July 14, 2003).

(iii) If the procedure titled ''CABIN ALTITUDE (Airplanes with the CABIN ALTITUDE lights installed)'' is currently contained in the applicable Boeing 737 AFM, delete the procedure titled ''CABIN ALTITUDE (Airplanes with the CABIN ALTITUDE lights installed).''

(iv) Add the following statement. This may be done by inserting a copy of this AD into the applicable AFM.

CABIN ALTITUDE WARNING OR RAPID DEPRESSURIZATION (REQUIRED BY AD 2013–02–05)

Condition: The Cabin Altitude warning light illuminates or the intermittent warning horn sounds in flight above 10,000 ft MSL.

Recall:	
Oxygen Masks and Regulators	ON, 100%
Crew Communications	ESTABLISH
Reference:	
Pressurization Mode Selector	MANUAL
Outflow Valve Switch	CLOSE
If Cabin Altitude is uncontrollable:	
Emergency Descent (If Required)	INITIATE
Passenger Oxygen Switch	ON
Thrust Levers	CLOSE
Speed Brakes	FLIGHT DETENT
Target Speed	VMO/MMO

Note 2 to paragraphs (j)(2)(iv) and (j)(3)(ii) of this AD: When statements identical to those specified in paragraphs (j)(2)(iv) and (j)(3)(ii) of this AD have been included in the general revisions of the AFM, the general revisions may be inserted into the AFM, and the copies of this AD may be removed from the AFM.

(3) Revise the Normal Procedures Section of the applicable Boeing 737 AFM by doing the actions specified in paragraphs (j)(3)(i) and (j)(3)(ii) of this AD.

(i) Delete the procedure titled ''CABIN ALTITUDE WARNING TAKEOFF BRIEFING'' added by AD 2008–23–07, Amendment 39–15728 (73 FR 66512, November 10, 2008).

(ii) Add the following statement. This may be done by inserting a copy of this AD into the applicable AFM.

For normal operations, the pressurization mode selector should be in AUTO prior to takeoff. (Required by AD 2013–02–05)

(k) Terminating Action for Affected ADs

Accomplishing the requirements of this AD terminates the requirements of the ADs identified in paragraphs (k)(1), (k)(2), and (k)(3) of this AD for only the airplanes identified in paragraph (c) of this AD.

(1) AD 2003–14–08, Amendment 39–13227 (68 FR 41519, July 14, 2003): The requirements specified in Table 1 and Figure 1 of that AD.

(2) AD 2006–13–13, Amendment 39–14666 (71 FR 35781, June 22, 2006; corrected July 3, 2006 (71 FR 37980): All requirements of that AD.

(3) AD 2008–23–07, Amendment 39–15728 (73 FR 66512, November 10, 2008): All requirements of that AD.

(l) Special Flight Permits

Special flight permits, as described in Section 21.197 and Section 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199), are not allowed.

(m) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Seattle Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19,

send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ACO, send it to the attention of the person identified in the Related Information section of this AD. Information may be emailed to: *9-ANM-Seattle-ACO-AMOC-Requests@faa.gov.*

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(3) An AMOC that provides an acceptable level of safety may be used for any repair required by this AD if it is approved by the Boeing Commercial Airplanes Organization Designation Authorization (ODA) that has been authorized by the Manager, Seattle ACO, to make those findings. For a repair method to be approved, the repair must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

(n) Related Information

(1) For more information about this AD, contact Jeffrey W. Palmer, Aerospace Engineer, Systems and Equipment Branch, ANM–130S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue SW., Renton, Washington 98057–3356; phone: (425) 917–6472; fax: (425) 917–6590; email: *jeffrey.w.palmer@faa.gov.*

(2) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, Washington 98124–2207; telephone 206–544–5000, extension 1, fax 206–766–5680; Internet *https://www.myboeingfleet.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

(o) Material Incorporated by Reference

(1) The Director of the Federal Register approved the incorporation by reference (IBR) of the service information listed in this paragraph under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) You must use this service information as applicable to do the actions required by this AD, unless the AD specifies otherwise.

(3) The following service information was approved for IBR on March 6, 2013.

(i) Boeing Service Bulletin 737–21–1171, dated February 12, 2009.

(ii) Reserved.

(4) The following service information was approved for IBR on November 7, 2012 (77 FR 60296, October 3, 2012).

(i) Boeing Alert Service Bulletin 737–31A1332, Revision 1, dated June 24, 2010.

(ii) Boeing Alert Service Bulletin 737–31A1332, Revision 2, dated August 18, 2011.

(iii) Boeing Alert Service Bulletin 737–31A1332, Revision 3, dated March 28, 2012.

(4) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, Washington 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; Internet *https://www.myboeingfleet.com.*

(5) You may view this service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

(6) You may view this service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued in Renton, Washington, on January 9, 2013.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2013–01720 Filed 1–29–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2013–0030; Directorate Identifier 2012–NE–42–AD; Amendment 39–17325; AD 2013–02–04]

RIN 2120–AA64

Airworthiness Directives; Rolls-Royce plc Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: We are adopting a new airworthiness directive (AD) for all Rolls-Royce plc RB211–Trent 970–84, RB211–Trent 970B–84, RB211–Trent 972–84, RB211–Trent 972B–84, RB211–Trent 977–84, RB211–Trent 977B–84 and RB211–Trent 980–84 turbofan engines. This AD requires on-wing inspections of low-pressure turbine (LPT) disk seal fins and interstage seals when post-flight review indicates Engine Health Monitoring (EHM) vibratory maintenance-alert limits were exceeded in flight. The AD also requires in-shop inspections of the LPT disk seal fins and interstage seals to detect cracks or damage and, depending on the findings, accomplishment of corrective action. This AD is prompted by a Trent 900 engine experiencing LPT stage 2 disk interstage seal material loss and increased low-pressure rotor vibration while in flight. We are issuing this AD to prevent cracks in the LPT disk, which could result in uncontained engine failure and damage to the airplane.

DATES: This AD becomes effective February 14, 2013.

We must receive comments on this AD by March 18, 2013.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in the AD as of February 14, 2013.

ADDRESSES: You may send comments by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- *Mail:* U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* (202) 493–2251.

For service information identified in this AD, contact Rolls-Royce plc, Corporate Communications, P.O. Box 31, Derby, England, DE248BJ; phone: 011–44–1332–242424; fax: 011–44–1332–245418, or email: *http://www.rolls-royce.com/contact/civil_team.jsp.* You may view this service information at the FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803. For information on the availability of this material at the FAA, call 781–238–7125.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (phone: (800) 647–5527) is the same as the Mail address provided in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Robert Green, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; phone: 781–238–7754; fax: 781–238–7199; email: *robert.green@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA Airworthiness Directive 2012–0220, dated October 22, 2012, a Mandatory

Continuing Airworthiness Information (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

Following a revenue service flight, a Trent 900 engine experienced increased low-pressure vibration. The vibration did not exceed any engine limits, and the engine was not shut down during flight. Upon post-flight inspection of the engine, debris was found in the exhaust tail pipe and the engine was removed. The results of a subsequent strip inspection revealed that the stage 2 Low-Pressure Turbine (LPT) disc had suffered material loss from a portion of the Interstage Seal (ISS) area of the disc, with impact damage to downstream LPT stages. All debris was contained within the engine casings.

Preliminary findings show that the ISS fin had rubbed into the stage 2 vane honeycomb seal, which overheated and cracked, finally resulting in releasing a portion of the ISS area of the disc.

This condition, if not detected and corrected, could lead to LPT stage 2 disc cracks, possibly resulting in an uncontained engine failure and subsequent damage to the aeroplane.

We are issuing this AD to prevent cracks in the LPT disks, which could result in uncontained engine failure and damage to the airplane. You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

RR has issued Repeater Technical Variance 125060, Issue 1, dated July 27, 2012; Repeater Technical Variance 125658, Issue 2, dated August 14, 2012; Alert Non-Modification Service Bulletin (NMSB) RB.211–72–AH054, Initial issue, dated September 14, 2012; and Alert NMSB RB.211–72–AH054, Revision 1, dated November 5, 2012. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of This AD

This product has been approved by the United Kingdom and is approved for operation in the United States. Pursuant to our bilateral agreement with the European Community, they have notified us of the unsafe condition described in the MCAI and service information referenced above. We are issuing this AD because we evaluated all information provided by EASA and determined the unsafe condition exists and is likely to exist or develop on other products of the same type design. This AD requires on-wing inspections of LPT disk seal fins and interstage seals when post-flight review of the EHM low-pressure rotor (N1) vibration data indicates maintenance-alert limits were exceeded in flight. The AD also requires in-shop inspections of the LPT disk seal fins and interstage seals to detect cracks or damage and, depending on the findings, the accomplishment of corrective action.

FAA's Determination of the Effective Date

No domestic operators use this product. Therefore, we find that notice and opportunity for prior public comment are unnecessary and that good cause exists for making this amendment effective in less than 30 days.

Comments Invited

This AD is a final rule that involves requirements affecting flight safety, and we did not precede it by notice and opportunity for public comment. We invite you to send any written relevant data, views, or arguments about this AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2013–0030; Directorate Identifier 2012–NE–42–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this AD. We will consider all comments received by the closing date and may amend this AD because of those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact with FAA personnel concerning this AD. Using the search function of the Web site, anyone can find and read the comments in any of our dockets, including, if provided, the name of the individual who sent the comment (or signed the comment on behalf of an association, business, labor union, etc.). You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. ''Subtitle VII: Aviation Programs,'' describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in ''Subtitle VII, Part A, Subpart III, Section 44701: General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this AD:

1. Is not a ''significant regulatory action'' under Executive Order 12866;

2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this AD and placed it in the AD docket.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new AD:

2013–02–04 Rolls-Royce plc: Amendment 39–17325; Docket No. FAA–2013–0030; Directorate Identifier 2012–NE–42–AD.

(a) Effective Date

This airworthiness directive (AD) becomes effective February 14, 2013.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Rolls-Royce plc (RR) RB211–Trent 970–84, RB211–Trent 970B–84, RB211–Trent 972–84, RB211–Trent 972B–84, RB211–Trent 977–84, RB211–Trent 977B–84, and RB211–Trent 980–84 engines, all serial numbers.

(d) Reason

This AD was prompted by a Trent 900 engine experiencing low-pressure turbine (LPT) stage 2 disk interstage seal material loss and increased low-pressure rotor vibration while in flight. We are issuing this AD to prevent cracks in the LPT disk, which could result in uncontained engine failure and damage to the airplane.

(e) Actions and Compliance

Unless already done, do the following.

(1) After every flight after the effective date of this AD, review the Engine Health Monitoring (EHM) low-pressure rotor (N1) vibration data. If you find that the maximum and average vibrations exceed 0.7 inches/sec (ips) and 0.5 ips, respectively, then within 10 engine flight cycles, confirm that the vibration data was not the result of indicator error.

(2) If you cannot show that the vibration increase was caused by indicator error, inspect the LPT disk seal fins and interstage seals. Use RR Repeater Technical Variance 125060, Issue 1, dated July 27, 2012, to do the inspections.

(3) After the effective date of this AD, at each engine shop visit inspect the LPT disk seal fins and interstage seals. Use RR Alert Non-Modification Service Bulletin RB.211–72–AH054, Revision 1, dated November 5, 2012, or Initial Issue, dated September 14, 2012, to do the inspections.

(4) If, during the inspection required by paragraphs (e)(2) or (e)(3) of this AD, you find any cracks in the disk seal fins or that the interstage seals are missing seal material, replace the parts with hardware eligible for installation before returning the engine to service.

(f) Definitions

For the purposes of this AD, a shop visit is defined as whenever engine maintenance performed prior to reinstallation requires one of the following:

(1) Separation of a pair of major mating engine module flanges. However, separation of flanges solely for the purpose of shipment without subsequent internal maintenance is not a shop visit. Separation of the external gearbox engine mating flanges or removal of the external gearbox is also not classified as a shop visit.

(2) Removal of a disk, hub, or spool.

(g) Credit for Previous Actions

If you took corrective action before the effective date of this AD in accordance with RR Repeater Technical Variance 125658, Issue 2, dated August 14, 2012, for detected excessive vibration, you met the inspection requirements of this AD.

(h) Alternative Methods of Compliance (AMOCs)

The Manager, Engine Certification Office, may approve AMOCs for this AD. Use the procedures found in 14 CFR 39.19 to make your request.

(i) Related Information

(1) For more information about this AD, contact Robert Green, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; phone: 781–238–7754; fax: 781–238–7199; email: *robert.green@faa.gov.*

(2) Refer to MCAI European Aviation Safety Agency AD 2012–0220, dated October 22, 2012.

(j) Material Incorporated by Reference

(1) The Director of the Federal Register approved the incorporation by reference (IBR) of the service information listed in this paragraph under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) You must use this service information as applicable to do the actions required by this AD, unless the AD specifies otherwise.

(i) Rolls-Royce plc (RR) Non-Modification Service Bulletin (NMSB) RB.211–72–AH054, Initial Issue, dated September 14, 2012.

(ii) RR NMSB RB.211–72–AH054, Revision 1, dated November 5, 2012.

(iii) RR Repeater Technical Variance 125060, Issue 1, dated July 27, 2012.

(3) For service information identified in this AD, contact Rolls-Royce plc, Corporate Communications, P.O. Box 31, Derby, England, DE248BJ; phone: 011–44–1332–242424; fax: 011–44–1332–245418, or email: *http://www.rolls-royce.com/contact/civil_team.jsp.*

(4) You may view this service information at FAA, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA. For information on the availability of this material at the FAA, call 781–238–7125.

(5) You may view this service information at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued in Burlington, Massachusetts, on January 15, 2013.

Thomas A. Boudreau,

Acting Manager, Engine & Propeller Directorate, Aircraft Certification Service.

[FR Doc. 2013–01361 Filed 1–29–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 68

[Docket No. DOD–2009–OS–0034]

RIN 0790–AI50

Voluntary Education Programs

AGENCY: Office of the Under Secretary of Defense for Personnel and Readiness, DoD.

ACTION: Final rule; notice of stay.

SUMMARY: On Friday, December 7, 2012 (77 FR 72941–72956), the Department of Defense published a final rule in the **Federal Register** titled Voluntary Education Programs. Subsequent to the publication of that rule, the Department discovered that the effective date in the **DATES** section was calculated incorrectly. The DoD is taking action to stay the rule to the appropriate effective date.

DATES: Effective January 30, 2013, 32 CFR part 68 is stayed until February 5, 2013.

FOR FURTHER INFORMATION CONTACT: Patricia Toppings, 571–372–0485.

Dated: January 25, 2013.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2013–01988 Filed 1–29–13; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[USCG–2013–0031]

Drawbridge Operating Regulations; Gulf Intracoastal Waterway, Belle Chasse, LA

AGENCY: Coast Guard, DHS.

ACTION: Notice of deviation from drawbridge regulation.

SUMMARY: The Coast Guard has issued a temporary deviation from the operating schedule that governs the Louisiana State Route 23 (LA 23) vertical lift span bridge, also known as the Judge Perez Bridge, across the Gulf Intracoastal Waterway (Algiers Alternate Route), mile 3.8, at Belle Chasse, Plaquemines Parish, Louisiana. This deviation is necessary to repair bridge machinery and to replace the wire ropes of the bridge. This deviation allows the bridge to remain closed to navigation for eight consecutive days in order to perform scheduled maintenance.

DATES: This deviation is effective from 6 a.m. on Sunday, February 24, 2013, until 6 a.m. on Monday, March 4, 2013.

ADDRESSES: The docket for this notice, docket number USCG–2013–0031, is available online. To view it, go to *http://www.regulations.gov,* type the docket number in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this notice of deviation. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary deviation, call or email David Frank, Bridge Administration Branch, Coast Guard, telephone (504) 671–2128, email *David.m.frank@uscg.mil.* If you have questions on viewing the docket, call Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION: C.E.C., Inc, on behalf of the Louisiana Department of Transportation and Development (LDOTD) has requested a temporary deviation in order to perform maintenance on the State Route 23 (LA 23) vertical lift span bridge, also known as the Judge Perez Bridge, across the Gulf Intracoastal Waterway (Algiers Alternate Route), mile 3.8, at Belle Chasse, Plaquemines Parish, Louisiana. This maintenance is necessary to make mechanical repairs to the bridge and to replace the wire ropes on the bridge. This temporary deviation will allow the bridge to remain closed to navigation position continuously from 6 a.m. on Sunday, February 24, 2013, until 6 a.m. on Monday, March 4, 2013. During the closure the draw will not be able to open for emergencies. Currently, as specified in 33 CFR 117.451(b), the draw opens on signal; except that, from 6 a.m. to 8:30 a.m. and from 3:30 p.m. to 5:30 p.m. Monday through Friday, except Federal holidays, the draw need not be opened for the passage of vessels.

The State Route 23 vertical lift span drawbridge across the Gulf Intracoastal Waterway (Algiers Alternate Route), mile 3.8, at Belle Chasse, Louisiana has a vertical clearance of 40 feet above mean high water in the closed-to-navigation position and 100 feet above mean high water in the open-to-navigation position. Navigation on the waterway consists primarily of tugs with tows, commercial fishing vessels, and occasional recreational craft. Mariners may use the Gulf Intracoastal Waterway (Harvey Canal) to avoid unnecessary delays. The Coast Guard has coordinated this closure with the Gulf Intracoastal Canal Association (GICA). The GICA representative indicated that the vessel operators will be able to schedule transits through the bridge such that operations will not significantly be hindered. Thus, it has been determined that this closure will not have a significant effect on these vessels. This closure is considered necessary for repair of the bridge.

In accordance with 33 CFR 117.35(e), the drawbridge must return to its regular operating schedule immediately at the end of the effective period of this temporary deviation. This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: January 22, 2013.

David M. Frank,

Bridge Administrator.

[FR Doc. 2013–01942 Filed 1–29–13; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2013–0010]

RIN 1625–AA00

Safety Zone; Grain-Shipment Vessels, Columbia and Willamette Rivers

AGENCY: Coast Guard, DHS.

ACTION: Temporary interim rule and request for comments.

SUMMARY: The Coast Guard is establishing a temporary safety zone around all inbound and outbound grain-shipment vessels involved in commerce with the Columbia Grain facility on the Willamette River in Portland, OR, the United Grain Corporation facility on the Columbia River in Vancouver, WA, the Temco Irving facility on the Willamette River in Portland, OR, or the Temco Kalama facility on the Columbia River in Kalama, WA while they are located on the Columbia and Willamette Rivers. This safety zone extends to waters 500 yards ahead of the vessel and 200 yards abeam and astern of the vessel. This safety zone is being established to ensure that protest activities relating to a labor dispute do not create hazardous navigation conditions for any vessel or other river user in the vicinity of the safety zone.

DATES: This rule is effective with actual notice from January 17, 2013 until January 30, 2013. It is effective in the **Federal Register** from January 30, 2013 until April 26, 2013.

Comments and related material must be received by the Coast Guard on or before March 1, 2013.

Requests for public meetings must be received by the Coast Guard on or before February 6, 2013.

ADDRESSES: Documents mentioned in this preamble are part of Docket Number USCG–2013–0010. To view documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* type the docket number in the ''SEARCH'' box and click ''SEARCH.'' Click on ''Open Docket Folder'' on the line associated with this rulemaking. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

You may submit comments, identified by docket number, using any one of the following methods:

(1) *Federal eRulemaking Portal: http://www.regulations.gov.*

(2) *Fax:* (202) 493–2251.

(3) *Mail or Delivery:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590–0001. Deliveries accepted between 9 a.m. and 5 p.m., Monday through Friday, except federal holidays. The telephone number is 202–366–9329.

See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section below for further instructions on submitting comments. To avoid duplication, please use only one of these three methods.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Ensign Ian P. McPhillips, Waterways Management Division, Marine Safety Unit Portland, U.S. Coast Guard; telephone (503) 240–9319, email *MSUPDXWWM@uscg.mil.* If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:

Table of Acronyms

DHS Department of Homeland Security
FR **Federal Register**
NPRM Notice of Proposed Rulemaking

A. Public Participation and Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related materials. All comments received will be posted without change to *http://www.regulations.gov* and will include any personal information you have provided.

1. Submitting Comments

If you submit a comment, please include the docket number for this rulemaking, indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online at *http://www.regulations.gov,* or by fax, mail, or hand delivery, but please use only one of these means. If you submit a comment online, it will be considered received by the Coast Guard when you successfully transmit the comment. If you fax, hand deliver, or mail your comment, it will be considered as having been received by the Coast Guard when it is received at the Docket Management Facility. We recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov,* type the docket number in the ''SEARCH'' box and click ''SEARCH.'' Click on ''Submit a Comment'' on the line associated with this rulemaking.

If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period and may change the rule based on your comments.

2. Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* type the docket number in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rulemaking. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

3. Privacy Act

Anyone can search the electronic form of comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review a Privacy Act notice regarding our public dockets in the January 17, 2008, issue of the **Federal Register** (73 FR 3316).

4. Public Meeting

We do not now plan to hold a public meeting. But you may submit a request for one, using one of the methods specified under **ADDRESSES**. Please explain why you believe a public meeting would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

B. Regulatory History and Information

The Coast Guard is issuing this final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because to do so would be impracticable, since the rule is intended to protect grain shipment vessels and potential protest activity cannot be postponed by the Coast Guard. Delayed promulgation may result in injury or damage to the maritime public, vessel crews, the vessels themselves, the facilities, and law enforcement personnel from protest activities that could occur prior to conclusion of a notice and comment period before promulgation.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register** because to do otherwise would be impracticable since the arrival of grain-shipment vessels cannot be delayed by the Coast Guard and protest activities are unpredictable and potentially volatile and may result in injury to persons, property, or the environment. Delaying the effective date until 30 days after publication may mean that grain-shipment vessels will have arrived or departed the Columbia and Willamette Rivers before the end of the 30 day period. This delay would eliminate the safety zone's effectiveness and usefulness in protecting persons, property, and the safe navigation of maritime traffic before 30 days have elapsed.

Although the Coast Guard is issuing this temporary rule without first publishing a proposed rule, you are invited to submit post-promulgation comments and related material regarding this rule through March 1, 2013. All comments will be reviewed as they are received. Your comments will assist us in drafting future rules should they be necessary, and may result in changes to this temporary interim rule before it expires.

C. Basis and Purpose

Labor protests relating grain-shipment vessels involved in commerce with the Columbia Grain facility on the Willamette River in Portland, OR, the United Grain Corporation facility on the Columbia River in Vancouver, WA, the Temco Irving facility on the Willamette River in Portland, OR, or the Temco Kalama facility on the Columbia River in Kalama, WA have the potential to create undue maritime hazards. The Coast Guard believes that a safety zone is necessary to ensure the safe navigation of maritime traffic on the Columbia and Willamette Rivers while grain-shipment vessels transit to and from grain export facilities in the Sector Columbia River Captain of the Port Zone. A safety zone is needed to allow maximal use of the waterway consistent with safe navigation and to ensure that protestors and other river users are not injured by deep-draft vessels with maneuvering characteristics with which they may be unfamiliar.

D. Discussion of the Interim Rule

This rule establishes a temporary safety zone around grain-shipment vessels involved in commerce with the Columbia Grain facility on the Willamette River in Portland, OR, the United Grain Corporation facility on the Columbia River in Vancouver, WA, the Temco Irving facility on the Willamette River in Portland, OR, or the Temco Kalama facility on the Columbia River in Kalama, WA while they are located on the Columbia and Willamette Rivers. This safety zone extends to waters 500 yards ahead of the vessel and 200 yards abeam and astern of the vessel. No person or vessel may enter or remain in the safety zone without authorization from the Sector Columbia River Captain of the Port or his designated representatives.

This rule has been enforced with actual notice since January 17, 2013 and it will be enforced until 90 days from the date of publication in the **Federal Register**.

E. Regulatory Analyses

We developed this rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on these statutes and executive orders.

1. Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, as supplemented by Executive Order 13563, Improving Regulation and Regulatory Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of Executive Order 12866 or under section 1 of Executive Order 13563. The Office of Management and Budget has not reviewed it under those Orders. Although this rule will restrict access to the regulated area, the effect of this rule will not be significant because: (i) The safety zone is limited in size; (ii) the official on-scene patrol may authorize access to the safety zone; (iii) the safety zone will effect a limited geographical location for a limited time; and (iv) the Coast Guard will make notifications via maritime advisories so mariners can adjust their plans accordingly.

2. Impact on Small Entities

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended, requires federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. This rule may affect the following entities some of which may be small entities: The owners and operators of vessels intending to operate in the area covered by the safety zone created in this rule.

This rule will not have a significant economic impact on a substantial number of small entities for the following reasons: (i) The safety zone is limited in size; (ii) the official on-scene patrol may authorize access to the safety zone; (iii) the safety zone will effect a limited geographical location for a limited time; and (iv) the Coast Guard will make notifications via maritime advisories so mariners can adjust their plans accordingly.

3. Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT**, above.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

4. Collection of Information

This rule will not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

5. Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this rule under that Order and determined that this rule does not have implications for federalism.

6. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. In preparing this temporary rule, the Coast Guard carefully considered the rights of lawful protestors. The safety zones created by this rule do not prohibit members of the public from assembling on shore or expressing their points of view from locations on shore. In addition, the Captain of the Port has identified waters in the vicinity of these safety zones where those desiring to do so can assemble and express their views without compromising navigational safety. Protesters are asked to contact the person listed in the **FOR FURTHER INTFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places or vessels.

7. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 (adjusted for inflation) or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

8. Taking of Private Property

This rule will not cause a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

9. Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

10. Protection of Children From Environmental Health Risks

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not create an environmental risk to health or risk to safety that may disproportionately affect children.

11. Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

12. Energy Effects

This action is not a ''significant energy action'' under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use.

13. Technical Standards

This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

14. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves the establishment of a temporary safety zone around grain-shipment vessels involved in commerce with grain export facilities on the Columbia and Willamette Rivers. This rule is categorically excluded from further review under paragraph 34(g) of Figure 2–1 of the Commandant Instruction. An environmental analysis checklist supporting this determination and a Categorical Exclusion Determination are available in the docket where indicated under **ADDRESSES**. We seek any comments or information that may lead to the discovery of a significant environmental impact from this rule.

List of Subjects in 33 CFR Part 165

Harbors, Marine Safety, Navigation (water), Reporting and recordkeeping requirements, Waterways.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add § 165.T13–239 to read as follows:

§ 165.T13–239 Safety Zone; Grain-Shipment Vessels, Columbia and Willamette Rivers.

(a) *Definitions.* As used in this section:

(1) *Federal Law Enforcement Officer* means any employee or agent of the United States government who has the authority to carry firearms and make warrantless arrests and whose duties involve the enforcement of criminal laws of the United States.

(2) *Navigable waters of the United States* means those waters defined as such in 33 CFR part 2.

(3) *Navigation Rules* means the Navigation Rules, International-Inland.

(4) *Official Patrol* means those persons designated by the Captain of the Port to monitor a vessel safety zone, permit entry into the zone, give legally enforceable orders to persons or vessels within the zone and take other actions authorized by the Captain of the Port. Federal Law Enforcement Officers authorized to enforce this section are designated as the Official Patrol.

(5) *Public vessel* means vessels owned, chartered, or operated by the United States, or by a State or political subdivision thereof.

(6) *Grain-shipment vessel* means any vessel bound for or departing from any of the following waterfront facilities: Columbia Grain in Portland, OR, United Grain Corporation in Vancouver, WA, Temco Irving in Portland, OR, and Temco Kalama in Kalama, WA, or any vessel assisting such a vessel to moor or maneuver, to include, but not limited to tugs, pilot boats, and launches.

(7) *Oregon Law Enforcement Officer* means any Oregon Peace Officer as defined in Oregon Revised Statutes section 161.015.

(8) *Washington Law Enforcement Officer* means any General Authority Washington Peace Officer, Limited Authority Washington Peace Officer, or Specially Commissioned Washington Peace Officer as defined in Revised Code of Washington section 10.93.020.

(b) *Location.* The following areas are safety zones: All navigable waters of the United States within the Sector Columbia River Captain of the Port Zone, extending from the surface to the sea floor, that are:

(1) Not more than 500 yards ahead of grain-shipment vessels and 200 yards abeam and astern of grain-shipment vessels underway on the Columbia and Willamette Rivers.

(2) Within a maximum 200-yard radius of grain-shipment vessels when anchored, at any berth, moored, or in the process of mooring on the Columbia and Willamette Rivers.

(c) *Effective Period.* The safety zones created in this section will be in effect from January 17, 2013 and will be enforced until April 26, 2013. They will be activated for enforcement as described in paragraph (d) of this section.

(d) *Enforcement Periods.* The Sector Columbia River Captain of the Port will cause notice of the enforcement of the grain-shipment vessels safety zone to be made by all appropriate means to effect the widest publicity among the affected segments of the public as practicable, in accordance with 33 CFR 165.7. This notification of enforcement will identify the grain-shipment vessel by name and IMO number. Such means of notification may include, but are not limited to, Broadcast Notices to Mariners or Local Notices to Mariners. The Sector Columbia River Captain of the Port will issue a Broadcast Notice to Mariners and Local Notice to Mariners notifying the public when enforcement of the safety zone is suspended. Upon notice of enforcement by the Sector Columbia River Captain of the Port, the Coast Guard will enforce the safety zone in accordance with rules set out in this section. Upon notice of suspension of enforcement by the Sector Columbia River Captain of the Port, all persons and vessels are authorized to enter, transit, and exit the safety zone, consistent with the Navigation Rules.

(e) *Regulation.* (1) In accordance with the general regulations in § 165.23 of this part, entry into or movement within these zones is prohibited unless authorized by the Sector Columbia River Captain of the Port, the official patrol, or other designated representatives of the Captain of the Port.

(2) To request authorization to enter or operate within the safety zone contact the on-scene official patrol on VHF–FM channel 16 or 13, or the Sector Columbia River Command Center at phone number (503) 861–6211. Authorization will be granted based on the necessity of access and consistent with safe navigation.

(3) Vessels authorized to enter or operate within the safety zone shall operate at the minimum speed necessary to maintain a safe course and shall proceed as directed by the on-scene official patrol. The Navigation Rules shall apply at all times within the safety zone.

(4) Maneuver-restricted vessels. When conditions permit, the on-scene official patrol, or a designated representative of the Captain of the Port at the Sector Columbia River Command Center, should:

(i) Permit vessels constrained by their navigational draft or restricted in their ability to maneuver to enter or operate within the safety zone in order to ensure a safe passage in accordance with the Navigation Rules; and

(ii) Permit commercial vessels anchored in a designated anchorage area to remain at anchor within the safety zone; and

(iii) Permit vessels that must transit via a navigable channel or waterway to enter or operate within the safety zone in order to do so.

(f) *Exemption.* Public vessels as defined in paragraph (a) of this section are exempt from complying with paragraph (e) of this section.

(g) *Enforcement.* Any Coast Guard commissioned, warrant, or petty officer may enforce the rules in this section. In the navigable waters of the United States to which this section applies, when immediate action is required and representatives of the Coast Guard are not present or are not present in sufficient force to provide effective enforcement of this section, any Federal Law Enforcement Officer, Oregon Law Enforcement Officer, or Washington Law Enforcement Officer may enforce the rules contained in this section pursuant to 46 U.S.C. 70118. In addition, the Captain of the Port may be assisted by other federal, state, or local agencies in enforcing this section.

(h) *Waiver.* The Captain of the Port Columbia River may waive any of the requirements of this section for any vessel or class of vessels upon finding that operational conditions or other circumstances are such that application of this section is unnecessary or impractical for the purpose of port safety or environmental safety.

Dated: January 17, 2013.

B.C. Jones,

Captain, U.S. Coast Guard, Captain of the Port, Sector Columbia River.

[FR Doc. 2013–01941 Filed 1–29–13; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2012–0456; FRL–9367–2]

Styrene-2-Ethylhexyl Acrylate Copolymer; Tolerance Exemption

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes an exemption from the requirement of a tolerance for residues of 2-propenoic acid, 2-ethylhexyl ester, polymer with ethenylbenzene; also known as styrene-2-ethylhexyl acrylate copolymer when used as an inert ingredient in a pesticide chemical formulation. H. B. Fuller Company submitted a petition to EPA under the Federal Food, Drug, and Cosmetic Act (FFDCA), requesting an exemption from the requirement of a tolerance. This regulation eliminates the need to establish a maximum permissible level for residues of 2-propenoic acid, 2-Ethylhexyl Ester, Polymer with Ethenylbenzene on food or feed commodities.

DATES: This regulation is effective January 30, 2013. Objections and requests for hearings must be received on or before April 1, 2013, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2012–0456, is available at *http://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), EPA West Bldg., Rm. 3334, 1301 Constitution Ave. NW., Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Mark Dow, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW. Washington, DC 20460–0001; telephone number: (703) 305–5533; email address: *dow.mark@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

B. How can I get electronic access to other related information?

You may access a frequently updated electronic version of 40 CFR part 180 through the Government Printing Office's e-CFR site at *http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?&c=ecfr&tpl=/ecfrbrowse/Title40/40tab_02.tpl.*

C. Can I file an objection or hearing request?

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2012–0456 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before April 1, 2013. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing (excluding any Confidential Business Information (CBI)) for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit the non-CBI copy of your objection or hearing request, identified by docket ID number EPA–HQ–OPP–2012–0456, by one of the following methods.

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be CBI or other information whose disclosure is restricted by statute.
- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001.
- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *http://www.epa.gov/dockets/contacts.htm.*

Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *http://www.epa.gov/dockets.*

II. Background and Statutory Findings

In the **Federal Register** of August 22, 2012 (77 FR 50661) (FRL–9358–9), EPA issued a document pursuant to FFDCA section 408, 21 U.S.C. 346a, announcing the receipt of a pesticide petition (PP 2E8033) filed by H.B. Fuller Company (1200 Willow Lake Boulevard, St. Paul, MN 55110–5101). The petition requested that 40 CFR 180.960 be amended by establishing an exemption from the requirement of a tolerance for residues of 2-propenoic acid, 2-ethylhexyl ester, polymer with ethenylbenzene; CAS No. 25153–46–2. That document included a summary of the petition prepared by the petitioner and solicited comments on the petitioner's request. The Agency did not receive any comments. Section 408(c)(2)(A)(i) of FFDCA allows EPA to establish an exemption from the requirement for a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the exemption is ''safe.'' Section 408(c)(2)(A)(ii) of FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and use in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing an exemption from the requirement of a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue. * * *'' and specifies factors EPA is to consider in establishing an exemption.

III. Risk Assessment and Statutory Findings

EPA establishes exemptions from the requirement of a tolerance only in those cases where it can be shown that the risks from aggregate exposure to pesticide chemical residues under reasonably foreseeable circumstances will pose no appreciable risks to human health. In order to determine the risks from aggregate exposure to pesticide inert ingredients, the Agency considers the toxicity of the inert in conjunction with possible exposure to residues of the inert ingredient through food, drinking water, and through other exposures that occur as a result of pesticide use in residential settings. If EPA is able to determine that a finite tolerance is not necessary to ensure that there is a reasonable certainty that no harm will result from aggregate exposure to the inert ingredient, an exemption from the requirement of a tolerance may be established.

Consistent with FFDCA section 408(b)(2)(D), EPA has reviewed the available scientific data and other relevant information in support of this action and considered its validity, completeness and reliability and the relationship of this information to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children. In the case of certain chemical substances that are defined as polymers, the Agency has established a set of criteria to identify categories of polymers expected to present minimal or no risk. The definition of a polymer is given in 40 CFR 723.250(b) and the exclusion criteria for identifying these low-risk polymers are described in 40 CFR 723.250(d). Styrene-2-ethylhexyl acrylate copolymer conforms to the definition of a polymer given in 40 CFR 723.250(b) and meets the following criteria that are used to identify low-risk polymers.

1. The polymer is not a cationic polymer nor is it reasonably anticipated to become a cationic polymer in a natural aquatic environment.

2. The polymer does contain as an integral part of its composition the atomic elements carbon, hydrogen, and oxygen.

3. The polymer does not contain as an integral part of its composition, except as impurities, any element other than those listed in 40 CFR 723.250(d)(2)(ii).

4. The polymer is neither designed nor can it be reasonably anticipated to substantially degrade, decompose, or depolymerize.

5. The polymer is manufactured or imported from monomers and/or reactants that are already included on the TSCA Chemical Substance Inventory or manufactured under an applicable TSCA section 5 exemption.

6. The polymer is not a water absorbing polymer with a number average molecular weight (MW) greater than or equal to 10,000 daltons.

Additionally, the polymer also meets as required the following exemption criteria specified in 40 CFR 723.250(e).

7. The polymer's number average MW of 14,000 daltons is greater than or equal to 10,000 daltons. The polymer contains less than 2% oligomeric material below MW 500 and less than 5% oligomeric material below MW 1,000.

Thus, styrene-2-ethylhexyl acrylate copolymer meets the criteria for a polymer to be considered low risk under 40 CFR 723.250. Based on its conformance to the criteria in this unit, no mammalian toxicity is anticipated from dietary, inhalation, or dermal exposure to styrene-2-ethylhexyl acrylate copolymer.

IV. Aggregate Exposures

For the purposes of assessing potential exposure under this exemption, EPA considered that styrene-2-ethylhexyl acrylate copolymer could be present in all raw and processed agricultural commodities and drinking water, and that non-occupational non-dietary exposure was possible. The number average MW of styrene-2-ethylhexyl acrylate copolymer is 14,000 daltons. Generally, a polymer of this size would be poorly absorbed through the intact gastrointestinal tract or through intact human skin. Since styrene-2-ethylhexyl acrylate copolymer conforms to the criteria that identify a low-risk polymer, there are no concerns for risks associated with any potential exposure scenarios that are reasonably foreseeable. The Agency has determined that a tolerance is not necessary to protect the public health.

V. Cumulative Effects From Substances With a Common Mechanism of Toxicity

Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider ''available information'' concerning the cumulative effects of a particular pesticide's residues and ''other substances that have a common mechanism of toxicity.''

EPA has not found styrene-2-ethylhexyl acrylate copolymer to share a common mechanism of toxicity with any other substances, and styrene-2-ethylhexyl acrylate copolymer does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has assumed that styrene-2-ethylhexyl acrylate copolymer does not have a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see EPA's Web site at *http://www.epa.gov/pesticides/cumulative.*

VI. Additional Safety Factor for the Protection of Infants and Children

Section 408(b)(2)(C) of FFDCA provides that EPA shall apply an additional tenfold margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the data base unless EPA concludes that a different margin of safety will be safe for infants and children. Due to the expected low toxicity of styrene-2-ethylhexyl acrylate copolymer, EPA has not used a safety factor analysis to assess the risk. For the same reasons the additional tenfold safety factor is unnecessary.

VII. Determination of Safety

Based on the conformance to the criteria used to identify a low-risk polymer, EPA concludes that there is a reasonable certainty of no harm to the U.S. population, including infants and children, from aggregate exposure to residues of styrene-2-ethylhexyl acrylate copolymer.

VIII. Other Considerations

A. Existing Exemptions From a Tolerance

There are no existing exemptions from the requirements of a tolerance.

B. Analytical Enforcement Methodology

An analytical method is not required for enforcement purposes since the Agency is establishing an exemption from the requirement of a tolerance without any numerical limitation.

C. International Residue Limits

In making its tolerance decisions, EPA seeks to harmonize U.S. tolerances with international standards whenever possible, consistent with U.S. food safety standards and agricultural practices. EPA considers the international maximum residue limits (MRLs) established by the Codex Alimentarius Commission (Codex), as required by FFDCA section 408(b)(4). The Codex Alimentarius is a joint United Nations Food and Agriculture Organization/World Health Organization food standards program, and it is recognized as an international food safety standards-setting organization in trade agreements to which the United States is a party. EPA may establish a tolerance that is different from a Codex MRL; however, FFDCA section 408(b)(4) requires that EPA explain the reasons for departing from the Codex level.

The Codex has not established a MRL for styrene-2-ethylhexyl acrylate copolymer.

IX. Conclusion

Accordingly, EPA finds that exempting residues of styrene-2-ethylhexyl acrylate copolymer from the requirement of a tolerance will be safe.

X. Statutory and Executive Order Reviews

This final rule establishes a tolerance under FFDCA section 408(d) in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these rules from review under Executive Order 12866, entitled ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993). Because this final rule has been exempted from review under Executive Order 12866, this final rule is not subject to Executive Order 13211, entitled ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), nor does it involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA) (15 U.S.C. 272 note).

Since tolerances and exemptions that are established on the basis of a petition under FFDCA section 408(d), such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), do not apply.

This final rule directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of FFDCA section 408(n)(4). As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes, or otherwise have any unique impacts on local governments. Thus, the Agency has determined that Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000) do not apply to this final rule. In addition, this final rule does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1501 *et seq.*).

Although this action does not require any special considerations under Executive Order 12898, entitled ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations'' (59 FR 7629, February 16, 1994), EPA seeks to achieve environmental justice, the fair treatment and meaningful involvement of any group, including minority and/or low-income populations, in the development, implementation, and enforcement of environmental laws, regulations, and policies. As such, to the extent that information is publicly available or was submitted in comments to EPA, the Agency considered whether groups or segments of the population, as a result of their location, cultural practices, or other factors, may have atypical or disproportionately high and adverse human health impacts or environmental effects from exposure to the pesticide discussed in this document, compared to the general population.

XI. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: January 23, 2013.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. In § 180.960, the table is amended by adding alphabetically the following polymer to read as follows:

§ 180.960 Polymers; exemptions from the requirement of a tolerance.

* * * * *

Polymer	CAS No.
* * * * *	
2-Propenoic acid, 2-ethylhexyl ester, polymer with ethenylbenzene 14,000 daltons	25153–46–2
* * * * *	

[FR Doc. 2013–02011 Filed 1–29–13; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF THE INTERIOR

Office of the Secretary

43 CFR Part 2

RIN 1093–AA15

Freedom of Information Act Regulations

AGENCY: Office of the Secretary, Interior.

ACTION: Final rule; correction.

SUMMARY: This document contains corrections to the final rule published on December 31, 2012 (77 FR 76898). The regulation revises the Department's Freedom of Information Act regulations.

DATES: Effective January 30, 2013

FOR FURTHER INFORMATION CONTACT: Cindy Cafaro, Office of Executive Secretariat and Regulatory Affairs, 202–208–5342.

SUPPLEMENTARY INFORMATION: We published a document in the **Federal Register** on December 31, 2012, revising the Department of the Interior Freedom of Information Act (FOIA) regulations. This document inadvertently omitted amendatory language needed to replace a phrase, to amend a sentence, and to renumber the sections in several redesignated subparts. This publication corrects that omission.

Correction of Publication

Accordingly, the publication on December 31, 2012, of the final rule that was the subject of FR Doc. 2012–31117, is corrected as follows:

■ 1. On page 76902, in the third column, revise numbered instruction 3 to read as follows:

''3. Subpart F (consisting of § 2.41), subpart G (consisting of §§ 2.45 through 2.79), and subpart H (consisting of §§ 2.80 through 2.90) are redesignated as subpart J (consisting of § 2.200), subpart K (consisting of §§ 2.220 through 2.254), and subpart L (consisting of §§ 2.280 through 2.290).''

■ 2. On page 76903, in the third column, in § 2.5(d), remove the words ''does not hear from you'' and add in their place the words ''does not receive a written response.''

■ 3. On page 76911, in the first column, in paragraph (b)(1), remove the words ''hears from you'' and add in their place the words ''receives a written response.''

■ 4. On page 76905, in the first column, add the following sentence at the end of paragraph (h):

If you believe this response was in error, you may file an appeal in accordance with the procedures in § 2.59.

David J. Hayes,

Deputy Secretary of the Interior.

[FR Doc. 2013–02064 Filed 1–29–13; 8:45 am]

BILLING CODE 4310–10–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 4

[PS Docket No. 11–82; DA 12–1962]

Extension of the Commission's Rules Regarding Outage Reporting to Interconnected Voice Over Internet Protocol Service Providers and Broadband Internet Service Providers

AGENCY: Federal Communications Commission.

ACTION: Final rule; correction.

SUMMARY: This document contains a correction to text in the Report and Order, FCC 12–22, adopted on February 15, 2012 and released on February 21, 2012, in PS Docket No. 11–82. The Report and Order was published in the **Federal Register** on Friday, April 27, 2012. This document also contains a related correction to text in the **Federal Register** but makes no changes to the final rules.

DATES: This correction is effective January 30, 2013. The rules in the Report and Order contain information collection requirements. The Federal Communications Commission published a document in the **Federal Register** announcing that OMB approved the information collection and that the rules in the Report and Order became effective December 16, 2012 (77 FR 63757).

FOR FURTHER INFORMATION CONTACT: Gregory Intoccia, Special Counsel, Cybersecurity and Communications Reliability Division, Public Safety and Homeland Security Bureau, (202) 418–1470 or *gregory.intoccia@fcc.gov* (email).

SUPPLEMENTARY INFORMATION: On February 21, 2012, the Federal Communications Commission released a Report and Order, FCC 12–22, in PS Docket No. 11–82, which was published at 27 FCC Rcd 2650 (2012). Under delegated authority, the Public Safety and Homeland Security Bureau of the Federal Communications Commission adopted and released Order DA 12–1962 on December 6, 2012. Order DA 12–1962, an Erratum, made a correction to the second sentence of paragraph 89 of the Report and Order. Specifically, in paragraph 89, in the second sentence, the phrase ''(1) that potentially affects at least 900,000 users;'' was corrected to read as ''(1) that potentially affects at least 900,000 user minutes of interconnected VoIP service and results in complete loss of service;''. The change was made to correct some inconsistency with the related rule and with text in several other places in the Report in Order reflecting language identical to the rule. In FR Doc. 2012–9749, which appears on pages 25088 through 25097 in the **Federal Register** of Friday, April 27, 2012 (77 FR 25088), the following correction is made:

On page 25094, the first column in the Discussion section, paragraph 52. second sentence, ''We apply to interconnected VoIP service providers the obligation to report when they have experienced, on any facilities that they own, operate, lease, or otherwise utilize, an outage of at least 30 minutes duration: (1) That potentially affects at least 900,000 users; * * *'' is corrected to read ''We apply to interconnected VoIP service providers the obligation to report when they have experienced, on any facilities that they own, operate, lease, or otherwise utilize, an outage of at least 30 minutes duration: (1) That potentially affects at least 900,000 user minutes of interconnected VoIP service and results in complete loss of service; * * *.''

The Bureau has not changed the text of the final rules that amended 47 CFR part 4.

Federal Communications Commission.

David S. Turetsky,

Chief, Public Safety and Homeland Security Bureau.

[FR Doc. 2013–01996 Filed 1–29–13; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 74

[WT Docket No. 10–153; RM–11602; FCC 11–120]

Facilitating the Use of Microwave for Wireless Backhaul and Other Uses and Providing Additional Flexibility To Broadcast Auxiliary Service and Operational Fixed Microwave Licensees

AGENCY: Federal Communications Commission.

ACTION: Final rule; announcement of effective date.

SUMMARY: In this document, the Commission announces that the Office of Management and Budget (OMB) has approved, for a period of three years, the information collection associated with the Commission's Report and Order (Order), Facilitating the use of Microwave for Wireless Backhaul and Other Uses and Providing Additional Flexibility To Broadcast Auxiliary Service and Operational Fixed Microwave Licensees.

This notice is consistent with the *Order,* which stated that the Commission would publish a document in the **Federal Register** announcing the effective date of those rules.

DATES: The rules published at 47 CFR 74.605, that appeared in the **Federal Register** at 76 FR 59559 (September 27, 2011), are effective on April 1, 2013.

ADDRESSES: Federal Communications Commission, 445 12th Street SW., Washington, DC 20554. A copy of any comments on the Paperwork Reduction Act information collection requirements contained herein should be submitted to Judith B. Herman, Federal Communications Commission, Room 1–B441, 445 12th Street SW., Washington, DC 20554 or via the Internet at *Judith-B.Herman@fcc.gov*.

FOR FURTHER INFORMATION CONTACT: John J. Schauble, Deputy Chief, Broadband Division, Wireless Telecommunications Bureau at (202) 418–0797 or via the Internet at *John.Schauble@fcc.gov*.

SUPPLEMENTARY INFORMATION: This document announces that, on March 27, 2012, OMB approved, for a period of three years, the information collection requirements contained in the Commission's *Order,* FCC 11–120, published at 76 FR 59559, September 27, 2011. The OMB Control Number is 3060–1165. The Commission publishes this notice as an announcement of the effective date of the rules. If you have any comments on the burden estimates listed below, or how the Commission can improve the collections and reduce any burdens caused thereby, please contact Judith B. Herman at (202) 418–0214 or via the Internet at *Judith-B.Herman@fcc.gov*. Please include the OMB Control Number, 3060–1165, in your correspondence. The Commission will also accept your comments via email at *PRA@fcc.gov*.

To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

Synopsis

As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507), the FCC is notifying the public that it received OMB approval on March 27, 2012, which contained new or modified information collection requirements in 47 CFR 74.605 of the Commission's rules, requiring Broadcast Auxiliary Service stations operating in the 6875–7125 and 12700–13200 MHz bands to register their stationary receive sites, which would not be effective until approved by the Office of Management and Budget. The information collection was adopted in the Report and Order in WT Docket No. 10–153 which appears at 76 FR 59559, September 27, 2011. The effective date of the rules adopted in that Report and Order was published as October 27, 2011, except for § 74.605. Through this document, the Commission announces that it has received this approval (OMB Control No. 3060–1165, Expiration Date: March 27, 2015) and that § 74.605 will become effective on April 1, 2013.

Under 5 CFR part 1320, an agency may not conduct or sponsor a collection of information unless it displays a current, valid OMB Control Number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act that does not display a current, valid OMB Control Number. The OMB Control Number is 3060–1165. The foregoing notice is required by the Paperwork Reduction Act of 1995, Public Law 104–13, October 1, 1995, and 44 U.S.C. 3507.

The total annual reporting burdens and costs for the respondents are as follows:

OMB Control Number: 3060–1165.

OMB Approval Date: March 27, 2012.

OMB Expiration Date: March 31, 2015.

Title: Section 74.605, Registration of Stationary TV Pickup Receive Sites.

Form Number: N/A.

Respondents: Business or other for-profit entities, not-for-profit entities, and state, local or tribal government.

Number of Respondents and Responses: 75 respondents; 314 responses.

Estimated Time per Response: 3 hours.

Frequency of Response: On occasion reporting requirement.

Obligation To Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. 303 and 308 of the Communications Act of 1934, as amended.

Total Annual Burden: 942 hours.

Total Annual Cost: $156,750.

Nature and Extent of Confidentiality: There is no need for confidentiality.

Needs and Uses: Section 74.605 requires that licensees of TV pickup stations in the 6875–7125 MHz and 12700–13200 MHz bands shall register their stationary receive sites using the Commission's Universal Licensing System. TV Pickup licensees record their receive-only sites in the Universal Licensing System (ULS) database, including all fixed service locations. The TV Pickup stations, licensed under part 74 of the Commission's rules, make it possible for television and radio stations and networks to transmit program material from the sites of breaking news stories or other live events to television studios for inclusion in broadcast programs, to transmit programming material from studios to broadcasting transmitters for delivery to consumers' televisions and radios, and to transmit programs between broadcast stations. Registering the receive sites will allow analysis to determine whether Fixed Service links will cause interference to TV Pickup stations.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 2013–01863 Filed 1–29–13; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 120717247–3029–02]

RIN 0648–BC37

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Reef Fish Fishery of the Gulf of Mexico; Amendment 38

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: NMFS issues this final rule to implement management measures described in Amendment 38 to the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico (FMP) prepared by the Gulf of Mexico (Gulf) Fishery Management Council (Council). This final rule modifies post-season accountability measures (AMs) that affect the recreational harvest of shallow-water grouper species (SWG), changes the trigger for recreational sector AMs for gag and red grouper, and revises the Gulf reef fish framework procedure. The intent of this final rule is to achieve optimum yield (OY) while ensuring the Gulf reef fish fishery resources are utilized efficiently.

DATES: This rule is effective March 1, 2013.

ADDRESSES: Electronic copies of Amendment 38, which includes an environmental assessment, fishery impact statement, regulatory flexibility act analysis, and a regulatory impact review, may be obtained from the Southeast Regional Office Web Site at *http://sero.nmfs.noaa.gov/sf/GrouperSnapperandReefFish.htm.*

FOR FURTHER INFORMATION CONTACT: Susan Gerhart, Southeast Regional Office, NMFS, telephone: 727–824–5305; email: *Susan.Gerhart@noaa.gov.*

SUPPLEMENTARY INFORMATION: The reef fish fishery of the Gulf is managed under the FMP. The FMP was prepared by the Council and is implemented through regulations at 50 CFR part 622 under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

On October 12, 2012, NMFS published a notice of availability for Amendment 38 to the FMP and requested public comments (77 FR 62209). On October 19, 2012, NMFS published a proposed rule for Amendment 38 to the FMP and requested public comments (77 FR 64300). Amendment 38 was approved by the Secretary of Commerce on January 9, 2013. Amendment 38 and the proposed rule for Amendment 38 outlined the rationale for the actions contained in this final rule. A summary of the actions implemented by this final rule are provided below.

Management Measures Contained in This Final Rule

This rule modifies the recreational sector post-season AMs for gag and red grouper, which currently affects all SWG species (*i.e.,* gag, red grouper, black grouper, scamp, yellowfin grouper, and yellowmouth grouper), changes the trigger for recreational sector AMs for gag and red grouper, and revises the Gulf reef fish framework procedure. The intent of this final rule is to achieve OY while ensuring the fishery resources are utilized efficiently.

This final rule revises the post-season recreational sector AMs for gag and red grouper so that the shortening of the recreational fishing season following a fishing year with a recreational sector ACL overage applies only to the species with landings that exceeded the recreational ACL the prior year. Revising the recreational sector AMs should improve the likelihood of achieving OY for red grouper and avoid unnecessary closures of all SWG species.

This rule also revises the trigger for post-season AMs for gag and red grouper, so that AMs are based on a comparison of the current year's recreational sector landings to the recreational ACL. These recreational sector AM revisions should provide greater protection to the gag and red grouper stocks, be easier for fishermen to understand, and be less burdensome to administer.

Additional Measures Contained in Amendment 38

Amendment 38 adds AMs to the list of measures that may be revised through the Gulf reef fish framework process. No changes to the regulatory text are required to implement the Amendment 38 action to add AMs to the framework process, because NMFS previously erroneously included AMs in § 622.48(d) in the rule implementing the Generic ACL/AM Amendment (76 FR 82044, December 29, 2011). Amendment 38 also updates language in the framework procedure related to Council advisory panels and committees. More general language in reference to Council committees and advisory panels replaces specific references that are no longer accurate. There is no regulatory text associated with this measure.

Additional Measures Contained in This Final Rule

In addition to the other changes to the FMP, this final rule revises the management measures contained in the regulations that may be established or modified by the framework procedure to match those that are contained in the FMP. In the final rule implementing the Generic ACL/AM Amendment, NMFS erroneously included sale and purchase restrictions, and transfer at sea provisions, in the list of management measures at § 622.48(d). Thus, NMFS is removing these two items from the list of management measures in § 622.48(d). Additionally, NMFS is removing total allowable catch (TAC) from § 622.48(d). TAC has been included in the Federal regulations since the adjustment of management measures was first codified in 1992 (57 FR 11914, April 8, 1992). With the implementation of ACLs and ACTs, TAC is no longer used in the management of Gulf reef fish.

In § 622.49, paragraphs (a)(4)(ii)(C) and (a)(5)(ii)(C), NMFS clarifies language regarding the management of a recreational sector ACL overage. If gag or red grouper are overfished, and the recreational ACL is exceeded, the recreational ACL overage is deducted from the recreational ACL established for the following year and from the ACT, as determined in § 622.49, paragraph (a)(4)(ii)(B) or (a)(5)(ii)(B). If the recreational ACT is scheduled to increase in the year following a recreational ACL overage, the recreational ACT could be maintained at the current level and the overage would be deducted from that prior year's ACT. However, if the best scientific information available determines that maintaining the prior year's recreational ACT is unnecessary, the recreational ACT could increase as scheduled and the recreational overage would be deducted from the increased ACT in the following fishing year. This distinction was not made in the final rule for Amendment 32 to the FMP (77 FR 6988, February 10, 2012); however, this clarification is consistent with not allowing the recreational ACT to increase above the recreational ACL after an overage occurs, maintains a larger buffer between the recreational ACT and recreational ACL when an overage occurs, and is what the Council intended in Amendment 32.

NMFS moves the following sentence in the regulations from § 622.49, paragraph (a)(4)(ii)(A) to paragraph (a)(4)(ii)(B): ''In addition, the notification will reduce the length of the recreational gag fishing season the following fishing year by the amount necessary to ensure gag recreational landings do not exceed the recreational ACT in the following fishing year.'' This change will keep only recreational in-season AMs in paragraph (a)(4)(ii)(A), and include the recreational post-season AMs in paragraph (a)(4)(ii)(B).

Additionally, NMFS identified an inadvertent inconsistency between the regulatory text in the proposed rule for Amendment 32 to the FMP (76 FR 67656, November 2, 2011) and the second proposed rule for Amendment 32 to the FMP (77 FR 1910, January 12, 2012). To correct this mistake, in § 622.49, paragraph (a)(4)(ii)(B), NMFS revises the phrase ''If gag are not overfished'' to read ''Without regard to overfished status,'' and in paragraph (a)(5)(ii)(B), NMFS revises the phrase ''If red grouper are not overfished'' to read ''Without regard to overfished status.''

Comments and Responses

NMFS received a total of five public comments on Amendment 38 and the proposed rule, including three comments from individuals. One Federal agency stated they had no comment on the proposed rule. Two commenters submitted suggestions for the reef fish fishery that were outside the scope of Amendment 38 and the proposed rule. Specific comments related to the actions contained in Amendment 38 and the proposed rule, as well as NMFS' respective responses, are summarized below.

Comment 1: In southwest Florida, a year-round open season for red grouper is needed. There are plenty of legal red grouper within 40 nautical miles (74 km) of the coast that can be targeted with little or no gag bycatch. If red grouper harvest is prohibited, fishermen will target snapper at wrecks and ledges. However, gag also occur at these wrecks and ledges, and, therefore, fishing in these locations results in continual catch and release of gag, which is contrary to the Council and NMFS' intent.

Response: Amendment 38 and this rule do not address the length of the recreational red grouper season and this comment is therefore beyond the scope of this rule. However, this final rule will remove the requirement to shorten the season for all SWG if the gag ACL is reached. This will allow the red grouper recreational season to remain open even if gag ACL is reached, except during the 2-month gag spawning season closure that applies to all SWG.

We also note that a separate framework action approved by the Council at its October 2012 meeting would modify the 2-month gag spawning season closure as it applies to SWG other than gag. That action has not been implemented yet; however, if that action is implemented, the recreational sector for SWG other than gag, in or from the Gulf EEZ, would be open for harvest in February and March shoreward of the 20-fathom contour line. That action, combined with those in Amendment 38, could allow year-round recreational red grouper harvest in shallow-water areas, unless the red grouper recreational ACL is reached.

Comment 2: NMFS should reject Action 1, Preferred Alternative 3, which would remove the portion of the AMs that require an adjustment of the fishing season for all SWG in the year following a gag or red grouper recreational ACL overage until further bycatch practicability analyses can be performed. After gag, red grouper is the main species caught in the SWG complex. Although gag and red grouper occupy slightly different habitats, they are generally found in the same areas and depths and have a broader depth range of occurrence than the other SWG. Also, the proportion of annual gag fishing mortality due to dead discards is unknown.

Response: NMFS disagrees that it should reject Action 1, Preferred Alternative 3, until further bycatch practicability analyses can be performed. Amendment 38 includes a bycatch practicability analysis that concludes there would be no adverse biological impacts associated with modifying the gag recreational post-season AMs. NMFS agrees with this conclusion. NMFS acknowledges that some gag bycatch will occur if the gag recreational season is shortened and fishermen target other species in the SWG complex, including red grouper. However, the recreational gag ACL has not been reached since the AM was established in 2009 through Amendment 30B to the FMP (74 FR 17603, April 16, 2009), and the AM has not been triggered. Thus, no change in bycatch is expected from implementation of this final rule relative to the historical discard levels.

Further, the Council analyzed the impacts to gag bycatch when it established a 4-month recreational gag open season in Amendment 32 to the FMP, while continuing to allow recreational fishing for SWG other than gag year-round (except for the February-March gag spawning season closure). That analysis accounted for dead discards and concluded that even with an effort increase of 1.5 times what it would have been with year-round gag fishing, reductions in total removals would be at the level necessary to rebuild the stock. If the recreational gag AM is triggered in the future, the changes implemented in this final rule are expected to result in only a minimal increase in gag bycatch beyond the current level because of the already limited 4-month gag season.

With respect to the proportion of annual gag fishing mortality due to dead discard, this is known and was included in the bycatch practicability analysis for Amendment 38. These data were originally produced during the 2010 re-run of the gag stock assessment. Although the discard and landings numbers are estimates, they are the best scientific information available.

Comment 3: NMFS should approve and implement Action 1, Preferred Alternative 4, which replaces the 3-year moving average AM trigger with an annual AM trigger.

Response: NMFS agrees. Comparing the recreational ACL to a single-year average of recreational landings is a more practical method of determining if recreational AMs should be triggered. The Council chose Alternative 4 as one of the two preferred alternatives in Action 1.

Comment 4: NMFS should reject Action 2, Preferred Alternative 2, which would modify the Gulf reef fish framework procedure to include changes to AMs through the standard documentation process for open framework actions. The existing framework procedure, as proposed and finalized in the Generic ACL/AM Amendment (76 FR 82044, December 29, 2011), already includes AMs as an appropriate action under the closed framework process. The framework procedure may only be used to take actions that have been anticipated and analyzed in the associated FMP. Prior to implementing such AMs for a fishery, those specific AMs must be fully analyzed in the context of the FMP.

Response: NMFS disagrees that it should reject Action 2, Preferred Alternative 2. The commenter apparently misunderstands the effect of the alternative chosen by the Council. The current AMs were established by plan amendment and are codified in the regulations at 50 CFR 622.49. When one of these AMs is triggered (*e.g.,* the annual catch limit is met), then that AM (*e.g.,* closing of the fishery) is implemented by NMFS under the closed framework procedure specified in the FMP by filing an appropriate notification in the **Federal Register**. The change in framework procedure described in Action 2, Preferred Alternative 2, would not change the implementation of AMs through this closed framework procedure. Rather, Action 2, Preferred Alternative 2, would amend the FMP to allow the Council through an open framework action to modify the existing AMs or to establish new AMs. The new AMs that could be established would be limited to the list of potential AMs in the FMP's open framework procedure as amended by this Action. Once an existing AM is modified, or a new AM is established for a species through the open framework, the modified or new AM will be codified in the regulations and may then be implemented annually via a closed framework action. The primary difference between an open framework action and a plan amendment is that the open framework action may be implemented with a shorter review process than that required for a plan amendment. However, any AMs established or modified through the open framework procedure would be fully analyzed, in the context of the FMP, the MSA, and all other applicable laws. The open framework procedure requires that the Council develop documentation to support the action and that the Regional Administrator review the Council's recommendations and supporting information and notify the Council of the determinations, in accordance with the MSA and other applicable law. The open framework procedure also includes the opportunity for public participation, during both the Council's development of the action and NMFS's rulemaking to implement the action.

Classification

The Regional Administrator, Southeast Region, NMFS has determined that the actions contained in this final rule and Amendment 38 are necessary for the conservation and management of the reef fish fishery and are consistent with the Magnuson-Stevens Act and other applicable laws.

This final rule has been determined to be not significant for purposes of Executive Order 12866.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities. The factual basis for this certification was published in the proposed rule and is not repeated here. No comments were received regarding the certification and NMFS has not received any new information that would affect its determination. No changes to the final rule were made in response to public comments. As a result, a regulatory flexibility analysis was not required and none was prepared.

List of Subjects in 50 CFR Part 622

Fisheries, Fishing, Puerto Rico, Reporting and recordkeeping requirements, Virgin Islands.

Dated: January 25, 2013.

Alan D. Risenhoover,

Director, Office of Sustainable Fisheries, performing the functions and duties of the Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 622 is amended as follows:

PART 622—FISHERIES OF THE CARIBBEAN, GULF, AND SOUTH ATLANTIC

■ 1. The authority citation for part 622 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*

■ 2. In § 622.48, paragraph (d) is revised to read as follows:

§ 622.48 Adjustment of management measures.

* * * * *

(d) *Gulf reef fish.* For a species or species group: reporting and monitoring requirements, permitting requirements, bag and possession limits (including a bag limit of zero), size limits, vessel trip limits, closed seasons or areas and reopenings, annual catch limits (ACLs), annual catch targets (ACTs), quotas (including a quota of zero), accountability measures (AMs), MSY (or proxy), OY, management parameters such as overfished and overfishing definitions, gear restrictions (ranging from regulation to complete prohibition), gear markings and identification, vessel markings and identification, allowable biological catch (ABC) and ABC control rules, rebuilding plans, and restrictions relative to conditions of harvested fish (maintaining fish in whole condition, use as bait).

* * * * *

■ 3. In § 622.49, paragraphs (a)(4)(ii), (a)(5)(ii)(B), (a)(5)(ii)(C), and (a)(5)(ii)(D) are revised to read as follows:

§ 622.49 Annual catch limits (ACLs), annual catch targets (ACTs), and accountability measures (AMs).

(a) * * *

(4) * * *

(ii) *Recreational sector.* (A) Without regard to overfished status, if gag recreational landings, as estimated by the SRD, reach or are projected to reach the applicable ACLs specified in paragraph (a)(4)(ii)(D) of this section, the AA will file a notification with the Office of the Federal Register, to close the recreational sector for the remainder of the fishing year. On and after the effective date of such a notification, the bag and possession limit of gag in or from the Gulf EEZ is zero. This bag and possession limit applies in the Gulf on board a vessel for which a valid Federal charter vessel/headboat permit for Gulf reef fish has been issued, without regard to where such species were harvested, *i.e.* in state or Federal waters.

(B) Without regard to overfished status, and in addition to the measures specified in paragraph (a)(4)(ii)(A) of this section, if gag recreational landings, as estimated by the SRD, exceed the applicable ACLs specified in paragraph (a)(4)(ii)(D) of this section, the AA will file a notification with the Office of the Federal Register to maintain the gag ACT, specified in paragraph (a)(4)(ii)(D) of this section, for that following fishing year at the level of the prior year's ACT, unless the best scientific information available determines that maintaining the prior year's ACT is unnecessary. In addition, the notification will reduce the length of the recreational gag fishing season the following fishing year by the amount necessary to ensure gag recreational landings do not exceed the recreational ACT in the following fishing year.

(C) If gag are overfished, based on the most recent status of U.S. Fisheries Report to Congress, and gag recreational landings, as estimated by the SRD, exceed the applicable ACL specified in paragraph (a)(4)(ii)(D) of this section, the following measures will apply. In addition to the measures specified in paragraphs (a)(4)(ii)(A) and (B) of this section, the AA will file a notification with the Office of the Federal Register, at or near the beginning of the following fishing year to reduce the ACL for that following year by the amount of the ACL overage in the prior fishing year, and reduce the ACT, as determined in paragraph (a)(4)(ii)(B)of this section, by the amount of the ACL overage in the prior fishing year, unless the best scientific information available determines that a greater, lesser, or no overage adjustment is necessary.

(D) The applicable recreational ACLs for gag, in gutted weight, are 1.232 million lb (0.559 million kg) for 2012, 1.495 million lb (0.678 million kg) for 2013, 1.720 million lb (0.780 million kg) for 2014, and 1.903 million lb (0.863 million kg) for 2015 and subsequent fishing years. The recreational ACTs for gag, in gutted weight, are 1.031 million lb (0.468 million kg) for 2012, 1.287 million lb (0.584 million kg) for 2013, 1.519 million lb (0.689 million kg) for 2014, and 1.708 million lb (0.775 million kg) for 2015 and subsequent fishing years.

(5) * * *

(ii) * * *

(B) Without regard to overfished status, and in addition to the measures specified in paragraph (a)(5)(ii)(A) of this section, if red grouper recreational landings, as estimated by the SRD, exceed the applicable ACL specified in paragraph (a)(5)(ii)(D) of this section, the AA will file a notification with the Office of the Federal Register to maintain the red grouper ACT, specified in paragraph (a)(5)(ii)(D) of this section, for that following fishing year at the level of the prior year's ACT, unless the best scientific information available determines that maintaining the prior year's ACT is unnecessary. In addition, the notification will reduce the bag limit by one fish and reduce the length of the recreational red grouper fishing season the following fishing year by the amount necessary to ensure red grouper recreational landings do not exceed the recreational ACT in the following fishing year. The minimum red grouper bag limit for 2014 and subsequent fishing years is two fish.

(C) If red grouper are overfished, based on the most recent Status of U.S. Fisheries Report to Congress, and red grouper recreational landings, as estimated by the SRD, exceed the applicable ACL specified in paragraph (a)(5)(ii)(D) of this section, the following measures will apply. In addition to the measures specified in paragraphs (a)(5)(ii)(A) and (B) of this section, the AA will file a notification with the Office of the Federal Register, at or near the beginning of the following fishing year to reduce the ACL for that following year by the amount of the ACL overage in the prior fishing year, and reduce the ACT, as determined in paragraph (a)(5)(ii)(B) of this section, by the amount of the ACL overage in the prior fishing year, unless the best scientific information available determines that a greater, lesser, or no overage adjustment is necessary.

(D) The recreational ACL for red grouper, in gutted weight, is 1.90 million lb (0.862 million kg) for 2012 and subsequent fishing years. The recreational ACT for red grouper, in gutted weight, is 1.730 million lb (0.785 million kg) for 2012 and subsequent fishing years.

* * * * *

[FR Doc. 2013–02013 Filed 1–29–13; 8:45 am]

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Proposed Rules

Federal Register

Vol. 78, No. 20

Wednesday, January 30, 2013

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 319

[Docket No. APHIS–2012–0002]

RIN 0579–AD63

Importation of Avocados From Continental Spain

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Proposed rule.

SUMMARY: We are proposing to amend the fruits and vegetables regulations to allow the importation of avocados from continental Spain (excluding the Balaeric Islands and Canary Islands) into the United States. As a condition of entry, avocados from Spain would have to be produced in accordance with a systems approach that would include requirements for importation in commercial consignments; registration and monitoring of places of production and packinghouses; grove sanitation; and inspection for quarantine pests by the national plant protection organization of Spain. Consignments of avocados other than the Hass variety would also have to be treated for the Mediterranean fruit fly either prior to moving to the United States or upon arrival prior to release. Consignments would also be required to be accompanied by a phytosanitary certificate with an additional declaration stating that the avocados were grown and inspected and found to be free of pests in accordance with the proposed requirements. This action would allow for the importation of avocados from Spain into the United States while continuing to provide protection against the introduction of quarantine pests.

DATES: We will consider all comments that we receive on or before April 1, 2013.

ADDRESSES: You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/#!documentDetail;D=APHIS-2012-0002-0001.*
- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2012–0002, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238.

Supporting documents and any comments we receive on this docket may be viewed at *http://www.regulations.gov/#!docketDetail;D=APHIS-2012-0002* or in our reading room, which is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799–7039 before coming.

FOR FURTHER INFORMATION CONTACT: Ms. Meredith Jones, Regulatory Coordination Specialist, Regulatory Coordination and Compliance, PPQ, APHIS, 4700 River Road Unit 133, Riverdale, MD 20737–1231; (301) 851–2289.

SUPPLEMENTARY INFORMATION:

Background

The regulations in ''Subpart—Fruits and Vegetables'' (7 CFR 319.56–1 through 319.56–57, referred to below as the regulations) prohibit or restrict the importation of fruits and vegetables into the United States from certain parts of the world to prevent the introduction and dissemination of plant pests that are new to or not widely distributed within the United States.

The national plant protection organization (NPPO) of Spain has requested that the Animal and Plant Health Inspection Service (APHIS) amend the regulations to allow avocados from continental Spain to be imported into the United States, including Hawaii and U.S. territories.

As part of our evaluation of Spain's request, we prepared a pest risk assessment (PRA), titled ''Importation of Fresh Avocado, *Persea americana* Miller, from Continental Spain into the United States, Including Hawaii and U.S. Territories'' (November 2011). The PRA evaluated the risks associated with the importation of avocados into the United States from Spain. Copies of the PRA may be obtained from the person listed under **FOR FURTHER INFORMATION CONTACT** or viewed on the Regulations.gov Web site (see **ADDRESSES** above for instructions for accessing Regulations.gov).

The PRA identifies one pest of quarantine significance present in continental Spain that could be introduced into the United States through the importation of avocados. That pest is *Ceratitis capitata* (Wiedemann), the Mediterranean fruit fly (Medfly).

APHIS has determined that measures beyond standard port-of-entry inspection are required to mitigate the risks posed by this plant pest. To recommend specific measures to mitigate those risks, we prepared a risk management document (RMD). Copies of the RMD may be obtained from the person listed under **FOR FURTHER INFORMATION CONTACT** or viewed on the Regulations.gov Web site (see **ADDRESSES** above for instructions for accessing Regulations.gov).

Based on the recommendations of the RMD, we are proposing to allow the importation of avocados from continental Spain into the United States only if they are produced in accordance with a systems approach. We would allow importation of untreated Hass avocados based on our finding [1] that Hass avocados on the tree are not a host to Medfly. We would allow importation of other varieties of avocado if they are treated for Medfly. The systems approach we are proposing would require:

- Registration, monitoring, and oversight of places of production;
- Grove sanitation;
- Harvesting requirements for safeguarding and identification of the fruit;
- Packinghouse requirements for safeguarding and identification of the fruit;
- Inspection by the NPPO of Spain for Medfly; and

[1] ''Host status of 'Hass' avocados to Mediterranean fruit fly, *Ceratitis capitata* (Wiedemann) and the South American fruit fly, *Anastrepha fraterculus* (Wiedemann).'' Commodity Import Evaluation Document. December 2010. United States Department of Agriculture, Animal and Plant Health Inspection Service, Plant Protection and Quarantine, Regulations, Permits and Manuals, Regulatory Coordination and Compliance, Riverdale, MD. 8pp. Available at *http://www.regulations.gov/#!documentDetail;D=APHIS-2010-0127-0002.*

• Cold treatment for avocado varieties other than Hass.

Additionally, all avocados from Spain would also be required to be accompanied by a phytosanitary certificate issued by the NPPO of Spain. The phytosanitary certificate accompanying Hass variety avocados would have to contain an additional declaration stating that the avocados were grown in an approved place of production and the consignment has been inspected and found free of *C. capitata.* The phytosanitary certificate accompanying non-Hass avocados would have to contain an additional declaration stating that the avocados were grown in an approved place of production and the consignment has been inspected and found free of *C. capitata,* and, if treated prior to export, that the consignment has been treated for *C. capitata* in accordance with 7 CFR part 305.

We are proposing to add the systems approach to the regulations in a new § 319.56–58 governing the importation of avocados from continental Spain into the United States. The mitigation measures in the proposed systems approach are discussed in greater detail below.

Proposed Systems Approach

General Requirements

Paragraph (a) of § 319.56–58 would set out general requirements for the NPPO of Spain and for growers and packers producing avocados for export to the United States.

Paragraph (a)(1) would require the NPPO of Spain to provide a workplan to APHIS that details the activities that the NPPO of Spain will, subject to APHIS' approval of the workplan, carry out to meet the requirements of proposed § 319.56–58. As described in a notice we published on May 10, 2006, in the **Federal Register** (71 FR 27221–27224, Docket No. APHIS–2005–0085), a bilateral workplan is an agreement between APHIS' Plant Protection and Quarantine program, officials of the NPPO of a foreign government, and, when necessary, foreign commercial entities that specifies in detail the phytosanitary measures that will comply with our regulations governing the import or export of a specific commodity. Bilateral workplans apply only to the signatory parties and establish detailed procedures and guidance for the day-to-day operations of specific import/export programs. Bilateral workplans also establish how specific phytosanitary issues are dealt with in the exporting country and make clear who is responsible for dealing with those issues. The implementation of a systems approach typically requires a bilateral workplan to be developed.

Paragraph (a)(1) would also state that the NPPO of Spain must establish a trust fund in accordance with § 319.56–6. Section 319.56–6 of the regulations sets forth provisions for establishing trust fund agreements to cover costs incurred by APHIS when APHIS personnel must be physically present in an exporting country or region to facilitate exports. The systems approach may require APHIS personnel to monitor treatments if they are conducted in Spain.

Paragraph (a)(2) would require the avocados to be grown at places of production in continental Spain that are registered with the NPPO of Spain and that meet the requirements for grove sanitation that are discussed later in this document. Places of production would be limited to continental Spain due to additional quarantine pests that may occur in the Canary Islands or Balaeric Islands.

Paragraph (a)(3) would require the avocados to be packed for export to the United States in packinghouses that are registered with the NPPO of Spain and that meet the packinghouse requirements for fruit origin, pest exclusion, cleaning, safeguarding, and identification that are described later in this document.

Paragraph (a)(4) would state that avocados from continental Spain may be imported in commercial consignments only. Produce grown commercially is less likely to be infested with plant pests than noncommercial consignments. Noncommercial consignments are more prone to infestations because the commodity is often ripe to overripe and is often grown with little or no pest control. Commercial consignments, as defined in § 319.56–2, are consignments that an inspector identifies as having been imported for sale and distribution. Such identification is based on a variety of indicators, including, but not limited to: Quantity of produce, type of packaging, identification of grower or packinghouse on the packaging, and documents consigning the fruits or vegetables to a wholesaler or retailer.

Commercially produced avocados are cleaned as part of the packing process. This practice would help to mitigate the risk associated with external pests that would be dislodged by cleaning. In addition, the industry practice of culling damaged fruit would help to ensure that avocados exported from Spain are free of quarantine pests in general.

Paragraph (a)(5) would require that avocados other than Hass variety from continental Spain must be treated for *C. capitata* in accordance with 7 CFR part 305. This treatment could occur prior to export to the United States, or upon arrival[2] prior to release. This requirement would mitigate the greater vulnerability of non-Hass avocados to attack by *C. capitata.* The regulations in part 305 set out standards and schedules for treatments[3] required in 7 CFR parts 301, 318, and 319 to prevent the introduction or dissemination of plant pests or noxious weeds into or through the United States through the importation or movement of fruits, vegetables, and other articles. Therefore, we are proposing to refer to 7 CFR part 305 for an approved treatment for *C. capitata* for avocados from continental Spain.

Monitoring and Oversight

The systems approach we are proposing includes monitoring and oversight requirements in paragraph (b) of proposed § 319.56–58 to ensure that the required phytosanitary measures are properly implemented throughout the process of growing and packing of avocados for export to the United States.

Paragraph (b)(1) would require the NPPO of Spain to visit and inspect registered places of production monthly, starting at least 2 months before harvest and continuing until the end of harvest, to verify that the growers are complying with the requirements for grove sanitation that are discussed later in this document and follow pest control guidelines, when necessary, to reduce quarantine pest populations.

Under paragraph (b)(2), in addition to conducting fruit inspections at the packinghouses, the NPPO of Spain would be required to monitor packinghouse operations to verify that the packinghouses are complying with the packinghouse requirements for fruit origin, pest exclusion, cleaning, safeguarding, and identification that are described later in this document.

Under paragraph (b)(3), if the NPPO of Spain finds that a place of production or a packinghouse is not complying with the proposed regulations, no fruit from the place of production or packinghouse would be eligible for export to the United States until APHIS and the NPPO of Spain conduct an investigation and appropriate remedial actions have been implemented.

[2] Cold treatment upon arrival is only available at certain ports in accordance with 7 CFR 305.6.

[3] Within part 305, § 305.2 provides that approved treatment schedules are set out in the PPQ Treatment Manual, found online at *http://www.aphis.usda.gov/import_export/plants/manuals/ports/downloads/treatment.pdf.* The manual specifies which treatment schedules are effective in neutralizing *C. capitata* on avocados.

Paragraph (b)(4) would require the NPPO of Spain to retain all forms and documents related to export program activities in groves and packinghouses for at least 1 year and, as requested, provide them to APHIS for review.

Grove Sanitation

Under paragraph (c) of proposed § 319.56–58, avocado fruit that has fallen from the trees would have to be removed from each place of production at least once every 7 days, starting 2 months before harvest and continuing to the end of harvest. This procedure would reduce the amount of material in the groves that could serve as potential host material for *C. capitata.*

Avocado fruit of any variety that has fallen from avocado trees to the ground may be damaged and thus more susceptible to infestation by *C. capitata,* and even the normally resistant Hass variety may become infested under these circumstances. Therefore, proposed paragraph (c) would not allow fallen avocado fruit to be included in field containers of fruit brought to the packinghouse to be packed for export.

Harvesting Requirements

Paragraph (d) of proposed § 319.56–58 sets out requirements for harvesting. Harvested avocados would have to be placed in field cartons or containers that are marked with the official registration number of the place of production. The place of production where the avocados were grown would have to remain identifiable when the fruit leaves the grove, at the packinghouse, and throughout the export process. These requirements would ensure that APHIS and the NPPO of Spain could identify the place of production where the avocados were produced if inspectors find Medflies in the fruit either before export or at the port of entry.

We would require the fruit to be moved to a registered packinghouse within 3 hours of harvest or to be protected from fruit fly infestation until moved. The fruit would have to be safeguarded by an insect-proof screen or plastic tarpaulin while in transit to the packinghouse and while awaiting packing. These requirements would prevent the fruit from being infested by fruit flies between harvest and packing.

Packinghouse Requirements

We are proposing several requirements for fruit origin and packinghouse activities, which would be contained in paragraph (e) of proposed § 319.56–58.

Paragraph (e)(1) would require registered packinghouses to accept only avocados that are from registered places of production and that are produced in accordance with the requirements of the systems approach during the time they are in use for packing avocados for export to the United States.

Paragraph (e)(2) would require avocados to be packed within 24 hours of harvest in an insect-exclusionary packinghouse. All openings to the outside of the packinghouse would have to be covered by screening with openings of not more than 1.6 mm or by some other barrier that prevents pests from entering. Screening with openings of not more than 1.6 mm excludes fruit flies. The packinghouse would have to have double doors at the entrance to the facility and at the interior entrance to the area where the avocados are packed. These proposed requirements are designed to exclude fruit flies from the packinghouse.

Paragraph (e)(3) would require all avocados to be cleaned of all plant debris before packing. This procedure would ensure that the fruit alone is exported to the United States; other parts of the avocado tree may harbor pests other than the quarantine pest *C. capitata,* and the cleaning process helps to remove them.

Paragraph (e)(4) would state that cartons or boxes in which avocados are packed would be required to be labeled with a lot number that provides information to identify the orchard where the fruit was grown and the packinghouse where the fruit was packed. The labeling would have to be large enough to clearly display the required information and be located on the side of cartons to facilitate inspection by APHIS.

Paragraph (e)(5) would require avocados to be packed in insect-proof packaging, or covered with insect-proof mesh or a plastic tarpaulin, for transport to the United States, to prevent fruit fly infestation after the fruit is packed. These safeguards would have to remain intact until arrival in the United States.

Paragraph (e)(6) would require shipping documents accompanying consignments of avocados from continental Spain that are exported to the United States to include the official registration number of the place of production at which the avocados were grown and to identify the packing shed or sheds in which the fruit was processed and packed. This identification would have to be maintained until the fruit is released for entry into the United States. These requirements would ensure that APHIS and the NPPO of Spain could identify the packinghouse at which the fruit was packed if inspectors find *C. capitata* in the fruit either before export or at the port of entry.

Inspection by the NPPO of Spain

To ensure that the mitigations required in the systems approach are effective at producing fruit free of quarantine pests, paragraph (f) of proposed § 319.56–58 would require inspectors from the NPPO of Spain to inspect a biometric sample from each place of production at a rate to be determined by APHIS. The inspectors would have to visually inspect the fruit and a portion of the fruit would be cut open to inspect for internal stages of *C. capitata.* If *C. capitata* is detected in this inspection, the place of production where the infested avocados were grown would immediately be suspended from the export program until an investigation has been conducted by APHIS and the NPPO of Spain and appropriate mitigations have been implemented.

Phytosanitary Certificate

To certify that the avocados from continental Spain have been grown and packed in accordance with the requirements of proposed § 319.56–58, proposed paragraph (g) would require each consignment of avocados imported from Spain into the United States to be accompanied by a phytosanitary certificate issued by the NPPO of Spain. The phytosanitary certificate accompanying Hass variety avocados would have to contain an additional declaration stating that the avocados are Hass variety and were grown in an approved place of production and the consignment has been inspected and found free of *C. capitata.* The phytosanitary certificate accompanying non-Hass avocados would have to contain an additional declaration stating that the avocados were grown in an approved place of production and the consignment has been inspected and found free of *C. capitata* and, if treated prior to export, that the consignment has been treated for *C. capitata* in accordance with 7 CFR part 305.

Executive Order 12866 and Regulatory Flexibility Act

This proposed rule has been has been determined to be not significant for the purposes of Executive Order 12866 and, therefore, has not been reviewed by the Office of Management and Budget.

In accordance with the Regulatory Flexibility Act, we have analyzed the potential economic effects of this action on small entities. The analysis is set forth below.

The NPPO of Spain has requested that APHIS authorize market access for commercial shipments of fresh avocados into the United States for domestic consumption. APHIS is proposing to grant this request if Spain produces the avocados in accordance with a systems approach intended to prevent the introduction of quarantine pests.

In 2009, the United States was the world's third largest avocado producer, after Mexico and Chile; the United States accounted for about 7 percent of global production, while Mexico and Chile accounted for 32 percent and 9 percent, respectively. U.S. commercial production of avocado occurs in three States. California accounts for about 90 percent of U.S. production, followed by Florida with about 9 percent, and Hawaii with less than 1 percent. In 2010, U.S. utilized production of avocado totaled about 135,500 metric tons (MT), only one-half of the 271,000 MT produced in 2009, and indicative of the significant variability in yield from year to year.

In the last decade, U.S. per capita consumption of avocado has risen significantly, from 1 kilogram in 2000 to 1.86 kilograms in 2010, representing an annual growth rate of about 6.4 percent. Although the United States is a major producer of avocado, it is also the largest import market (since 2002) and has been a net importer since the late 1980s. During this time, the gap between U.S. imports and U.S. exports has widened substantially. The average annual value of U.S. avocado imports, 2008–2010, was nearly $622 million, compared to average annual exports valued at less than $16 million.

Spanish avocado producers expect to export to the United States about 260 MT of fresh avocado annually, an amount equivalent to 0.15 percent of U.S. production, 0.07 percent of U.S. net imports (imports minus exports), and 0.05 percent of U.S. supply (production plus net imports), based on 2008–2010 average annual U.S. production and trade quantities.

Entities that may be directly affected by the proposed rule are U.S. importers and producers of avocado. Avocado importers are classified in the North American Industry Classification System (NAICS) under Fresh Fruit and Vegetable Merchant Wholesalers (NAICS 424480). Avocado producers are classified under Other Noncitrus Fruit Farming (NAICS 111339). The Small Business Administration (SBA) has established guidelines for determining which establishments are to be considered small. A firm primarily engaged in fresh fruit and vegetable wholesaling is considered small if it employs not more than 100 persons. A firm primarily engaged in noncitrus fruit farming is considered small if it has annual sales of not more than $750,000.

In 2007, nearly 95 percent of fruit and vegetable wholesale establishments (4,207 of 4,437 businesses) that operated the entire year were small by the SBA's small-entity threshold of not more than 100 employees. That same year, nearly 93 percent of farms that sold fruits, tree nuts, or berries (104,424 of 112,690 operations) had annual sales of less than $500,000, well below the SBA's small-entity threshold of $750,000. The subset of these farms that comprise the industry Other Noncitrus Fruit Farming numbered 23,641, and can be assumed to be also primarily composed of small entities. Of these Other Noncitrus Fruit Farming establishments, there were 8,245 avocado farms in 2007, also presumed to be principally small operations.

While most entities that may be affected by the proposed rule are small, any effects would be insignificant because of the small quantity of avocado expected to be imported from continental Spain.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action would not have a significant economic impact on a substantial number of small entities.

Executive Order 12988

This proposed rule would allow avocados to be imported into the United States from continental Spain. If this proposed rule is adopted, State and local laws and regulations regarding avocados imported under this rule would be preempted while the fruit is in foreign commerce. Fresh avocados are generally imported for immediate distribution and sale to the consuming public and would remain in foreign commerce until sold to the ultimate consumer. The question of when foreign commerce ceases in other cases must be addressed on a case-by-case basis. If this proposed rule is adopted, no retroactive effect will be given to this rule, and this rule will not require administrative proceedings before parties may file suit in court challenging this rule.

Paperwork Reduction Act

In accordance with section 3507(d) of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the information collection or recordkeeping requirements included in this proposed rule have been submitted for approval to the Office of Management and Budget (OMB). Please send written comments to the Office of Information and Regulatory Affairs, OMB, Attention: Desk Officer for APHIS, Washington, DC 20503. Please state that your comments refer to Docket No. APHIS–2012–0002. Please send a copy of your comments to: (1) Docket No. APHIS–2012–0002, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238, and (2) Clearance Officer, OCIO, USDA, room 404–W, 14th Street and Independence Avenue SW., Washington, DC 20250. A comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication of this proposed rule.

We are proposing to amend the fruits and vegetables regulations to allow the importation of avocados from continental Spain into the United States, including Hawaii and U.S. territories. As a condition of entry, avocados from continental Spain would have to be produced in accordance with a systems approach that would include requirements for importation in commercial consignments; registration and monitoring of places of production and packinghouses; grove sanitation; and inspection for quarantine pests by the NPPO of Spain. Implementation of this proposed rule would require the submission of documents such as phytosanitary certificates, trust fund agreements, workplans, records for recordkeeping, and production site and packinghouse registration and inspection forms. This proposed rule will also require the labeling of boxes or cartons.

We are soliciting comments from the public (as well as affected agencies) concerning our proposed information collection and recordkeeping requirements. These comments will help us:

(1) Evaluate whether the proposed information collection is necessary for the proper performance of our agency's functions, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the proposed information collection, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the information collection on those who are to respond (such as through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology; e.g., permitting electronic submission of responses).

Estimate of burden: Public reporting burden for this collection of information is estimated to average 0.029503 hours per response.

Respondents: Producers and importers of avocados and the NPPO of Spain.

Estimated annual number of respondents: 28.

Estimated annual number of responses per respondent: 515.6785.

Estimated annual number of responses: 14,439.

Estimated total annual burden on respondents: 426 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

Copies of this information collection can be obtained from Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 851–2908.

E-Government Act Compliance

The Animal and Plant Health Inspection Service is committed to compliance with the E-Government Act to promote the use of the Internet and other information technologies, to provide increased opportunities for citizen access to Government information and services, and for other purposes. For information pertinent to E-Government Act compliance related to this proposed rule, please contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 851–2908.

List of Subjects in 7 CFR Part 319

Coffee, Cotton, Fruits, Imports, Logs, Nursery stock, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements, Rice, Vegetables.

Accordingly, we propose to amend 7 CFR part 319 as follows:

PART 319—FOREIGN QUARANTINE NOTICES

■ 1. The authority citation for part 319 continues to read as follows:

Authority: 7 U.S.C. 450, 7701–7772, and 7781–7786; 21 U.S.C. 136 and 136a; 7 CFR 2.22, 2.80, and 371.3.

■ 2. Add § 319.56–58 to read as follows:

§ 319.56–58 Avocados from continental Spain.

Fresh avocados (*Persea americana* P. Mill.) may be imported into the United States from continental Spain (excluding the Balaeric Islands and Canary Islands) only under the conditions described in this section. These conditions are designed to prevent the introduction of the quarantine pest *Ceratitis capitata* (Wiedemann), the Mediterranean fruit fly.

(a) *General requirements.* (1) The national plant protection organization (NPPO) of Spain must provide a workplan to APHIS that details the activities that the NPPO of Spain will, subject to APHIS' approval of the workplan, carry out to meet the requirements of this section. The NPPO of Spain must also establish a trust fund in accordance with § 319.56–6.

(2) The avocados must be grown at places of production in continental Spain that are registered with the NPPO of Spain and that meet the requirements of this section.

(3) The avocados must be packed for export to the United States in packinghouses that are registered with the NPPO of Spain and that meet the requirements of this section.

(4) Avocados from Spain may be imported in commercial consignments only.

(5) Avocados other than Hass variety from continental Spain must be treated for *C. capitata* in accordance with part 305 of this chapter.

(b) *Monitoring and oversight.* (1) The NPPO of Spain must visit and inspect registered places of production monthly, starting at least 2 months before harvest and continuing until the end of the shipping season, to verify that the growers are complying with the requirements of paragraph (c) of this section and follow pest control guidelines, when necessary, to reduce quarantine pest populations.

(2) In addition to conducting fruit inspections at the packinghouses, the NPPO of Spain must monitor packinghouse operations to verify that the packinghouses are complying with the requirements of paragraph (e) of this section.

(3) If the NPPO of Spain finds that a place of production or packinghouse is not complying with the requirements of this section, no fruit from the place of production or packinghouse will be eligible for export to the United States until APHIS and the NPPO of Spain conduct an investigation and appropriate remedial actions have been implemented.

(4) The NPPO of Spain must retain all forms and documents related to export program activities in groves and packinghouses for at least 1 year and, as requested, provide them to APHIS for review.

(c) *Grove sanitation.* Avocado fruit that has fallen from the trees must be removed from each place of production at least once every 7 days, starting 2 months before harvest and continuing to the end of harvest. Fallen avocado fruit may not be included in field containers of fruit brought to the packinghouse to be packed for export.

(d) *Harvesting requirements.* Harvested avocados must be placed in field cartons or containers that are marked with the official registration number of the place of production. The place of production where the avocados were grown must remain identifiable when the fruit leaves the grove, at the packinghouse, and throughout the export process. The fruit must be moved to a registered packinghouse within 3 hours of harvest or must be protected from fruit fly infestation until moved. The fruit must be safeguarded by an insect-proof screen or plastic tarpaulin while in transit to the packinghouse and while awaiting packing.

(e) *Packinghouse requirements.* (1) During the time registered packinghouses are in use for packing avocados for export to the United States, the packinghouses may only accept avocados that are from registered places of production and that are produced in accordance with the requirements of this section.

(2) Avocados must be packed within 24 hours of harvest in an insect-exclusionary packinghouse. All openings to the outside of the packinghouse must be covered by screening with openings of not more than 1.6 mm or by some other barrier that prevents pests from entering. The packinghouse must have double doors at the entrance to the facility and at the interior entrance to the area where the avocados are packed.

(3) Before packing, all avocados must be cleaned of all plant debris.

(4) Boxes or cartons in which avocados are packed must be labeled with a lot number that provides information to identify the orchard where grown and the packinghouse where packed. The labeling must be large enough to clearly display the required information and must be located on the outside of the boxes to facilitate inspection.

(5) Avocados must be packed in insect-proof packaging, or covered with insect-proof mesh or a plastic tarpaulin, for transport to the United States. These safeguards must remain intact until arrival in the United States.

(6) Shipping documents accompanying consignments of avocados from continental Spain that are exported to the United States must include the official registration number of the place of production at which the avocados were grown and must identify the packing shed or sheds in which the fruit was processed and packed. This identification must be maintained until

the fruit is released for entry into the United States.

(f) *NPPO of Spain inspection.* Following any post-harvest processing, inspectors from the NPPO of Spain must inspect a biometric sample of fruit at a rate determined by APHIS. Inspectors must visually inspect the fruit and cut a portion of the fruit to inspect for *C. capitata.* If any *C. capitata* are detected in this inspection, the place of production where the infested avocados were grown will immediately be suspended from the export program until an investigation has been conducted by APHIS and the NPPO of Spain and appropriate mitigations have been implemented.

(g) *Phytosanitary certificate.* Each consignment of avocados imported from Spain into the United States must be accompanied by a phytosanitary certificate issued by the NPPO of Spain.

(1) The phytosanitary certificate accompanying Hass variety avocados must contain an additional declaration stating that the avocados are Hass variety and were grown in an approved place of production and the consignment has been inspected and found free of *C. capitata.*

(2) The phytosanitary certificate accompanying non-Hass avocados must contain an additional declaration stating that the avocados were grown in an approved place of production and the consignment has been inspected and found free of *C. capitata.* If the consignment has been subjected to treatment for *C. capitata* prior to export in accordance with 7 CFR part 305, the additional declaration must also state this.

Done in Washington, DC, this 25th day of January 2013.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2013–02017 Filed 1–29–13; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 319

[Docket No. APHIS–2011–0132]

RIN 0579–AD62

Importation of Fresh Apricots From Continental Spain

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Proposed rule.

SUMMARY: We are proposing to amend the fruits and vegetables regulations to allow the importation into the United States of fresh apricots from continental Spain. As a condition of entry, fresh apricots from continental Spain would have to be produced in accordance with a systems approach that would include registration of production locations and packinghouses, pest monitoring, sanitary practices, chemical and biological controls, and phytosanitary treatment. The fruit would also have to be imported in commercial consignments, with each consignment identified throughout its movement from place of production to port of entry in the United States. Consignments would have to be accompanied by a phytosanitary certificate issued by the national plant protection organization of Spain certifying that the fruit is free from all quarantine pests and has been produced in accordance with the systems approach. This proposed rule would allow for the importation of fresh apricots from continental Spain into the United States while continuing to provide protection against the introduction of quarantine pests.

DATES: We will consider all comments that we receive on or before April 1, 2013.

ADDRESSES: You may submit comments by either of the following methods:

- Federal eRulemaking Portal: Go to *http://www.regulations.gov/#!documentDetail;D=APHIS-2011-0132-0001.*
- Postal Mail/Commercial Delivery: Send your comment to Docket No. APHIS–2011–0132, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238.

Supporting documents and any comments we receive on this docket may be viewed at *http://www.regulations.gov/#!docketDetail;D=APHIS-2011-0132* or in our reading room, which is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799–7039 before coming.

FOR FURTHER INFORMATION CONTACT: Ms. Meredith C. Jones, Senior Regulatory Policy Specialist, Regulatory Coordination and Compliance, PPQ, APHIS, 4700 River Road Unit 156, Riverdale, MD 20737–1231; (301) 851–2018.

SUPPLEMENTARY INFORMATION:

Background

The regulations in ''Subpart-Fruits and Vegetables'' (7 CFR 319.56–1 through 319.56–57, referred to below as the regulations) prohibit or restrict the importation of fruits and vegetables into the United States from certain parts of the world to prevent the introduction and dissemination of plant pests that are new to or not widely distributed within the United States.

Currently, the regulations prohibit imports of fresh apricot fruit (*Prunus armeniaca* Marshall) from continental Spain (excluding the Balearic Islands and Canary Islands) due to the fruit serving as a likely pathway for four quarantine pests. The Animal and Plant Health Inspection Service (APHIS) received a request from the national plant protection organization (NPPO) of Spain to allow fresh apricots from continental Spain to be imported into the United States subject to a systems approach. As part of our evaluation of Spain's request, we prepared a pest risk assessment (PRA) and a risk management document (RMD). Copies of the PRA and the RMD may be obtained from the person listed under **FOR FURTHER INFORMATION CONTACT** or viewed on the Regulations.gov Web site (see **ADDRESSES** above for instructions for accessing Regulations.gov).

The PRA, titled ''Importation of Fresh Apricot, *Prunus armeniaca* (L.) fruit, from Continental Spain into the United States, including Hawaii and U.S. Territories'' (March 2010), evaluates the risks associated with the importation of fresh apricot fruit into the United States from continental Spain. The RMD draws upon the findings of the PRA to determine the phytosanitary measures necessary to ensure the safe importation into the United States of apricots from continental Spain.

The PRA identifies four quarantine pests that could follow the pathway of consignments of fresh apricots imported from continental Spain into the United States:

- The Mediterranean fruit fly (Medfly), *Ceratitis capitata* Wiedemann,
- The plum fruit moth, *Cydia funebrana* (Treitschke),
- Leaf scorch, *Apiognomonia erythrostoma* (Pers.), a fungus, and
- Brown rot, *Monilinia fructigena* Honey, a fungus.

A quarantine pest is defined in § 319.56–2 as a pest of potential economic importance to the area endangered thereby and not yet present there, or present but not widely distributed and being officially controlled. Plant pest risk potentials associated with the importation of fresh apricots from continental Spain into the United States were derived by estimating the consequences and likelihood of introduction of each quarantine pest into the United States and ranking the risk potential as High, Medium, or Low. The PRA determined that three of these four quarantine pests—brown rot, Medfly, and plum fruit moth—pose a high risk of following the pathway of fresh apricots from continental Spain into the United States and having negative effects on U.S. agriculture. Leaf scorch was rated as having a medium risk potential.

Based on the conclusions of the PRA and RMD, we are proposing to allow the importation of fresh apricots from continental Spain [1] into the United States subject to a systems approach. Under a systems approach, a set of phytosanitary conditions, at least two of which have an independent effect in mitigating the pest risk associated with the movement of commodities, is specified, whereby fruits and vegetables may be imported into the United States from countries that are not free of certain plant pests.

We are proposing to add the systems approach for apricots from continental Spain to the regulations in a new § 319.56–58. The specific mitigation measures required in the systems approach for each quarantine pest are discussed below, as well as in the risk management document.

General Requirements

General requirements for importing apricots from continental Spain into the United States would be listed in proposed § 319.56–58(a). The NPPO of Spain would be required to provide a bilateral workplan to APHIS that details the activities of the systems approach, including inspections, monitoring, trapping, and surveying, that the NPPO of Spain will carry out to meet the proposed requirements. APHIS would have to approve the workplan and would be directly involved with the NPPO of Spain in monitoring and auditing the systems approach implementation. A bilateral workplan is an agreement between APHIS' Plant Protection and Quarantine program, officials of the NPPO of a foreign government, and, when necessary, foreign commercial entities, that specifies in detail the phytosanitary measures that will comply with our regulations governing the import or export of a specific commodity. Bilateral workplans apply only to the signatory parties and establish detailed procedures and guidance for the day-to-day operations of specific import/export programs. Bilateral workplans also establish how specific phytosanitary issues are dealt with in the exporting country and make clear who is responsible for dealing with those issues. The implementation of a systems approach typically requires a bilateral workplan to be developed. The NPPO of Spain would also be required to enter into a trust fund agreement with APHIS in accordance with § 319.56–6 to cover our monitoring and auditing costs.

All places of production and packinghouses in continental Spain that participate in the program to export apricots to the United States must be registered with and approved by the NPPO of Spain and meet the requirements of proposed § 319.56–58. The place of production where the apricots were grown would have to be identifiable when the fruit leaves the grove, at the packinghouse where the fruit is packed, and throughout the export process. Boxes containing apricot fruit would have to be marked with the identity and origin of the fruit. Safeguarding in accordance with the regulations in proposed § 319.56–58(h) would have to be maintained at all times during the movement of the apricot fruit to the United States and remain intact upon arrival in the United States.

Commercial Consignments

The regulations in proposed § 319.56–58(b) would require that fresh apricots from continental Spain would be allowed to be imported into the United States in commercial consignments only. Commercial consignments, as defined in § 319.56–2, are consignments that an inspector identifies as having been imported for sale and distribution. Produce grown commercially is less likely to be infested with plant pests than noncommercial consignments. Noncommercial consignments are more prone to infestations because the commodity is often ripe to overripe, could be of a variety with unknown susceptibility to pests, and is often grown with little or no pest control.

Monitoring and Oversight

Under proposed § 319.56–58(c), if APHIS approved the workplan, the NPPO of Spain would have to begin conducting inspections and monitoring places of production and packinghouse operations to verify that they comply with the requirements of proposed § 319.56–58. The NPPO of Spain would be required to visit and inspect the places of production monthly, starting 2 months (60 days) before harvest and continuing until the end of the shipping season, to verify that growers are complying with the requirements of proposed § 319.56–58 and following pest control guidelines, when necessary, to reduce quarantine pest populations. The NPPO would also have to monitor packinghouses to verify that the packinghouses are complying with proposed § 319.56–58. Under paragraph (c)(3) of proposed § 319.56–58, if the NPPO of Spain were to find that a place of production or a packinghouse did not comply with the regulations in proposed § 319.56–58, fruit from that place of production or packinghouse would not be eligible for export to the United States until APHIS and the NPPO of Spain conducted an investigation and implemented appropriate remedial actions.

Any personnel conducting trapping and pest surveys required by the systems approach would have to be hired, trained, and supervised by the NPPO of Spain. The NPPO would have to certify that exporting places of production have fruit fly and moth trapping programs and follow control guidelines, when necessary, to reduce regulated pest populations. APHIS would monitor and inspect the places of production as necessary.

Proposed § 319.56–58(c)(4) would also require that the NPPO of Spain retain all forms and documents related to export program activities in places of production and packinghouses for at least 1 year and, upon request, provide them to APHIS for review.

Grove Sanitation

Proposed § 319.56–58(d) would require all fruit that has fallen from the trees of each place of production to be removed from the grove and destroyed weekly. This procedure would reduce the amount of material in the groves that could serve as potential host material for insect pests.

Mitigations for Specific Quarantine Pests

Fungi

During the growing season, the NPPO of Spain would be required in accordance with proposed § 319.56–58(e) to conduct inspections at intervals specified in the workplan in places of production for signs of the fungi *A. erythrostoma* and *M. fructigena* until harvest is completed. Infected leaves would have to be removed from places of production to reduce the inoculum potential. Upon detection of either *A. erythrostoma* or *M. fructigena,* the NPPO of Spain would be required to

[1] Imports of fresh apricots from the Balearic Islands and Canary Islands would continue to be prohibited.

notify APHIS, which may prohibit the importation into the United States of apricots from the production site for the season.

Mitigations for C. funebrana

Under proposed § 319.56–58(f), APHIS would require the NPPO of Spain to use one of the following two mitigation measures to address the risk potential posed by *C. funebrana:*

Pest-Free Area: Under this mitigation measure, apricots would have to originate from an area designated as free of *C. funebrana* in accordance with § 319.56–5 for the establishment of pest-free areas. Paragraph (a) of § 319.56–5 states that determinations of pest-free areas be made in accordance with International Standards for Phytosanitary Measures (ISPM) No. 4, which is incorporated by reference in § 300.5. ISPM No. 4 sets out three main criteria for recognition of a pest-free area:

- Systems to establish freedom;
- Phytosanitary measures to maintain freedom; and
- Checks to verify freedom has been maintained.

Paragraph (b) of § 319.56–5 requires that APHIS approve the survey protocol used to determine and maintain pest-free status, as well as protocols for actions to be taken upon detection of a pest. It also indicates that pest-free areas are subject to audit by APHIS to verify their status.

Area of Low Pest Prevalence and Pest Management: Under this mitigation measure, each registered place of production would have to be visited and inspected by the NPPO of Spain for signs of *C. funebrana* and pheromone trapping for *C. funebrana* would have to be conducted. The purpose of the inspection and trapping is to demonstrate that the places of production have a low prevalence of *C. funebrana.*

Specific inspection and trapping requirements would be included in the bilateral workplan and would be adjusted as necessary to ensure that inspection and trapping are effective. Consistent with the recommendations of the RMD, the bilateral workplan would initially require samples of 20 fruits per tree from 50 trees within every 4 hectares to be visually inspected by the NPPO of Spain every 7 days during the growing season. During the harvest period, samples of 40 fruits per tree from 50 trees within every 4 hectares would have to be visually inspected by the NPPO of Spain every 7 days until harvest is completed. The NPPO of Spain would also have to sample and inspect a quantity of fruit specified in the workplan. In addition, the bilateral workplan would initially require places of production to be trapped for *C. funebrana* with APHIS-approved pheromone traps at a density of 2 traps per 4 hectares, with a minimum of 2 traps per place of production. Traps would have to be checked every 7 days from fruit formation until completion of harvest. If the trap counts are greater than 10 moths per trap per week, or more than 1 percent of the fruits sampled in a week are damaged or found to have any life stage of *C. funebrana,* remedial measures would have to be implemented. The NPPO of Spain would have to keep records of the placement of traps, trap visits, trap counts, and treatments for each registered place of production.

Mitigations for Medfly

Under proposed § 319.56–58(g), the places of production would be required to be trapped for Medfly to demonstrate that there is a low prevalence of Medfly in those places of production. Similar to *C. funebrana,* specific trapping requirements for Medfly would be included in the bilateral workplan and would be adjusted as necessary to ensure that trapping is effective. Consistent with the recommendations of the RMD, the bilateral workplan would initially require trapping with 1 APHIS-approved trap per 12 hectares, with a minimum of 1 trap per place of production, beginning May 1 of each year and remaining in place and in service until harvesting is completed. Any time that trap counts are greater than 0.5 flies per trap per day, remedial measures would need to be implemented and approved by APHIS and the NPPO of Spain. The NPPO of Spain would have to keep records of the placement of traps, trap visits, trap counts, and treatments for each registered place of production.

All fresh apricots for export from continental Spain to the United States would have to undergo a cold treatment for Medfly in accordance with the requirements for conducting phytosanitary treatment in 7 CFR part 305.

We are proposing to require two phytosanitary mitigation measures for Medfly because high larval populations of Medfly in fruit can overwhelm the effectiveness of cold treatment. The trapping and field mitigation measures for Medfly would maintain populations at acceptably low prevalence levels and ensure that cold treatment is effective.

Post-Harvest Procedures and Packinghouse Requirements

Specific post-harvest and packinghouse requirements, listed in paragraphs (h) and (i) of proposed § 319.56–58, are intended to prevent insect infestation of harvested fruit during processing, packing, and shipment. Apricots would have to be safeguarded by a pest-proof screen, plastic tarpaulin, or some other pest-proof barrier while in transit to the packinghouse and while awaiting packing. They would have to be packed and sealed within 24 hours of harvest into pest-proof cartons or containers or covered with pest-proof mesh or a plastic tarpaulin for transport to the United States. These safeguards would be required to remain intact until arrival of the consignment in the United States.

Packing of apricots for export to the United States would have to be conducted within a packinghouse registered and approved by the NPPO of Spain. Packinghouses in which apricots are packed for export to the United States would have to be able to exclude quarantine pests. All openings to the outside of the packinghouse would have to be covered by screening with openings of not more than 1.6 mm or by some other barrier that prevents pests from entering. The 1.6 mm maximum screening size is adequate to exclude the insect pests of quarantine significance named earlier in this document. The packinghouse would have to be equipped with double self-closing doors at the entrance to the packinghouse and at the interior entrance to the area where fruit is packed to prevent inadvertent introduction of pests into the packinghouse. During the time the packinghouse is used to pack and export apricot fruit to the United States, the packinghouse may only accept fruit from places of production registered and approved by the NPPO of Spain.

Phytosanitary Inspection

Under proposed § 319.56–58(j), a biometric sample of apricots, jointly agreed upon by APHIS and the NPPO of Spain, would be required to be inspected in Spain by the NPPO following post-harvest processing. The sample would have to be visually inspected for the quarantine pests *A. erythrostoma, C. funebrana,* and *M. fructigena,* and a portion of the fruit would be cut open to inspect for the internal pest *C. capitata.* If any of these quarantine pests are found, the entire consignment of apricots would be prohibited from import into the United States.

Fruit presented for inspection at a U.S. port of entry would have to be identified in the shipping documents accompanying each consignment of fruit that specify the place of production in which the fruit was produced and the packinghouse in which the fruit was processed. This identification would have to be maintained with the consignment until the fruit is released for entry into the United States.

Phytosanitary Certificate

Under proposed § 319.56–58(k), each consignment of apricot fruit would have to be accompanied by a phytosanitary certificate issued by the NPPO of Spain that states that the fruit has been treated for *C. capitata* in accordance with 7 CFR part 305 and includes an additional declaration stating that the fruit in the consignment was inspected and found free from *A. erythrostoma, C. capitata, C. funebrana,* and *M. fructigena.*

Executive Order 12866 and Regulatory Flexibility Act

This proposed rule has been determined to be not significant for the purposes of Executive Order 12866 and, therefore, has not been reviewed by the Office of Management and Budget.

In accordance with the Regulatory Flexibility Act, we have analyzed the potential economic effects of this action on small entities. The analysis is summarized below. Copies of the full analysis are available by contacting the person listed under **FOR FURTHER INFORMATION CONTACT** or on the *Regulations.gov* Web site (see **ADDRESSES** above for instructions for accessing Regulations.gov).

This proposed rule would allow the importation into the United States of fresh apricots from continental Spain, subject to a systems approach.

The economic analysis examines impacts for U.S. small entities of a rule that would allow fresh apricot imports from continental Spain. Spain is expected to export at most 10 standard shipping containers of fresh apricot per year to the United States. Each container can hold approximately 18 metric tons (MT), thus fresh apricot imports from Spain may total as much as 180 MT annually. This amount is equivalent to about 1 percent of current U.S. consumption. With U.S. fresh apricot exports four times the quantity imported, and the amount expected to be imported from Spain very small in comparison to current U.S. consumption, any market effects of such a relatively small change in supply would be minor.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action would not have a significant economic impact on a substantial number of small entities.

Executive Order 12988

This proposed rule would allow fresh apricots to be imported into the United States from continental Spain, subject to a systems approach. If this proposed rule is adopted, State and local laws and regulations regarding fresh apricots imported under this rule would be preempted while the fruit is in foreign commerce. Fresh apricots are generally imported for immediate distribution and sale to the consuming public and would remain in foreign commerce until sold to the ultimate consumer. The question of when foreign commerce ceases in other cases must be addressed on a case-by-case basis. If this proposed rule is adopted, no retroactive effect will be given to this rule, and this rule will not require administrative proceedings before parties may file suit in court challenging this rule.

Paperwork Reduction Act

In accordance with section 3507(d) of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the information collection or recordkeeping requirements included in this proposed rule have been submitted for approval to the Office of Management and Budget (OMB). Please send written comments to the Office of Information and Regulatory Affairs, OMB, Attention: Desk Officer for APHIS, Washington, DC 20503. Please state that your comments refer to Docket No. APHIS–2011–0132. Please send a copy of your comments to: (1) Docket No. APHIS–2011–0132, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238, and (2) Clearance Officer, OCIO, USDA, room 404–W, 14th Street and Independence Avenue SW., Washington, DC 20250. A comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication of this proposed rule.

APHIS is proposing to amend the fruits and vegetables regulations to allow the importation of fresh apricots from continental Spain into the United States subject to a systems approach. As a condition of entry, apricots from Spain would have to be produced in accordance with a systems approach that would include requirements for importation in commercial consignments; a limited harvest period; registration of production and packinghouses; grove sanitation, and pest control practices; treatment with surface disinfectant; and inspection for quarantine pests by the NPPO of Spain.

Apricots from continental Spain would also be required to be accompanied by a phytosanitary certificate with an additional declaration stating that the apricots have been inspected and found to be free of quarantine pests and were grown and packed in accordance with the proposed requirements. This action would allow for the importation of apricots from continental Spain into the United States while continuing to provide protection against the introduction of quarantine pests.

Allowing the importation of apricots to be imported into the United States from Spain will require information collection activities, including phytosanitary certificates, production site and packinghouse registration, recordkeeping, a workplan, and a trust fund agreement.

We are soliciting comments from the public (as well as affected agencies) concerning our proposed information collection and recordkeeping requirements. These comments will help us:

(1) Evaluate whether the proposed information collection is necessary for the proper performance of our agency's functions, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the proposed information collection, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the information collection on those who are to respond (such as through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology; e.g., permitting electronic submission of responses).

Estimate of burden: Public reporting burden for this collection of information is estimated to average 6.4827 hours per response.

Respondents: The NPPO of Spain and producers and importers of apricots.

Estimated number of respondents: 23.

Estimated number of responses per respondent: 1.2608.

Estimated annual number of responses: 29.

Estimated total annual burden on respondents: 188 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

Copies of this information collection can be obtained from Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 851–2908.

E-Government Act Compliance

The Animal and Plant Health Inspection Service is committed to compliance with the E-Government Act to promote the use of the Internet and other information technologies, to provide increased opportunities for citizen access to Government information and services, and for other purposes. For information pertinent to E-Government Act compliance related to this proposed rule, please contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 851–2908.

List of Subjects in 7 CFR Part 319

Coffee, Cotton, Fruits, Imports, Logs, Nursery stock, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements, Rice, Vegetables.

Accordingly, we propose to amend 7 CFR part 319 as follows:

PART 319—FOREIGN QUARANTINE NOTICES

■ 1. The authority citation for part 319 continues to read as follows:

Authority: 7 U.S.C. 450, 7701–7772, and 7781–7786; 21 U.S.C. 136 and 136a; 7 CFR 2.22, 2.80, and 371.3.

■ 2. Add § 319.56–58 to read as follows:

§ 319.56–58 Fresh apricots from continental Spain.

Fresh apricots (*Prunus armeniaca* Marshall) may be imported into the United States from continental Spain (excluding the Balearic Islands and Canary Islands) only under the conditions described in this section. These conditions are designed to prevent the introduction of the following quarantine pests: *Apiognomonia erythrostoma* (Pers.), a brown rot fungus; *Ceratitis capitata* Wiedemann, the Mediterranean fruit fly; *Cydia funebrana* (Treitschke), the plum fruit moth; and *Monilinia fructigena* Honey, the leaf scorch fungus.

(a) *General requirements.* (1) The national plant protection organization (NPPO) of Spain must provide a bilateral workplan to APHIS that details the activities that the NPPO of Spain will, subject to APHIS' approval of the workplan, carry out to meet the requirements of this section. APHIS will be directly involved with the NPPO of Spain in monitoring and auditing implementation of the systems approach. The NPPO of Spain must also enter into a trust fund agreement with APHIS in accordance with § 319.56–6.

(2) All places of production and packinghouses that participate in the export program must be registered with the NPPO of Spain.

(3) The fruit must be grown at places of production that meet the requirements of paragraph (d) of this section.

(4) The fruit must be packed for export to the United States in a packinghouse that meets the requirements of paragraph (i) of this section. The place of production where the apricots were grown must remain identifiable when the fruit leaves the grove, at the packinghouse, and throughout the export process. Safeguarding in accordance with paragraph (h) of this section must be maintained at all times during the movement of the apricot fruit to the United States and must be intact upon arrival of the apricot fruit in the United States.

(b) *Commercial consignments.* Apricots from continental Spain may be imported to the United States in commercial consignments only.

(c) *Monitoring and oversight.* (1) The NPPO of Spain must visit and inspect places of production starting 2 months (60 days) before harvest and continuing until the end of the shipping season to verify that growers are complying with the requirements of this section and to follow pest control guidelines, when necessary, to reduce quarantine pest populations. The NPPO of Spain must certify that exporting places of production have fruit fly and moth trapping programs and follow control guidelines, when necessary, to reduce regulated pest populations. Any personnel conducting trapping and pest surveys must be hired, trained, and supervised by the NPPO of Spain. APHIS may monitor the places of production if necessary.

(2) In addition to conducting fruit inspections at the packinghouses, the NPPO of Spain must monitor packinghouse operations to verify that the packinghouses are complying with the requirements of this section.

(3) If the NPPO of Spain finds that a place of production or packinghouse is not complying with the requirements of this section, no fruit from the place of production or packinghouse will be eligible for export to the United States until APHIS and the NPPO of Spain conduct an investigation and implement appropriate remedial actions.

(4) The NPPO of Spain must retain all forms and documents related to export program activities in places of production and packinghouses for at least 1 year and, as requested, provide them to APHIS for review.

(d) *Grove sanitation.* Fruit that has fallen from the trees at each place of production must be removed and destroyed weekly.

(e) *Fungi.* During the growing season, the NPPO of Spain must conduct inspections at intervals specified in the workplan in the place of production for signs of *A. erythrostoma* and *M. fructigena* until harvest is completed. Infected leaves must be removed from places of production to reduce the inoculum potential. Upon detection of these fungal diseases, the NPPO of Spain must notify APHIS, which may prohibit the importation into the United States of apricots from the production site for the season.

(f) *C. funebrana.* The NPPO of Spain must use one of the following two mitigation measures to address the risk potential posed by *C. funebrana.*

(1) *Pest-free area:* Under this mitigation measure, apricots must originate from an area designated as free of *C. funebrana* in accordance with § 319.56–5.

(2) *Area of low pest prevalence and pest management:* Under this mitigation measure, the NPPO of Spain must visit and visually inspect registered places of production during the growing season and harvest period for signs of *C. funebrana* to demonstrate that the places of production have a low prevalence of *C. funebrana* and to verify that the growers are complying with the requirements of this paragraph. The NPPO of Spain must also sample and visually inspect a quantity of fruit specified in the workplan. Trapping must also be conducted in the places of production to demonstrate that the places of production have a low prevalence of *C. funebrana.* If the prevalence of any life stage of *C. funebrana* rises above levels specified in the bilateral workplan, remedial measures approved jointly by APHIS and the NPPO of Spain must be implemented. The NPPO of Spain must keep records of the placement of traps, trap visits, trap counts, and treatments for each registered place of production and make the records available to APHIS upon request.

(g) *C. capitata.* (1) Trapping must be conducted in the places of production to demonstrate that those places of production have a low prevalence of *C. capitata.* Specific trapping requirements are included in the bilateral workplan. If the prevalence rises above levels specified in the bilateral workplan, remedial measures approved jointly by APHIS and the NPPO of Spain must be implemented. The NPPO of Spain must keep records of the placement of traps, trap visits, trap counts, and treatments for each registered place of production and make the records available to APHIS upon request.

(2) All apricots for export from continental Spain to the United States must be treated for *C. capitata* in accordance with part 305 of this chapter.

(h) *Post-harvest procedures.* The apricots must be safeguarded by a pest-proof screen, plastic tarpaulin, or by some other pest-proof barrier while in transit to the packinghouse and while awaiting packing. They must be packed within 24 hours of harvest into pest-proof cartons or containers or covered with pest-proof mesh or a plastic tarpaulin for transport to the United States. These safeguards must remain intact until arrival of the consignment in the United States.

(i) *Packinghouse requirements.* Packing of apricots for export to the United States must be conducted within a packinghouse registered and approved by the NPPO of Spain. Packinghouses in which apricots are packed for export to the United States must be able to exclude quarantine pests. All openings to the outside of the packinghouse must be covered by screening with openings of not more than 1.6 mm or by some other barrier that prevents pests from entering. The packinghouse must have double self-closing doors at the entrance to the facility and at the interior entrance to the area where the apricots are to be packed. During the time the packinghouse is used to pack and export apricot fruit to the United States, the packinghouse must only accept fruit from places of production registered and approved by the NPPO of Spain.

(j) *Phytosanitary inspection.* (1) A biometric sample of apricot fruit jointly agreed upon by APHIS and the NPPO of Spain must be inspected in Spain by the NPPO of Spain following post-harvest processing. The sample must be visually inspected for the quarantine pests *A. erythrostoma, C. funebrana,* and *M. fructigena.* A portion of the fruit must be cut open and inspected for *C. capitata.* If any of these quarantine pests are found, the entire consignment of apricot fruit will be prohibited from importation into the United States.

(2) Fruit presented for inspection at a U.S. port of entry must be identified in the shipping documents accompanying each lot of fruit that specify the place of production in which the fruit was produced and the packinghouse in which the fruit was processed. This identification must be maintained until the fruit is released for entry into the United States.

(k) *Phytosanitary certificate.* Each consignment of apricot fruit must be accompanied by a phytosanitary certificate issued by the NPPO of Spain that states that the fruit has been treated for *C. capitata* in accordance with 7 CFR part 305 and includes an additional declaration that the fruit in the consignment was inspected and found free from *A. erythrostoma, C. capitata, C. funebrana,* and *M. fructigena.*

Done in Washington, DC, this 25th day of January 2013.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2013–02021 Filed 1–29–13; 8:45 am]

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DEPARTMENT OF ENERGY

10 CFR Part 430

[Docket No. EERE–2012–BT–TP–0013]

RIN 1904–AC71

Energy Conservation Program: Test Procedures for Conventional Cooking Products With Induction Heating Technology

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Notice of proposed rulemaking; public meeting.

SUMMARY: The U.S. Department of Energy (DOE) proposes to revise its test procedures for cooking products established under the Energy Policy and Conservation Act. Test procedures for cooking products can be found at DOE's regulations for Energy Conservation Program for Consumer Products, subpart B, appendix I (Appendix I). The proposed amendments to Appendix I would amend the test method for measuring the energy efficiency of induction cooking tops and ranges. Appendix I does not currently include any test methods applicable to induction cooking products. The proposed amendments would incorporate induction cooking tops by amending the definition of ''conventional cooking top'' to include induction heating technology. Furthermore, the proposed amendments would require for cooking tops the use of test equipment compatible with induction technology as well as with gas burners and electric resistance heating elements. Specifically, the amendments would replace the solid aluminum test blocks currently specified in the test procedure for cooking tops with hybrid test blocks comprising two separate pieces: an aluminum body and a stainless steel base. Appendix I currently specifies the test block size for electric cooking tops based on the surface unit diameter; however, there are no provisions for determining which test block size to use for non-circular electric surface units. The proposed amendments include a clarification that the test block size be determined using the smallest dimension of the electric surface unit.

DATES: DOE will accept comments, data, and information regarding this notice of proposed rulemaking (NOPR) before and after the public meeting, but no later than April 15, 2013. See section V, ''Public Participation,'' for details.

DOE will hold a public meeting on Monday, March 4, 2013, from 9 a.m. to 4 p.m., in Washington, DC. The meeting will also be broadcast as a Webinar. See section V, ''Public Participation,'' for Webinar registration information, participant instructions, and information about the capabilities available to Webinar participants.

ADDRESSES: The public meeting will be held at the U.S. Department of Energy, Forrestal Building, Room 8E–089, 1000 Independence Avenue SW., Washington, DC 20585. To attend, please notify Ms. Brenda Edwards at (202) 586–2945. Persons can attend the public meeting via Webinar. For more information, refer to the Public Participation section near the end of this notice.

Comments: Comments may be submitted using any of the following methods:

1. *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
2. *Email: Induction-Cooking-Prod-2012–TP–0013@ee.doe.gov* Include the docket number and/or RIN in the subject line of the message.
3. *Mail:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, Mailstop EE–2J, 1000 Independence Avenue SW., Washington, DC 20585–0121. If possible, please submit all items on a CD. It is not necessary to include printed copies.
4. *Hand Delivery/Courier:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, 950 L'Enfant Plaza SW., Suite 600, Washington, DC 20024. Telephone: (202) 586–2945. If possible, please submit all items on a CD. It is not necessary to include printed copies.

For detailed instructions on submitting comments and additional information on the rulemaking process, see section V of this document (Public Participation).

Docket: The docket is available for review at *regulations.gov*, including **Federal Register** notices, framework documents, public meeting attendee lists and transcripts, comments, and other supporting documents/materials. All documents in the docket are listed in the *regulations.gov* index. However, not all documents listed in the index may be publicly available, such as information that is exempt from public disclosure.

A link to the docket Web page can be found at: *http://www.regulations.gov/#!docketDetail;dct=FR+PR+N+O+SR+PSrpp=50;so=DESC;sb=postedDate;po=0;D=EERE–2012-BT-TP-0013*. This Web page will contain a link to the docket for this notice on the regulations.gov site. The regulations.gov Web page will contain simple instructions on how to access all documents, including public comments, in the docket. See section V for information on how to submit comments through *regulations.gov.*

For further information on how to submit a comment, review other public comments and the docket, or participate in the public meeting, contact Ms. Brenda Edwards at (202) 586–2945 or by email: *Brenda.Edwards@ee.doe.gov.*

FOR FURTHER INFORMATION CONTACT:

Ms. Ashley Armstrong, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Program, EE–2J, 1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 586–6590. Email: *Ashley.Armstrong@ee.doe.gov.*

Mr. Ari Altman, U.S. Department of Energy, Office of the General Counsel, GC–71, 1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 202–287–6307. Email: *Ari.Altman@hq.doe.gov*.

SUPPLEMENTARY INFORMATION:

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I. Authority and Background

Title III of the Energy Policy and Conservation Act (42 U.S.C. 6291, *et seq.;* ''EPCA'' or, ''the Act'') sets forth a variety of provisions designed to improve energy efficiency. (All references to EPCA refer to the statute as amended through the Energy Independence and Security Act of 2007 (EISA 2007), Public Law 110–140 (Dec. 19, 2007)). Part B of title III, which for editorial reasons was redesignated as Part A upon incorporation into the U.S. Code (42 U.S.C. 6291–6309), establishes the ''Energy Conservation Program for Consumer Products Other Than Automobiles.'' These include residential kitchen ranges and ovens, the subject of today's notice of proposed rulemaking (NOPR). (42 U.S.C. 6292(a)(10))

Under EPCA, this program consists essentially of four parts: (1) Testing, (2) labeling, (3) Federal energy conservation standards, and (4) certification and enforcement procedures. The testing requirements consist of test procedures that manufacturers of covered products must use (1) as the basis for certifying to DOE that their products comply with the applicable energy conservation standards adopted under EPCA, and (2) for making representations about the efficiency of those products. Similarly, DOE must use these test requirements to determine whether the products comply with any relevant standards promulgated under EPCA.

A. General Test Procedure Rulemaking Process

Under 42 U.S.C. 6293, EPCA sets forth the criteria and procedures DOE must follow when prescribing or amending test procedures for covered products. EPCA provides in relevant part that any test procedures prescribed or amended under this section shall be reasonably designed to produce test results which measure energy efficiency, energy use or estimated annual operating cost of a covered product during a representative average use cycle or period of use and shall not be unduly burdensome to conduct. (42 U.S.C. 6293(b)(3))

In addition, if DOE determines that a test procedure amendment is warranted, it must publish proposed test procedures and offer the public an opportunity to present oral and written comments. . (42 U.S.C. 6293(b)(2)) Finally, in any rulemaking to amend a test procedure, DOE must determine to what extent, if any, the proposed test procedure would alter the measured energy efficiency of any covered product as determined under the existing test procedure. (42 U.S.C. 6293(e)(1)) If DOE determines that the amended test procedure would alter the measured efficiency of a covered product, DOE must amend the applicable energy conservation standard accordingly. (42 U.S.C. 6293(e)(2))

B. Test Procedures for Cooking Products

DOE's test procedures for conventional ranges, conventional cooking tops, conventional ovens, and microwave ovens are codified at appendix I to subpart B of Title 10 of the Code of Federal Regulations (CFR) (Appendix I).

DOE established the test procedures in a final rule published in the **Federal Register** on May 10, 1978. 43 FR 20108, 20120–28. These test procedures did not cover induction cooking products because they were, at the time, relatively new products, and represented a small share of the market. 43 FR 20117. DOE revised its test procedures for cooking products to more accurately measure their efficiency and energy use, and published the revisions as a final rule in 1997. 62 FR 51976 (Oct. 3, 1997). These test procedure amendments did not address induction cooking, but included: (1) A reduction in the annual useful cooking energy; (2) a reduction in the number of self-cleaning oven cycles per year; and (3) incorporation of portions of International Electrotechnical Commission (IEC) Standard 705–1988, ''Methods for measuring the performance of microwave ovens for household and similar purposes,'' and Amendment 2–1993 for the testing of microwave ovens. *Id.* The test procedures for conventional cooking products establish provisions for determining estimated annual operating cost, cooking efficiency (defined as the ratio of cooking energy output to cooking energy input), and energy factor (defined as the ratio of annual useful cooking energy output to total annual energy input). 10 CFR 430.23(i); Appendix I. These provisions for conventional cooking products are not currently used for compliance with any energy conservation standards because the present standards only regulate design requirements, nor is there an EnergyGuide [1] labeling program for cooking products.

DOE recently conducted a separate rulemaking to address standby and off mode energy consumption, as well as certain active mode testing provisions, for residential dishwashers, dehumidifiers, and conventional cooking products. DOE published a final rule on October 31, 2012 (77 FR 65942, hereafter referred to as the October 2012 Final Rule), adopting standby and off mode provisions that satisfy the EISA 2007 amendments to EPCA, which require DOE to include measures of standby mode and off mode energy consumption in its test procedures for residential products, if technically feasible. (42 U.S.C. 6295(gg)(2)(A))

II. Summary of the Notice of Proposed Rulemaking

In today's NOPR, DOE proposes amendments to the test procedures in Appendix I that would allow for testing the active mode energy consumption of induction cooking products; *i.e.,* conventional cooking tops and ranges equipped with induction heating technology for one or more surface units on the cooking top.[2] The term surface unit refers to burners for gas cooking tops, electric resistance heating elements for electric cooking tops, and inductive heating elements for induction cooking tops. Under the proposed amendments, which would amend the definition of ''conventional cooking top'' to include products with induction heating, induction cooking products would be tested according to the same test procedures as conventional cooking products.

The current test method for conventional cooking tops (which is also used for the cooking top portion of conventional ranges) involves heating a solid aluminum test block on each surface unit of the cooking top. The cooking top cooking efficiency is determined by averaging the efficiencies of all surface units on the cooking top. The proposed test procedure would replace the aluminum test blocks currently specified for conventional cooking top testing with hybrid test blocks comprising two separate stacked pieces: a stainless steel alloy 430 base, which is compatible with the induction technology, and an aluminum body. The proposed hybrid test blocks would have the same outer diameters and heat capacities as the existing aluminum test blocks.

DOE considered other potential test blocks, including blocks made entirely of carbon steel alloy 1018, and hybrid blocks with carbon steel bases, but found the results using those blocks to be less repeatable than for the hybrid blocks with stainless steel alloy 430 bases. DOE also considered an alternate test method based on heating water. While this method may better represent actual consumer use, DOE is not proposing a water-heating test procedure due to concerns regarding repeatability, and to maintain consistency with the existing test procedure for conventional cooking tops and ranges.

In today's NOPR, DOE further proposes methodology to determine the required test block size for all electric surface units, including those that are non-circular.

III. Discussion

A. Products Covered by This Test Procedure Rulemaking

As discussed in section I of this NOPR, the test procedures currently in Appendix I do not apply to induction cooking products. Induction products were not considered in the initial final rule to establish these test procedures because of their relatively small market share in 1978. 43 FR 20117. Today's proposal would amend the DOE test procedures for conventional cooking tops and ranges to cover induction cooking products.

Although induction cooking products started as a niche product with a very small market share, a recent survey of major retailers indicates that roughly 10 percent of all cooking tops currently available on the market now use induction heating. Additionally, the three manufacturers comprising more than 84 percent of the market for conventional ranges [3] each offer multiple induction cooking products. Given the increased availability of induction cooking products, DOE believes these products now warrant inclusion in the Appendix I test procedures to allow for consideration in future rulemaking analyses.

Induction cooking products use an oscillating magnetic field, produced by alternating current through a coil under the cooking top surface, to generate (''induce'') current in the cooking vessel. The current in turn creates heat in the cooking vessel due to the electrical resistance of the metal, and the heat is transferred to the food load by means of conduction and convection. In order for the current to be induced and the induction technology to function properly, the cooking vessel must be made of a ferromagnetic material, such as steel or iron.

As discussed further in section III.C of this NOPR, the amendments proposed in today's notice would apply to conventional cooking products in general, including induction cooking products. DOE currently defines ''cooking products'' as the major household cooking appliances that cook or heat food by gas, electricity, or microwave energy, and include conventional ranges, conventional cooking tops, conventional ovens, microwave ovens, microwave/conventional ranges and other cooking products. 10 CFR 430.2. A ''conventional cooking top'' contains one or more surface units which include either a gas flame or electric resistance heating. *Id.* A ''conventional range'' consists of a conventional cooking top and one or more conventional ovens. *Id.*

The current definition of ''conventional cooking top,'' and by extension, the definition of ''conventional range,'' does not refer to heating by means of electricity other than electric resistance heating, which would preclude induction heating. Because of the increased availability of induction cooking products discussed in the beginning of this section, DOE is proposing to amend the definition of ''conventional cooking top'' to a household cooking appliance within a class of kitchen ranges and ovens, each of which consists of a horizontal surface containing one or more surface units that utilize a gas flame, electric resistance heating, or electric inductive heating. The definition of ''conventional range'' would remain unchanged, but

[1] For more information on the EnergyGuide labeling program, see: *www.access.gpo.gov/nara/cfr/waisidx_00/16cfr305_00.html.*

[2] DOE is not aware of any residential conventional ovens that use induction heating technology that are available on the market in the United States.

[3] GE, Whirlpool, and Electrolux, as reported in ''U.S. Appliance Industry: Market Share, Life Expectancy & Replacement Market, and Saturation Levels''. *Appliance Magazine Market Research Report,* January 2010.

would newly cover products with a conventional oven and a cooking top that heats by means of induction technology.

Appendix I also includes a definition of ''active mode,'' which references production of heat by means of a gas flame, electric resistance heating, or microwave energy. 10 CFR part 430, subpart B, appendix I. As with the definition of ''conventional cooking top,'' this definition does not cover induction cooking products. DOE proposes to revise the definition of ''active mode'' to a mode in which a conventional cooking top, conventional oven, conventional range, or microwave oven is connected to a mains power source, has been activated, and is performing the main function of producing heat by means of a gas flame, electric resistance heating, electric inductive heating, or microwave energy. The definition would include the current clarification that delay start mode is a one-off user-initiated short duration function that is associated with an active mode. This definition would be consistent with the proposed definition of ''conventional cooking top.''

DOE requests comment on the proposed amended definitions of conventional cooking top and active mode.

B. Effective Date

The amended test procedure would become effective 30 days after any test procedure final rule is published in the **Federal Register**. The amendments would require that as of 180 days after publication of any test procedure final rule, representations related to the energy consumption of conventional cooking products, including induction cooking products, must be based upon results generated under the applicable provisions of the amended test procedures in Appendix I. (42 U.S.C. 6293(c)(2))

C. Active Mode Test Procedure

The current test procedure for conventional cooking tops involves heating an aluminum test block on each surface unit of the cooking top. Two aluminum test blocks, of different diameters, are specified for testing different surface units. The small test block (6.25 inches diameter) is used for electric surface units with diameters of 7 inches or less, and the large test block (9 inches diameter) is used for electric surface units with diameters greater than 7 inches and all gas surface units. Once the initial test and ambient conditions are met, the surface unit is turned to its maximum energy input setting. After the test block temperature increases by 144 °F, the surface unit is immediately reduced to 25 percent ± 5 percent of the maximum energy input rate for 15 ± 0.1 minutes. The efficiency of the surface unit is calculated as the ratio of the energy transferred to the test block (based on its temperature rise) to the energy consumed by the cooking top during the test. The cooking top cooking efficiency is calculated as the average efficiency of the surface units on the cooking top.

As discussed in section III.A of today's NOPR, induction cooking products are only compatible with ferromagnetic cooking vessels because their high magnetic permeability concentrates the induced current near the surface of the metal, increasing resistance and thus heating. Aluminum is not a ferromagnetic metal—its lower magnetic permeability allows the magnetic field to penetrate further into the material so that the induced current flows with little resistance, and thus does not heat up when it encounters an oscillating magnetic field. Therefore, the aluminum test blocks, currently required by Appendix I, are not appropriate for testing induction cooking products.

DOE conducted testing to investigate potential substitute test blocks for testing induction cooking products. DOE conducted tests on three conventional and three induction cooking tops to determine what effects, if any, the different types of test blocks would have on the test-to-test repeatability and final efficiency results. The test sample included conventional cooking tops to allow for a comparison between the substitute test blocks and the current aluminum test blocks.

DOE considered three possible substitute test blocks: carbon steel, carbon steel hybrid, and stainless steel hybrid. Table III.1 describes the construction of the current aluminum test blocks and the three substitute test blocks.

TABLE III.1—TEST BLOCK COMPOSITION DESCRIPTIONS

Test block classification	Test block composition *(component and material)*
Aluminum	One solid aluminum alloy 6061 block.
Carbon Steel	One solid carbon steel alloy 1018 block.
Carbon Steel Hybrid	Carbon steel alloy 1018 base + Aluminum alloy 6061 body.
Stainless Steel Hybrid	Stainless steel alloy 430 base + Aluminum alloy 6061 body.

The diameters and heat capacities of the aluminum test blocks currently specified in Appendix I reflect consumer cooking behavior. DOE is not aware of information indicating cooking behavior has changed. Therefore, each substitute test block was constructed with the same diameter as the current aluminum test blocks (6.25 inches for small and 9 inches for large). Additionally, DOE varied the heights of the substitute test blocks to match the heat capacities of the current aluminum blocks. For the hybrid test blocks, DOE set the thickness of the steel bases at 0.25 inches to be thin enough to represent the thickness of a typical pot or pan while still being thick enough to prevent warping. DOE set the height of the aluminum body in the hybrid test blocks so the overall heat capacity (the sum of the steel base heat capacity and the aluminum body heat capacity) matched that of the current aluminum test blocks.

DOE proposes in today's NOPR to maintain the test method of heating the test blocks, but to substitute the current aluminum test blocks with the stainless steel hybrid test blocks described above for testing all cooking tops covered by the proposed definition of conventional cooking top (*i.e.,* gas flame, electric resistance heating, and electric inductive heating). Sections III.C.1 through III.C.4 below compare the test results for the different potential test blocks and discuss the rationale for selecting the stainless steel hybrid test block as the substitute.

DOE also conducted tests to heat water in cooking vessels to compare test repeatability with the metal block heating tests. Heating water would allow for a test procedure that is more representative of actual consumer usage (in terms of the cooking food load), but would also introduce additional sources of variability. Section III.C.5 below describes the water-heating tests.

1. Aluminum Test Blocks

DOE conducted tests using the current aluminum test blocks to establish a baseline for comparison to the candidate substitute test blocks. Appendix I provides specifications for the large and small aluminum test blocks as shown in Table III.2.

TABLE III.2—ALUMINUM TEST BLOCK SPECIFICATIONS

Test block size	Block diameter (inches (in))	Block height (in)	Block weight (pounds (lb))	Specific heat (British thermal units (Btu)/(lb-°F))	Heat capacity (Btu/°F)
Small	6.25 ± 0.05	2.8	8.5 ± 0.1	0.23	1.96
Large	9 ± 0.05	3	19 ± 0.1	0.23	4.37

Because aluminum is not compatible with induction cooking, DOE only tested the aluminum blocks on the three conventional cooking tops (2 electric and 1 gas cooking tops), in the test sample. The small test block was used for electric surface units with diameters of 7 inches or less. The large test block was used for electric surface units with diameters greater than 7 inches and all gas surface units, as required by Appendix I.

DOE did not test every surface unit on each cooking top in the test sample because most cooking tops include multiple surface units of equal diameter and power rating. Prior investigative testing showed that surface units with equal diameters and power ratings on the same cooking top have similar performance. In these cases, DOE tested only one of the identical surface units to limit the total number of tests.

Cooking Top A has electric resistance heating in open coils, Cooking Top B has electric resistance heating under a smooth ceramic surface, and Cooking Top C has gas-flame burners. Table III.3 summarizes the test results using the aluminum blocks for surface units on these products. The surface unit numbers included in Table III.3 are used to differentiate between surface units on the same cooking top. The values listed for each surface unit summarize the data from five tests, except where noted.

TABLE III.3—ALUMINUM TEST BLOCK RESULTS

Test block size	Cooking top	Heating technology	Surface unit	Mean efficiency %	Standard deviation %	95-percent confidence interval (±) %
Large	A	Electric Coil	1	71.03	2.22	2.76
	B	Electric Smooth	1	54.22	0.64	0.80
			2	65.19	1.06	1.32
	C	Gas	1	[a b] 18.96	[a] 1.01	[a] 1.60
Small	A	Electric Coil	2	65.04	2.73	3.39
	B	Electric Smooth	3	61.70	0.73	0.90

[a] Values describe data for four tests, not five. In addition, cooking efficiencies for gas burners are typically lower than for electric resistance heating elements.

[b] Results lower than expected due to a meter error, but consistently low from test-to-test.

As shown in Table III.3, a set of five tests using the aluminum test block on the surface units with electric resistance or gas flame heating produced standard deviations of less than 3 percent for each surface unit. These standard deviations correspond to 95-percent confidence intervals within 4 percent of the mean efficiency.

DOE is aware that the mean efficiency listed for the gas surface unit is lower than expected. Typically, gas surface units have efficiencies at or above 40 percent. The lower-than-expected efficiency suggests the magnitudes of the gas consumption for these tests as measured by the meter are likely higher than the actual consumption. The surface unit tested on Cooking Top C has a maximum energy output rating of 9,200 Btu per hour. However, the measured gas use for each test was consistently about 55 percent greater than the maximum rating at the maximum energy input rate setting, suggesting the meter overstated the gas consumption.

Although the meter readings affected the magnitude of the gas surface unit efficiency results, DOE believes the results still provide meaningful information for assessing the candidate test blocks. The purpose of the testing was to compare the testing results, in terms of repeatability and overall efficiency, across the different test block types, and not necessarily to compare efficiencies from unit-to-unit. DOE observed the same low efficiencies and high gas consumptions in the tests on the substitute test blocks described in sections III.C.2 though III.C.5 of this NOPR, so the results for the gas cooking top can still be compared between the different test blocks. The high meter readings do not allow a consistent comparison of the gas surface unit efficiency to the electric surface units, but gas surface units typically have efficiencies in a lower range compared to electric surface units.

2. Carbon Steel Test Blocks

DOE conducted tests using solid carbon steel test blocks with the specifications shown in Table III.4, matching the aluminum test blocks in diameter and heat capacity.

TABLE III.4—CARBON STEEL TEST BLOCK SPECIFICATIONS

Test block size	Block diameter (in)	Block height (in)	Block weight (lb)	Specific heat (Btu/lb-°F)	Heat capacity (Btu/°F)
Small	6.25	1.93	16.85	0.116	1.96
Large	9	2.09	37.67	0.116	4.37

DOE tested the carbon steel blocks on all six cooking tops in the test sample, comprising the three conventional cooking tops discussed in section III.C.1 and three induction cooking tops. Cooking Tops D and E are built-in induction cooking tops, and Cooking Top F is a portable, single-element induction cooking top. Table III.5 summarizes the test results using the carbon steel test blocks for surface units on these products. As described in section III.C.1, DOE did not test multiple surface units with equal diameters on the same cooking top, and the surface unit numbers included in the table are used to differentiate between surface units on the same cooking top.

TABLE III.5—CARBON STEEL TEST BLOCK RESULTS

Test block size	Cooking top	Heating technology	Surface unit	Mean efficiency %	Standard deviation %	95-percent confidence interval (±) %
Large	A	Electric Coil	1	69.79	1.59	1.97
	B	Electric Smooth	1	53.19	1.28	1.60
			2	63.24	2.03	2.52
	C	Gas	1	[a b] 18.67	[a] 0.92	[a] 1.46
	D	Induction	1	63.92	2.30	2.86
	E	Induction	1	67.78	0.68	0.84
	F	Induction	1	67.93	0.56	0.70
Small	A	Electric Coil	2	64.61	0.54	0.67
	B	Electric Smooth	3	60.44	1.55	1.93
	D	Induction	2	64.10	1.04	1.29
			3	60.89	2.70	3.35
	E	Induction	2	62.86	1.08	1.34

[a] Values describe data for four tests, not five. In addition, cooking efficiencies for gas burners are typically lower than for electric resistance heating elements.

[b] Results lower than expected due to a meter error, but consistently low from test-to-test.

The results in Table III.5 for carbon steel test blocks are comparable to the test results for the aluminum test blocks presented in Table III.3. The mean efficiencies for the carbon steel blocks were slightly lower than the aluminum test blocks on each surface unit for the conventional cooking tops (Cooking Tops A, B, and C), but the means of the two test block types still fell within the 95-percent confidence intervals for each surface unit. The carbon steel blocks produced results that were just as repeatable as the aluminum test blocks, with standard deviations less than 3 percent for all surface units, and 95-percent confidence intervals all within 4 percent of the mean efficiency.

Based on these test results, DOE concludes that the carbon steel test blocks are a reasonable substitute for the aluminum test blocks. However, the heating that occurs using a solid block of ferromagnetic material may not be representative of how induction cooking tops actually operate in real-world situations. Typically, induction cooking tops only induce current in a thin layer of ferromagnetic material in the cooking vessel, which then heats up the food load. For this reason, DOE conducted further investigations with hybrid test blocks, as discussed below.

3. Carbon Steel Hybrid Test Blocks

DOE conducted additional tests using hybrid test blocks to more closely reflect the real-world operation of induction cooking tops. DOE fabricated carbon steel hybrid test blocks using a 0.25 inch base of carbon steel 1018 with a body of aluminum 6061. Typical cookware is slightly thinner gauge than this base, but DOE chose the base to preclude against warping while the block heats up. Additionally, DOE observed that the portable induction unit is packaged with a steel plate adaptor of roughly the same thickness as DOE's carbon steel base to allow for cooking with non-ferromagnetic cookware.

Table III.6 provides the component and overall properties of the carbon steel hybrid test blocks. DOE varied the height of the aluminum bodies so the overall heat capacities of the hybrid blocks would match the solid aluminum test blocks described in section III.C.1.

TABLE III.6—CARBON STEEL HYBRID TEST BLOCK SPECIFICATIONS

Test block size	Block diameter (in)	Block height (in)	Block weight (lb)	Specific heat (Btu/lb-°F)	Heat capacity (Btu/°F)
Small Carbon Steel Base	6.25	0.25	2.06	0.116	0.24
Small Aluminum Body	6.25	2.5	7.46	0.23	1.72
Small Total	6.25	2.75	9.52	0.21	1.96
Large Carbon Steel Base	9	0.25	4.27	0.116	0.5
Large Aluminum Body	9	2.72	16.85	0.23	3.87

TABLE III.6—CARBON STEEL HYBRID TEST BLOCK SPECIFICATIONS—Continued

Test block size	Block diameter (in)	Block height (in)	Block weight (lb)	Specific heat (Btu/lb-°F)	Heat capacity (Btu/°F)
Large Total	9	2.97	21.12	0.21	4.37

DOE tested the carbon steel hybrid test blocks on all six cooking tops in the test sample. Table III.7 summarizes the test results using the carbon steel hybrid test blocks for surface units on these products. As described in section III.C.1, DOE did not test multiple surface units with equal diameters on the same cooking top, and the surface unit numbers included in the table are used to differentiate between surface units on the same cooking top.

TABLE III.7—CARBON STEEL HYBRID TEST BLOCK RESULTS

Test block size	Cooking top	Heating technology	Surface unit	Mean efficiency %	Standard deviation %	95-Percent confidence interval (±) %
Large	A	Electric Coil	1	67.78	1.87	2.32
	B	Electric Smooth	1	52.03	0.78	0.97
			2	63.59	0.64	0.79
	C	Gas	1	[a b] 18.64	[a] 0.59	[a] 0.93
	D	Induction	1	65.94	2.68	3.32
	E	Induction	1	68.17	1.06	1.31
	F	Induction	1	60.10	3.21	3.99
	A	Electric Coil	2	64.44	1.87	2.32
	B	Electric Smooth	3	59.71	1.06	1.32
Small	D	Induction	2	63.26	0.79	0.98
			3	62.88	0.65	0.81
	E	Induction	2	63.27	1.19	1.48

[a] Values describe data for four tests, not five. In addition, cooking efficiencies for gas burners are typically lower than for electric resistance heating elements.
[b] Results lower than expected due to a meter error, but consistently low from test-to-test.

The carbon steel hybrid test block results in Table III.7 are similar to both the aluminum and carbon steel test block results presented in Table III.3 and Table III.5. The efficiencies for the conventional cooking tops are slightly lower than with the aluminum test blocks, and also slightly lower than with the carbon steel test blocks, but within the 95-percent confidence intervals. However, it is not clear what effect the hybrid blocks have on the efficiencies for the induction cooking tops. Five of the six induction surface units have efficiencies nearly equal to or slightly higher than with the single carbon steel test blocks. However, the efficiency for surface unit on Cooking Top F dropped by more than 7 percent.

In addition, after conducting multiple tests using the carbon steel hybrid test blocks, DOE observed rust forming on the carbon steel base. DOE was concerned that the rust could lead to inconsistent heat transfer between the carbon steel base and the aluminum body based on the amount of rust present, which would affect thermal contact.[4] Thus, DOE conducted another set of tests using hybrid test blocks with stainless steel 430 bases that would be more resistant to rust formation.

4.Stainless Steel Hybrid Test Blocks

The specific heats and densities of carbon steel and stainless steel are similar, so bases with the same dimensions have similar heat capacities. Therefore, the same aluminum test bodies were used for both sets of hybrid block tests. Table III.8 describes the component and overall properties of the stainless steel hybrid test blocks.

TABLE III.8—STAINLESS STEEL HYBRID TEST BLOCK SPECIFICATIONS

Test block size	Block diameter (in)	Block height (in)	Block weight (lb)	Specific heat (Btu/lb-°F)	Heat capacity (Btu/°F)
Small Stainless Steel Base	6.25	0.25	2.15	0.11	0.24
Small Aluminum Body	6.25	2.5	7.46	0.23	1.72
Small Total	6.25	2.75	9.61	0.2	1.96
Large Stainless Steel Base	9	0.25	4.28	0.11	0.47
Large Aluminum Body	9	2.72	16.85	0.23	3.87
Large Total	9	2.97	21.13	0.21	4.34

DOE tested the stainless steel hybrid test blocks on all six cooking tops in the test sample. Table III.9 summarizes the test results for surface units on these products using the stainless steel hybrid test blocks. As described in section III.C.1, DOE did not test multiple surface units with equal diameters on the same cooking top, and the surface

[4] Rust also formed on the solid carbon steel test blocks, which could affect heat transfer and repeatability. These issues would likely be more significant for the carbon steel hybrid test blocks due to the additional heat transfer surface between the base and the test block.

unit numbers included in the table are used to differentiate between surface units on the same cooking top.

TABLE III.9—STAINLESS STEEL HYBRID TEST BLOCK RESULTS

Test block size	Cooking top	Heating technology	Surface unit	Mean efficiency %	Standard deviation %	95-Percent confidence interval (±) %
Large	A	Electric Coil	1	64.52	0.87	1.08
	B	Electric Smooth	1	49.19	0.46	0.57
			2	59.60	0.46	0.57
	C	Gas	1	[a b] 16.27	[a] 1.16	[a] 1.85
	D	Induction	1	64.19	1.28	1.59
	E	Induction	1	64.32	0.91	1.13
	F	Induction	1	55.57	1.47	1.83
Small	A	Electric Coil	2	62.87	2.36	2.93
	B	Electric Smooth	3	57.75	0.87	1.08
	D	Induction	2	62.83	1.47	1.83
			3	60.29	0.68	0.84
	E	Induction	2	61.81	1.19	1.47

[a] Values describe data for four tests, not five. In addition, cooking efficiencies for gas burners are typically lower than for electric resistance heating elements.
[b] Results lower than expected due to a meter error, but consistently low from test-to-test.

The stainless steel hybrid test block efficiency results in Table III.9 are on average 2.5 percentage points lower than those for the carbon steel hybrid test blocks shown in Table III.7. However, the standard deviations and 95-percent confidence intervals are less than for the aluminum test blocks, the carbon steel test blocks, and the carbon steel hybrid test blocks, as shown in Table III.10.

TABLE III.10—TEST BLOCK COMPARISON

Test block type	Average efficiency %	Average standard deviation %	Average 95-percent confidence interval (±) %
Aluminum	[a] 56.02	[a] 1.40	[a] 1.80
Carbon Steel	59.78	1.36	1.71
Carbon Steel Hybrid	59.15	1.36	1.71
Stainless Steel Hybrid	56.60	1.10	1.40

[a] Values describe data for electric resistance and gas flame surface units only. For comparison, the average efficiencies for the carbon steel, carbon steel hybrid, and stainless steel hybrid blocks on these surface units are 54.99 percent, 54.36 percent, and 51.70 percent respectively.

Because the stainless steel hybrid test blocks produce the most repeatable results from test-to-test, DOE is proposing that these test blocks be required for testing induction cooking tops. DOE is also proposing to amend the existing cooking tops test procedure to incorporate the stainless steel hybrid blocks for cooking tops with gas flame or electric resistance heating. This would ensure consistency in results among all products covered by the proposed definition of conventional cooking tops. DOE notes that, although the efficiency results using the stainless steel hybrid test blocks for the cooking tops with gas flame or electric resistance heating are on average 4.3 percentage points lower than for the aluminum test blocks, the relative efficiencies among the various surface units remain generally unchanged.

DOE seeks comment on its proposal to require the use of stainless steel hybrid test blocks for testing all cooking tops that would be covered by the proposed definition of conventional cooking tops in an amended cooking products test procedure, including the potential burden associated with the requirement for such new test equipment.

5.Water-Heating Tests

To investigate additional test methods that may be representative of actual consumer usage, DOE conducted a test series based on water heating in place of metal block heating. Water provides a heating medium that is more representative of actual consumer use, because many foods cooked on a cooking top have a relatively high liquid content. However, water heating introduces additional sources of variability not present for metal block heating—the temperature distribution in the water is not always uniform, the properties of the water can vary from lab to lab, and the ambient conditions and cookware surface effects can have a large impact on the water boiling and evaporating throughout the test.

DOE is aware of a draft cooking products test method based on water heating that is under development by the International Electrotechnical Commission (IEC). A draft amendment to IEC Standard 60350–2 Edition 1.0 ''Household electric cooking appliances—Part 2: Hobs—Method for measuring performance'' (Draft IEC 60350 Amendment) specifies heating the water to a certain temperature at the maximum energy input setting, and then turning the unit to a lower energy input setting for an extended simmering period.

The Draft IEC 60350 Amendment specifies the quantity of water to be heated in a standardized cooking vessel whose size is based on the diameter of the surface unit. For this analysis, DOE chose the two IEC-specified cooking vessels with diameters closest to the diameters specified for the aluminum test blocks (6.25 inches and 9 inches). The cookware consists of a thin-walled stainless steel cylinder attached to a flat stainless steel 430 base plate. The test method also specifies an aluminum lid with vent holes and a small center hole to fix the thermocouple in the center of the pot. Table III.11 describes the IEC cookware and the quantity of water used for DOE's testing.[5]

TABLE III.11—IEC COOKWARE AND WATER SPECIFICATIONS

Cookware size	Cookware diameter (in)	Base thickness (in)	Total height (in)	Lid diameter (in)	Water weight (lbs)
Small	5.91	0.24	4.92	6.5	2.27
Large	9.45	0.24	4.92	10.43	5.95

The Draft IEC 60350 Amendment specifies testing at the maximum energy input rate until a calculated turndown temperature is reached, at which point the energy input rate is reduced to a setting that will maintain the water temperature above 194 °F (a simmering temperature), but as close to 194 °F as possible without additional adjustment of the low-power setting. The test ends 20 minutes after the temperature increases above 194 °F. The turndown temperature is calculated based on an initial test to determine the number of degrees that the temperature continues to rise after turning the unit off from the maximum energy input setting. Energy consumption is measured throughout the entire test, and the final metric describes the energy in Watt-hours (Wh) per 1000 grams (g) of water necessary to reach and maintain the simmering temperature.

DOE observed during some tests that the water approached boiling even at 194 °F, and a significant amount of the water evaporated or boiled off for all of the tests. Additionally, the simmering water temperatures varied from test-to-test even at the same reduced setting. The test method only requires that the simmering temperature stay above 194 °F for a valid test. Certain tests would produce simmering temperatures around 196 °F, close to the 194 °F goal, while others would rise above 200 °F at the same setting. Both tests would be deemed valid under the method in the Draft IEC 60350 Amendment method, but the normalized energy use results would vary because the 200 °F test would use significantly more energy.

To address this concern, DOE developed additional calculations to estimate the efficiency of the water-heating process. The calculations factor in the total temperature rise of the water to account for differences in simmering temperatures, and the total amount of water lost to boiling or evaporation during the test. DOE's method entails measuring the mass of the cookware plus water at the start and end of the test. Table III.12 shows the water-heating efficiency results using the DOE calculation method.

TABLE III.12—WATER-HEATING EFFICIENCY TEST RESULTS

Cookware size	Cooking top	Heating technology	Surface unit	Mean efficiency %	Standard deviation %	95-percent confidence interval (±) %
Large	A	Electric Coil	1	79.81	1.66	2.06
	B	Electric Smooth	1	61.81	2.83	3.52
			2	75.88	3.11	3.86
	C	Gas	1	[a b] 26.29	[a] 2.83	[a] 4.51
	D	Induction	1	81.31	0.28	0.34
	E	Induction	1	79.21	0.65	0.81
	F	Induction	1	74.17	2.55	3.17
Small	A	Electric Coil	2	76.99	1.65	2.05
	B	Electric Smooth	3	68.09	4.12	5.11
	D	Induction	2	79.35	0.37	0.46
			3	80.67	1.71	2.13
	E	Induction	2	75.99	2.03	2.52

[a] Values describe data for four tests, not five. In addition, cooking efficiencies for gas burners are typically lower than for electric resistance heating elements.
[b] Results lower than expected due to a meter error, but consistently low from test-to-test.

Even after considering differences in the final water temperature and the amount of water boiled or evaporated during the test, the variability for the water-heating tests was still greater than for the metal block tests. Table III.13 compares the standard deviations for each surface unit tested with both the water-heating and metal block-heating tests.

[5] Section 7.1.Z2 of the Draft IEC 60350 Amendment, "Cookware and water amount", specifies the general construction of the cookware, and Table Z3, "Sizes of standardized cookware and water amounts", specifies the dimensions of the cookware and quantity of water based on the diameter or the surface unit under test.

TABLE III.13—OVERALL RESULTS COMPARISON—COEFFICIENT OF VARIATION

Test block size	Cooking top	Heating technology	Surface unit	Standard deviation				
				Aluminum %	Carbon steel %	Carbon steel hybrid %	Stainless steel hybrid %	Water-heating efficiency %
Large	A	Electric Coil	1	2.22	1.59	1.87	0.87	1.66
	B	Electric	1	0.64	1.28	0.78	0.46	2.83
		Smooth	2	1.06	2.03	0.64	0.46	3.11
	C	Gas	1	[a] 1.01	[a] 0.92	[a] 0.59	[a] 1.16	[a] 2.83
	D	Induction	1	N/A	2.30	2.68	1.28	0.28
	E	Induction	1	N/A	0.68	1.06	0.91	0.65
	F	Induction	1	N/A	0.56	3.21	1.47	2.55
Small	A	Electric Coil	2	2.73	0.54	1.87	2.36	1.65
	B	Electric Smooth	3	0.73	1.55	1.06	0.87	4.12
	D	Induction	2	N/A	1.04	0.79	1.47	0.37
			3	N/A	2.70	0.65	0.68	1.71
	E	Induction	2	N/A	1.08	1.19	1.19	2.03
Average				1.40	1.36	1.36	1.10	1.98

[a] Values describe data for four tests, not five.

The water-heating test variability could potentially be reduced by more stringent tolerances on the ambient conditions. Ambient air pressure, temperature, and humidity significantly impact the amount of water that evaporates during the test and the temperature at which the water begins to boil. Appendix I, however, only specifies ambient air temperature, and its relatively large tolerance, 77 °F ± 9 °F, could contribute to increased test variability.

Because the water-heating tests do not show an improvement in repeatability from test-to-test under the current DOE test conditions compared to the metal block tests, and because achieving closer ambient temperature tolerances would potentially place a high burden on manufacturers, DOE is proposing to use stainless steel hybrid test blocks in the test procedure for all products covered under the proposed definition of conventional cooking tops.

DOE acknowledges that the water-heating tests may better reflect actual consumer behavior for cooking tops, and invites comment on whether water-heating tests should be considered in place of the metal block-heating tests. DOE also invites comment on the appropriate test method and conditions for water-heating tests, and the burden that would be incurred by more stringent specifications for ambient conditions.

6. Non-Circular Electric Surface Units

As discussed in the beginning of section III.C, the small test block (6.25 inches diameter) is used for testing surface units with diameters of 7 inches or less, and the large test block (9 inches diameter) is used for electric surface units with diameters greater than 7 inches and all gas surface units. These provisions do not address how to determine the proper test block size for testing non-circular electric surface units.

DOE is aware that the Draft IEC 60350 Amendment requires measuring the dimensions of each side of rectangular or similar electric surface units, and by measuring the major and minor dimensions of elliptical or similar electric surface units. For these types of surface units, the smallest dimension is used to determine the cookware size according to the Draft IEC 60350 Amendment.

DOE lacks information on the size of the cookware consumers typically use for non-circular surface units. Given this lack of consumer use data, and given the potential non-representative thermal behavior of a test block in which a portion of the bottom is not exposed to the surface unit, DOE proposes to amend section 3.2.1 of Appendix I to replace the reference to an electric surface unit's diameter with the electric surface unit's smallest dimension to account for surface units of all shapes. This is consistent with the method included in the Draft IEC 60350 Amendment. DOE does not propose to change the requirement that all gas surface units be tested using the large test block.

DOE invites comments on whether using the smallest dimension of an electric surface unit is appropriate for determining the proper test block size.

D. Standby and Off Mode Test Procedure

EISA 2007 amended EPCA to require that DOE amend its test procedures for all covered residential products, including cooking products, to include measures of standby mode and off mode energy consumption, if technically feasible. (42 U.S.C. 6295(gg)(2)(A)) Accordingly, DOE recently conducted a separate rulemaking for conventional cooking products, dishwashers, and dehumidifiers to address standby and off mode energy consumption.[6] In the October 2012 Final Rule, DOE addressed standby mode and off mode energy consumption, as well as active mode fan-only operation, for conventional cooking products. 77 FR 65942.

Today's NOPR proposes a change to the definition of ''conventional cooking top'' to include induction technologies. Under this proposed definition, induction cooking tops would be covered by the standby and off mode test procedures adopted in the separate test procedure rulemaking.

DOE did not observe any standby mode or off mode operation or features unique to induction cooking tops that would warrant any changes to the standby mode and off mode test methods adopted by the October 2012 Final Rule for conventional cooking tops. DOE invites comment on whether induction cooking products require separate consideration for standby mode and off mode testing.

E. Compliance With Other EPCA Requirements

EPCA requires that any new or amended test procedures for residential products must be reasonably designed to produce test results which measure energy efficiency, energy use, or

[6] DOE pursued amendments to Appendix I addressing standby and off mode energy for microwave ovens as part of a separate rulemaking. The most recent notice for this rulemaking is the SNOPR published on May 16, 2012. 76 FR 72322.

estimated annual operating cost of a covered product during a representative average use cycle or period of use, and must not be unduly burdensome to conduct. (42 U.S.C. 6293(b)(3))

DOE tentatively concludes that the amended test procedures would produce test results that measure the energy consumption of cooking tops during representative use, and that the test procedures would not be unduly burdensome to conduct.

The test procedure proposed in today's NOPR follows the same method currently included in Appendix I for testing cooking tops, but would replace the aluminum test blocks with stainless steel hybrid blocks. DOE estimates current testing represents a cost of roughly $500 per test for labor, with a one-time investment of $2,000 for test equipment ($1,000 for test blocks and $1,000 for instrumentation). The proposed reusable test blocks would represent an additional one-time expense of approximately $500 for each test block, or $1000 for each pair of large and small diameter test blocks. No additional instrumentation would be required beyond what is required in the current test procedure. DOE does not believe this additional cost represents an excessive burden for test labs or manufacturers given the significant investments necessary to manufacture, test and market consumer appliances, as described further in section IV.B below. The only additional time burden associated with the proposed test method is the time required to weigh the stainless steel base in addition to the aluminum body. This additional step in the test procedure would increase the test duration by about 2 minutes per surface unit.

DOE concluded in the test procedure rulemaking for cooking products preceding today's NOPR, completed recently by the publication of the October 2012 Final Rule (see section I.B. for the rulemaking history for today's NOPR), that the amended test procedure is not unduly burdensome to conduct. In today's NOPR, DOE further concludes, given the small magnitude of the proposed changes (both in terms of the new test blocks and the time needed to take the test), that the newly proposed amended test procedure for cooking products would not be unreasonably burdensome to conduct.

IV. Procedural Issues and Regulatory Review

A. Review Under Executive Order 12866

The Office of Management and Budget has determined that test procedure rulemakings do not constitute ''significant regulatory actions'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, 58 FR 51735 (Oct. 4, 1993). Accordingly, this action was not subject to review under the Executive Order by the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB).

B. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of a regulatory flexibility analysis (RFA) for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, ''Proper Consideration of Small Entities in Agency Rulemaking,'' 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the DOE rulemaking process. 68 FR 7990. DOE has made its procedures and policies available on the Office of the General Counsel's Web site: *http://energy.gov/gc/office-general-counsel.*

DOE reviewed today's proposed rule under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003. The proposed rule would amend the test method for measuring the energy efficiency of conventional cooking tops and ranges to include test methods applicable to induction cooking products.

The Small Business Administration (SBA) considers a business entity to be a small business, if, together with its affiliates, it employs less than a threshold number of workers or earns less than the average annual receipts specified in 13 CFR part 121. The threshold values set forth in these regulations use size standards and codes established by the North American Industry Classification System (NAICS) that are available at: *http://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf.* The threshold number for NAICS classification code 335221, titled ''Household Cooking Appliance Manufacturing,'' is 750 employees; this classification includes manufacturers of residential conventional cooking products.

Most of the manufacturers supplying conventional cooking products are large multinational corporations. DOE surveyed the AHAM member directory to identify manufacturers of residential conventional cooking products. DOE then consulted publicly-available data, purchased company reports from vendors such as Dun and Bradstreet, and contacted manufacturers, where needed, to determine if they meet the SBA's definition of a ''small business manufacturing facility'' and have their manufacturing facilities located within the United States. Based on this analysis, DOE estimates that there are two small businesses that manufacture conventional cooking products.

For the reasons stated in the preamble, DOE has tentatively concluded that the proposed rule would not have a significant impact on either small or large manufacturers under the applicable provisions of the Regulatory Flexibility Act. The proposed rule would amend DOE's test procedures for cooking products by incorporating testing provisions to address active mode energy consumption for induction cooking products that will be used to develop and test compliance with any future energy conservation standards that may be established by DOE. The test procedure amendments involve the measurement of active mode energy consumption through the use of a different metal test block than is currently specified for conventional cooking tops. The proposed amendments would also apply for testing products currently considered conventional cooking tops. DOE estimates a cost for this new equipment of approximately $1000. Additionally, DOE estimates a cost of roughly $6,000 for manufacturers to test induction cooking products not currently covered by the test procedure. This estimate assumes $500 per test, as described in section III.E, with up to 12 total tests needed assuming three induction cooking top models with four individual tests per cooking top model. This cost is small compared to the average annual revenue of the two identified small businesses, which DOE estimates to be over $40 million.[7] These tests follow the same methodology and can be conducted in the same facilities used for the current energy testing of conventional cooking tops, so there would be no additional facilities costs required by the proposed rule.

For these reasons, DOE tentatively concludes and certifies that the proposed rule would not have a significant economic impact on a substantial number of small entities. Accordingly, DOE has not prepared a

[7] Estimated average revenue is based on financial information provided for the two small businesses in reports provided by Dun and Bradstreet.

regulatory flexibility analysis for this rulemaking. DOE will transmit the certification and supporting statement of factual basis to the Chief Counsel for Advocacy of the SBA for review under 5 U.S.C. 605(b).

C. Review Under the Paperwork Reduction Act of 1995

Manufacturers of conventional cooking products must certify to DOE that their products comply with any applicable energy conservation standards. In certifying compliance, manufacturers must test their products according to the DOE test procedures for conventional cooking products, including any amendments adopted for those test procedures. DOE has established regulations for the certification and recordkeeping requirements for all covered consumer products and commercial equipment, including conventional cooking products. (76 FR 12422 (March 7, 2011). The collection-of-information requirement for the certification and recordkeeping is subject to review and approval by OMB under the Paperwork Reduction Act (PRA). This requirement has been approved by OMB under OMB control number 1910–1400. Public reporting burden for the certification is estimated to average 20 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

There is currently no information collection requirement related specifically to induction cooking tops. In the event that DOE proposes an energy conservation standard with which manufacturers must demonstrate compliance, or otherwise proposes to require the collection of information derived from the testing of induction cooking tops according to this test procedure, DOE will seek OMB approval of such information collection requirement. DOE will seek approval either through a proposed amendment to the information collection requirement approved under OMB control number 1910–1400 or as a separate proposed information collection requirement.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

D. Review Under the National Environmental Policy Act of 1969

In this proposed rule, DOE proposes test procedure amendments that it expects will be used to develop and implement future energy conservation standards for conventional cooking products. DOE has determined that this rule falls into a class of actions that are categorically excluded from review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and DOE's implementing regulations at 10 CFR part 1021. Specifically, this proposed rule would amend the existing test procedures without affecting the amount, quality or distribution of energy usage, and, therefore, would not result in any environmental impacts. Thus, this rulemaking is covered by Categorical Exclusion A5 under 10 CFR part 1021, subpart D, which applies to any rulemaking that interprets or amends an existing rule without changing the environmental effect of that rule. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

E. Review Under Executive Order 13132

Executive Order 13132, ''Federalism,'' 64 FR 43255 (August 4, 1999) imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have Federalism implications. The Executive Order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The Executive Order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have Federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. 65 FR 13735. DOE has examined this proposed rule and has determined that it would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. EPCA governs and prescribes Federal preemption of State regulations as to energy conservation for the products that are the subject of today's proposed rule. States can petition DOE for exemption from such preemption to the extent, and based on criteria, set forth in EPCA. (42 U.S.C. 6297(d)) No further action is required by Executive Order 13132.

F. Review Under Executive Order 12988

Regarding the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, ''Civil Justice Reform,'' 61 FR 4729 (Feb. 7, 1996), imposes on Federal agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; (3) provide a clear legal standard for affected conduct rather than a general standard; and (4) promote simplification and burden reduction. Section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in sections 3(a) and 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, the proposed rule meets the relevant standards of Executive Order 12988.

G. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. Pub. L. 104–4, sec. 201 (codified at 2 U.S.C. 1531). For a proposed regulatory action likely to result in a rule that may cause the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a), (b)) The UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a proposed ''significant intergovernmental mandate,'' and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect small governments. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. 62 FR 12820; also available at *http://energy.gov/gc/office-general-counsel*. DOE examined today's proposed rule according to UMRA and its statement of policy and determined that the rule contains neither an intergovernmental mandate, nor a mandate that may result in the expenditure of $100 million or more in any year, so these requirements do not apply.

H. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. This rule would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

I. Review Under Executive Order 12630

DOE has determined, under Executive Order 12630, ''Governmental Actions and Interference with Constitutionally Protected Property Rights'' 53 FR 8859 (March 18, 1988) that this regulation would not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

J. Review Under Treasury and General Government Appropriations Act, 2001

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). DOE has reviewed today's proposed rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

K. Review Under Executive Order 13211

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to OMB, a Statement of Energy Effects for any proposed significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

Today's regulatory action to amend the test procedure for measuring the energy efficiency of conventional cooking products is not a significant regulatory action under Executive Order 12866. Moreover, it would not have a significant adverse effect on the supply, distribution, or use of energy, nor has it been designated as a significant energy action by the Administrator of OIRA. Therefore, it is not a significant energy action, and, accordingly, DOE has not prepared a Statement of Energy Effects.

L. Review Under Section 32 of the Federal Energy Administration Act of 1974

Under section 301 of the Department of Energy Organization Act (Pub. L. 95–91; 42 U.S.C. 7101), DOE must comply with section 32 of the Federal Energy Administration Act of 1974, as amended by the Federal Energy Administration Authorization Act of 1977. (15 U.S.C. 788; FEAA) Section 32 essentially provides in relevant part that, where a proposed rule authorizes or requires use of commercial standards, the notice of proposed rulemaking must inform the public of the use and background of such standards. In addition, section 32(c) requires DOE to consult with the Attorney General and the Chairman of the Federal Trade Commission (FTC) concerning the impact of the commercial or industry standards on competition. The amendments proposed in today's NOPR do not authorize or require the use of any commercial standards.

V. Public Participation

A. Attendance at Public Meeting

The time, date and location of the public meeting are listed in the **DATES** and **ADDRESSES** sections at the beginning of this document. If you plan to attend the public meeting, please notify Ms. Brenda Edwards at (202) 586–2945 or *Brenda.Edwards@ee.doe.gov.* Please note that foreign nationals visiting DOE Headquarters are subject to advance security screening procedures. Any foreign national wishing to participate in the meeting should advise DOE as soon as possible by contacting Ms. Edwards to initiate the necessary procedures. Please also note that those wishing to bring laptops into the Forrestal Building will be required to obtain a property pass. Visitors should avoid bringing laptops, or allow an extra 45 minutes.

In addition, you can attend the public meeting via Webinar. Webinar registration information, participant instructions, and information about the capabilities available to Webinar participants will be published on DOE's Web site *http://www1.eere.energy.gov/buildings/appliance_standards/rulemaking.aspx/ruleid/57*. Participants are responsible for ensuring their systems are compatible with the Webinar software.

B. Procedure for Submitting Prepared General Statements For Distribution

Any person who has plans to present a prepared general statement may request that copies of his or her statement be made available at the public meeting. Such persons may submit requests, along with an advance electronic copy of their statement in PDF (preferred), Microsoft Word or Excel, WordPerfect, or text (ASCII) file format, to the appropriate address shown in the **ADDRESSES** section at the beginning of this NOPR. The request and advance copy of statements must be received at least one week before the public meeting and may be emailed, hand-delivered, or sent by mail. DOE prefers to receive requests and advance copies via email. Please include a telephone number to enable DOE staff to make a follow-up contact, if needed.

C. Conduct of Public Meeting

DOE will designate a DOE official to preside at the public meeting and may also use a professional facilitator to aid discussion. The meeting will not be a judicial or evidentiary-type public hearing, but DOE will conduct it in accordance with section 336 of EPCA (42 U.S.C. 6306). A court reporter will be present to record the proceedings and prepare a transcript. DOE reserves the right to schedule the order of presentations and to establish the procedures governing the conduct of the public meeting. After the public meeting, interested parties may submit further comments on the proceedings as well as on any aspect of the rulemaking until the end of the comment period.

The public meeting will be conducted in an informal, conference style. DOE will present summaries of comments received before the public meeting, allow time for prepared general statements by participants, and encourage all interested parties to share their views on issues affecting this rulemaking. Each participant will be allowed to make a general statement (within time limits determined by DOE), before the discussion of specific topics. DOE will permit, as time permits, other participants to comment briefly on any general statements.

At the end of all prepared statements on a topic, DOE will permit participants to clarify their statements briefly and comment on statements made by others. Participants should be prepared to answer questions by DOE and by other participants concerning these issues. DOE representatives may also ask questions of participants concerning other matters relevant to this rulemaking. The official conducting the public meeting will accept additional comments or questions from those attending, as time permits. The presiding official will announce any further procedural rules or modification of the above procedures that may be needed for the proper conduct of the public meeting.

A transcript of the public meeting will be included in the docket, which can be viewed as described in the *Docket* section at the beginning of this NOPR. In addition, any person may buy a copy of the transcript from the transcribing reporter.

D. Submission of Comments

DOE will accept comments, data, and information regarding this proposed rule before or after the public meeting, but no later than the date provided in the **DATES** section at the beginning of this proposed rule. Interested parties may submit comments using any of the methods described in the **ADDRESSES** section at the beginning of this NOPR. Any comments submitted must identify the NOPR for Test Procedures for Conventional Cooking Products, and provide docket number EERE–2012–BT–TP–0013 and/or regulatory information number (RIN) number 1904–AC71.

Submitting comments via regulations.gov. The regulations.gov Web page will require you to provide your name and contact information. Your contact information will be viewable to DOE Building Technologies staff only. Your contact information will not be publicly viewable except for your first and last names, organization name (if any), and submitter representative name (if any). If your comment is not processed properly because of technical difficulties, DOE will use this information to contact you. If DOE cannot read your comment due to technical difficulties and cannot contact you for clarification, DOE may not be able to consider your comment.

However, your contact information will be publicly viewable if you include it in the comment or in any documents attached to your comment. Any information that you do not want to be publicly viewable should not be included in your comment, nor in any document attached to your comment. Persons viewing comments will see only first and last names, organization names, correspondence containing comments, and any documents submitted with the comments.

Do not submit to regulations.gov information for which disclosure is restricted by statute, such as trade secrets and commercial or financial information (hereinafter referred to as Confidential Business Information (CBI)). Comments submitted through regulations.gov cannot be claimed as CBI. Comments received through the Web site will waive any CBI claims for the information submitted. For information on submitting CBI, see the Confidential Business Information section.

DOE processes submissions made through regulations.gov before posting. Normally, comments will be posted within a few days of being submitted. However, if large volumes of comments are being processed simultaneously, your comment may not be viewable for up to several weeks. Please keep the comment tracking number that regulations.gov provides after you have successfully uploaded your comment.

Submitting comments via email, hand delivery, or mail. Comments and documents submitted via email, hand delivery, or mail also will be posted to regulations.gov. If you do not want your personal contact information to be publicly viewable, do not include it in your comment or any accompanying documents. Instead, provide your contact information on a cover letter. Include your first and last names, email address, telephone number, and optional mailing address. The cover letter will not be publicly viewable as long as it does not include any comments.

Include contact information each time you submit comments, data, documents, and other information to DOE. If you submit via mail or hand delivery, please provide all items on a CD, if feasible. It is not necessary to submit printed copies. No facsimiles (faxes) will be accepted.

Comments, data, and other information submitted to DOE electronically should be provided in PDF (preferred), Microsoft Word or Excel, WordPerfect, or text (ASCII) file format. Provide documents that are not secured, written in English and are free of any defects or viruses. Documents should not contain special characters or any form of encryption and, if possible, they should carry the electronic signature of the author.

Campaign form letters. Please submit campaign form letters by the originating organization in batches of between 50 to 500 form letters per PDF or as one form letter with a list of supporters' names compiled into one or more PDFs. This reduces comment processing and posting time.

Confidential Business Information. According to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit via email, postal mail, or hand delivery two well-marked copies: one copy of the document marked confidential including all the information believed to be confidential, and one copy of the document marked non-confidential with the information believed to be confidential deleted. Submit these documents via email or on a CD, if feasible. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

Factors of interest to DOE when evaluating requests to treat submitted information as confidential include: (1) A description of the items; (2) whether and why such items are customarily treated as confidential within the industry; (3) whether the information is generally known by or available from other sources; (4) whether the information has previously been made available to others without obligation concerning its confidentiality; (5) an explanation of the competitive injury to the submitting person which would result from public disclosure; (6) when such information might lose its confidential character due to the passage of time; and (7) why disclosure of the information would be contrary to the public interest.

It is DOE's policy that all comments may be included in the public docket, without change and as received, including any personal information provided in the comments (except information deemed to be exempt from public disclosure).

E. Issues on Which DOE Seeks Comment

Although DOE welcomes comments on any aspect of this proposal, DOE is particularly interested in receiving comments and views of interested parties concerning the following issues:

1. Proposed Amended Definitions

DOE requests comment on the proposed amended definitions of ''conventional cooking top'' and ''active mode.'' (See section III.A)

2. Stainless Steel Hybrid Test Blocks

DOE seeks comment on its proposal to require the use of stainless steel hybrid test blocks for testing all cooking tops that would be covered by the proposed definition of conventional cooking tops in an amended cooking products test procedure, including the potential burden associated with the requirement for such new test equipment. (See section III.C.4)

3. Water-Heating Test

DOE invites comment on whether water-heating tests should be considered in place of the metal block-heating tests, and on the appropriate water-heating test method and conditions. DOE also invites comment on the burden that would be incurred by more stringent specifications for ambient conditions. (See section III.C.5)

4. Non-Circular Electric Surface Units

DOE invites comments on whether using the smallest dimension of an electric surface unit is appropriate for determining the proper test block size. (See section III.C.6)

5. Standby and Off Mode

DOE requests comment on whether induction cooking products include any unique features or operational modes that would not be covered by the definitions and standby and off mode test procedures included in the October 2012 Final Rule. 77 FR 65942. (See section III.D)

VI. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this proposed rule.

List of Subjects in 10 CFR Part 430

Administrative practice and procedure, Confidential business information, Energy conservation, Household appliances, Imports, Intergovernmental relations, Small businesses.

Issued in Washington, DC, on January 18, 2013.

Kathleen B. Hogan,

Deputy Assistant Secretary for Energy Efficiency, Energy Efficiency and Renewable Energy.

For the reasons stated in the preamble, DOE is proposing to amend part 430 of Chapter II of Title 10, Code of Federal Regulations as set forth below:

PART 430—ENERGY CONSERVATION PROGRAM FOR CONSUMER PRODUCTS

■ 1. The authority citation for part 430 continues to read as follows:

Authority: 42 U.S.C. 6291–6309; 28 U.S.C. 2461 note.

■ 2. Section 430.2 is amended by revising the definition for ''conventional cooking top'' to read as follows:

§ 430.2 Definitions.

* * * * *

Conventional cooking top is a household cooking appliance within a class of kitchen ranges and ovens, each of which consists of a horizontal surface containing one or more surface units that utilize a gas flame, electric resistance heating, or electric inductive heating.

* * * * *

Appendix I—[Amended]

■ 3. Appendix I to subpart B of part 430 is amended by:
■ a. Revising the Note;
■ b. Revising section 1.1 in section 1. Definitions;
■ c. Revising sections 2.7, 2.7.2, and 2.7.3 in section 2. Test Conditions;
■ d. Revising sections 3.1.2 and 3.3.2 in section 3. Test Methods and Measurements; and
■ e. Revising sections 4.2.1.1 and 4.2.1.2 in section 4. Calculation of Derived Results From Test Measurements.

Appendix I to Subpart B of Part 430—Uniform Test Method for Measuring the Energy Consumption of Conventional Ranges, Conventional Cooking Tops, Conventional Ovens, and Microwave Ovens

Note: Any representation related to active mode energy consumption of conventional ranges, conventional cooking tops (except for induction cooking products), and conventional ovens must be based upon results generated under this test procedure. Any representation made after April 29, 2013 related to standby mode and off mode energy consumption of conventional ranges, conventional cooking tops (except for induction cooking products), and conventional ovens, and any representation made after [INSERT DATE 180 DAYS AFTER FINAL RULE PUBLICATION IN THE **FEDERAL REGISTER**] related to any energy consumption of induction cooking products, must be based upon results generated under this test procedure.

Any representation made after July 17, 2013 related to standby mode and off mode energy consumption of microwave ovens must also be based upon this test procedure. Any representation related to standby mode and off mode energy consumption of microwave ovens made between February 17, 2013 and July 17, 2013 may be based upon results generated under this test procedure or upon the test procedure as contained in the 10 CFR parts 200 to 499 edition revised as of January 1, 2012.

Upon the compliance date(s) of any energy conservation standard(s) for conventional ranges, conventional cooking tops, conventional ovens, and microwave ovens, use of the applicable provisions of this test procedure to demonstrate compliance with the energy conservation standard will also be required.

1. Definitions

1.1 *Active mode* means a mode in which the product is connected to a mains power source, has been activated, and is performing the main function of producing heat by means of a gas flame, electric resistance heating, electric inductive heating, or microwave energy, or circulating air internally or externally to the cooking product. Delay start mode is a one-off, user-initiated, short-duration function that is associated with an active mode.

* * * * *

2. Test Conditions

* * * * *

2.7 *Test blocks for conventional oven and cooking top.* The test blocks for conventional ovens and the test block bodies for conventional cooking tops shall be made of aluminum alloy No. 6061, with a specific heat of 0.23 Btu/lb- °F (0.96 kJ/[kg ÷ °C]) and with any temper that will give a coefficient of thermal conductivity of 1073.3 to 1189.1 Btu-in/h-ft^2- °F (154.8 to 171.5 W/[m ÷ °C]). Each test block and test block body shall have a hole at its top. The hole shall be 0.08 inch (2.03 mm) in diameter and 0.80 inch (20.3 mm) deep. Other means may be provided which will ensure that the thermocouple junction is installed at this same position and depth.

The test block bases for conventional cooking tops shall be made of stainless steel grade 430, with a specific heat of 0.11 Btu/lb- °F (0.46 kJ/[kg ÷ °C]) and with coefficient of thermal conductivity of 172.0 to 190.0 Btu-in/h-ft^2- °F (24.8 to 27.4 W/[m ÷ °C]).

The bottom of each test block and test block body, and top and bottom of each test block base, shall be flat to within 0.002 inch (0.051 mm) TIR (total indicator reading). Determine the actual weight of each test block, test block body, and test block base with a scale with an accuracy as indicated in section 2.9.5 of this appendix.

* * * * *

2.7.2 *Small test block for conventional cooking top.* The small test block shall comprise a body and separate base. The small test block body, W_2, shall be 6.25±0.05 inches (158.8±1.3 mm) in diameter, approximately 2.5 inches (64 mm) high and shall weigh 7.5±0.1 lbs (3.40±0.05 kg). The small test block base, W_3, shall be 6.25±0.05 inches (158.8±1.3 mm) in diameter, approximately 0.25 inches (6.4 mm) high and shall weigh 2.2±0.1 lbs (1.00±0.05 kg). The small test block body shall not be fixed to the base, and shall be centered over the base for testing.

2.7.3 *Large test block for conventional cooking top.* The large test block shall comprise a body and separate base. The large test block body for the conventional cooking top, W_4, shall be 9±0.05 inches (228.6±1.3 mm) in diameter, approximately 2.7 inches (69 mm) high and shall weigh 16.9±0.1 lbs (7.67±0.05 kg). The large test block base, W_5, shall be 9±0.05 inches (228.6±1.3 mm) in diameter, approximately 0.25 inches (6.4 mm) high and shall weigh 4.3±0.1 lbs (1.95±0.05 kg). The large test block body shall not be fixed to the base, and shall be centered over the base for testing.

* * * * *

3. Test Methods and Measurements

* * * * *

3.1.2 *Conventional cooking top.* Establish the test conditions set forth in section 2, Test Conditions, of this appendix. Turn off the gas flow to the conventional oven(s), if so equipped. The temperature of the conventional cooking top shall be its normal nonoperating temperature as defined in section 1.12 and described in section 2.6 of this appendix. Set the test block in the center of the surface unit under test. The small test block, W_2 and W_3, shall be used on electric surface units with a smallest dimension of 7 inches (178 mm) or less. The large test block, W_4 and W_5, shall be used on electric surface units with a smallest dimension over 7 inches (178 mm) and on all gas surface units. Turn on the surface unit under test and set its energy input rate to the maximum setting. When the test block reaches 144 °F (80 °C) above its initial test block temperature, immediately reduce the energy input rate to 25±5 percent of the maximum energy input rate. After 15±0.1 minutes at the reduced energy setting, turn off the surface unit under test.

* * * * *

3.3.2 Record measured test block, test block body, and test block base weights W_1, W_2, W_3, W_4, and W_5 in pounds (kg).

* * * * *

4. Calculation of Derived Results From Test Measurements

* * * * *

4.2 * * *

4.2.1 * * *

4.2.1.1 *Electric surface unit cooking efficiency.* Calculate the cooking efficiency, $Eff_{SU,}$ of the electric surface unit under test, defined as:

$$Eff_{SU} = (W_{TB} \times C_{p,TB} + W_B \times C_{p,B}) \times \left(\frac{T_{SU}}{K_e \times E_{CT}}\right)$$

Where:

W_{TB} = measured weight of test block body, W_2 or W_4, expressed in pounds (kg).

$C_{p,TB}$ = 0.23 Btu/lb-°F (0.96 kJ/kg ÷ °C), specific heat of test block body.

W_B = measured weight of test block base, W_3 or W_5, expressed in pounds (kg).

$C_{p,B}$ = 0.11 Btu/lb-°F (0.46 kJ/kg ÷ °C), specific heat of test block base.

T_{SU} = temperature rise of the test block: Final test block temperature, T_{CT}, as determined in section 3.2.2 of this appendix, minus the initial test block temperature, T_I, expressed in °F (°C) as determined in section 2.7.5 of this appendix.

K_e = 3.412 Btu/Wh (3.6 kJ/Wh), conversion factor of watt-hours to Btu's.

E_{CT} = measured energy consumption, as determined according to section 3.2.2 of this appendix, expressed in watt-hours (kJ).

4.2.1.2 *Gas surface unit cooking efficiency.* Calculate the cooking efficiency, $Eff_{SU,}$ of the gas surface unit under test, defined as:

$$Eff_{SU} = \frac{(W_4 \times C_{p,TB} + W_5 \times C_{p,B}) \times T_{SU}}{E}$$

Where:

W_{TB} = measured weight of test block body as measured in section 3.3.2 of this appendix, expressed in pounds (kg).

W_B = measured weight of test block base as measured in section 3.3.2 of this appendix, expressed in pounds (kg).

$C_{p,TB}$, $C_{p,B}$, and T_{SU} are the same as defined in section 4.2.1.1 of this appendix.

and,

$E = (V_{CT} \times H) + (E_{IC} \times K_e)$,

Where:

V_{CT} = total gas consumption in standard cubic feet (L) for the gas surface unit test as measured in section 3.2.2.1 of this appendix.

E_{IC} = electrical energy consumed in watt-hours (kJ) by an ignition device of a gas surface unit as measured in section 3.2.2.1 of this appendix.

K_e = 3.412 Btu/Wh (3.6 kJ/Wh), conversion factor of watt-hours to Btu's.

H = either H_n or H_p, the heating value of the gas used in the test as specified in sections 2.2.2.2 and 2.2.2.3 of this appendix, expressed in Btu's per standard cubic foot (kJ/L) of gas.

* * * * *

[FR Doc. 2013–01526 Filed 1–29–13; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–1319; Directorate Identifier 2012–NM–179–AD]

RIN 2120–AA64

Airworthiness Directives; the Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to revise an existing airworthiness directive (AD) that applies to all The Boeing Company Model 757 airplanes. The existing AD currently requires revising the maintenance program by incorporating new and revised fuel tank system limitations in the Airworthiness Limitations (AWLs) section of the Instructions for Continued Airworthiness; and requires the initial inspection of certain repetitive AWL inspections to phase-in those inspections, and repair if necessary. Since we issued that AD, we have found errors in paragraph references in the existing AD. This proposed AD would revise those paragraph references to refer to the correct paragraphs. We are proposing this AD to prevent the potential for ignition sources inside fuel tanks caused by latent failures, alterations, repairs, or maintenance actions, which in combination with flammable fuel vapors, could result in a

fuel tank explosion and consequent loss of the airplane.

DATES: We must receive comments on this proposed AD by March 18, 2013.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, WA 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; Internet *https://www.myboeingfleet.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov*; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (phone: 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Kevin Nguyen, Aerospace Engineer, Propulsion Branch, ANM–140S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue SW., Renton, Washington 98057–3356; phone: 425–917–6501; fax: 425–917–6590; email: *kevin.nguyen@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2012–1319; Directorate Identifier 2012–NM–179–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov*, including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

On June 6, 2012, we issued AD 2012–12–15, Amendment 39–17095 (77 FR 42964, July 23, 2012), for all The Boeing Company Model 757 airplanes. That AD superseded AD 2008–10–11, Amendment 39–15517 (73 FR 25974, May 8, 2008). AD 2012–12–15 requires revising the maintenance program by incorporating new and revised fuel tank system limitations in the Airworthiness Limitations (AWLs) section of the Instructions for Continued Airworthiness to satisfy Special Federal Aviation Regulation No. 88 requirements; and requires the initial inspection of certain repetitive AWL inspections to phase-in those inspections, and repair if necessary. That AD resulted from a report that an AWL required by a previous AD must be revised. We issued that AD to prevent the potential for ignition sources inside fuel tanks caused by latent failures, alterations, repairs, or maintenance actions, which in combination with flammable fuel vapors, could result in a fuel tank explosion and consequent loss of the airplane.

Actions Since Existing AD Was Issued

Since we issued AD 2012–12–15, Amendment 39–17095 (77 FR 42964, July 23, 2012), we have found errors in paragraph references in the existing AD. The second sentence in paragraph (h)(1) of the existing AD refers to paragraph (n) of that AD, which is a compliance time for AWL No. 28–AWL–26. The correct reference should be to paragraph (l) of that AD, which is a compliance time for AWL No. 28–AWL–03. The last sentence in paragraph (l) of the existing AD refers to paragraph (h)(2) of that AD, which is a definition of a detailed inspection. The correct reference should be to paragraph (h)(1)(ii) of that AD, which references a specific AWL and compliance time.

FAA's Determination

We are proposing this AD because we evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

Proposed AD Requirements

This proposed AD would retain all requirements of AD 2012–12–15, Amendment 39–17095 (77 FR 42964, July 23, 2012). This proposed AD would revise certain paragraph references.

Costs of Compliance

We estimate that this proposed AD affects 639 airplanes of U.S. registry.

We estimate the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
AWLs revisions [retained actions from existing AD (AD 2012–12–15, Amendment 39–17095 (77 FR 42964, July 23, 2012))].	9 work-hours × $85 per hour = $765.	None	$765	$488,835
Inspections [retained actions from existing AD (AD 2012–12–15, Amendment 39–17095 (77 FR 42964, July 23, 2012))].	8 work-hours × $85 per hour = $680.	None	680	434,520

The new requirements of this proposed AD add no additional economic burden.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, Section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701, ''General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We have determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that the proposed regulation:

(1) Is not a ''significant regulatory action'' under Executive Order 12866,

(2) Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979),

(3) Will not affect intrastate aviation in Alaska, and

(4) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new AD:

The Boeing Company: Docket No. FAA–2012–1319; Directorate Identifier 2012–NM–179–AD.

(a) Comments Due Date

The FAA must receive comments on this AD action by March 18, 2013.

(b) Affected ADs

This AD revises AD 2012–12–15, Amendment 39–17095 (77 FR 42964, July 23, 2012). Certain requirements of this AD terminate certain requirements of AD 2008–11–07, Amendment 39–15529 (73 FR 30755, May 29, 2008); AD 2008–06–03, Amendment 39–15415 (73 FR 13081, March 12, 2008); and AD 2009–06–20, Amendment 39–15857 (74 FR 12236, March 24, 2009).

(c) Applicability

(1) This AD applies to all The Boeing Company Model 757–200, –00PF, –200CB, and –300 series airplanes, certificated in any category.

(2) This AD requires revisions to certain operator maintenance documents to include new actions (e.g., inspections) and/or critical design configuration control limitations (CDCCLs). Compliance with these actions and/or CDCCLs is required by 14 CFR 91.403(c). For airplanes that have been previously modified, altered, or repaired in the areas addressed by these inspections, the operator may not be able to accomplish the actions described in the revisions. In this situation, to comply with 14 CFR 91.403(c), the operator must request approval of an alternative method of compliance (AMOC) according to paragraph (s) of this AD. The request should include a description of changes to the required actions that will ensure the continued operational safety of the airplane.

(d) Subject

Joint Aircraft System Component (JASC)/ Air Transport Association (ATA) of America Code 28: Fuel.

(e) Unsafe Condition

This AD results from a design review of the fuel tank systems. The Federal Aviation Administration is issuing this AD to prevent the potential for ignition sources inside fuel tanks caused by latent failures, alterations, repairs, or maintenance actions, which, in combination with flammable fuel vapors, could result in a fuel tank explosion and consequent loss of the airplane.

(f) Compliance

You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

(g) Retained Revision of Airworthiness Limitations (AWLs) Section

This paragraph restates the requirements of paragraph (g) of AD 2012–12–15, Amendment 39–17095 (77 FR 42964, July 23, 2012). Before December 16, 2008, revise the AWLs section of the Instructions for Continued Airworthiness (ICA) by incorporating the information in the subsections specified in paragraphs (g)(1) through (g)(3) of this AD into the maintenance planning data (MPD) document; except that the initial inspections specified in table 1 to paragraph (h)(1) of this AD must be done at the compliance times specified in table 1 to paragraph (h)(1) of this AD. Accomplishing the requirements of paragraph (k) of this AD terminates the requirements of this paragraph.

(1) Subsection E, ''AIRWORTHINESS LIMITATIONS—FUEL SYSTEMS,'' of Boeing Temporary Revision (TR) 09–008, dated March 2008, to Section 9, ''Airworthiness Limitations (AWLs) and Certification Maintenance Requirements (CMRs),'' of the Boeing 757 MPD Document, D622N001–9.

(2) Subsection F, ''PAGE FORMAT: SYSTEMS AIRWORTHINESS LIMITATIONS,'' of Boeing TR 09–008, dated March 2008, to Section 9, ''Airworthiness Limitations (AWLs) and Certification Maintenance Requirements (CMRs),'' of the Boeing 757 MPD Document, D622N001–9.

(3) Subsection G, ''AIRWORTHINESS LIMITATIONS—FUEL SYSTEM AWLs,'' AWLs No. 28–AWL–01 through No. 28–AWL–24 inclusive, of Boeing TR 09–008, dated March 2008, to Section 9, ''Airworthiness Limitations (AWLs) and Certification Maintenance Requirements (CMRs),'' of the Boeing 757 MPD Document, D622N001–9. As an optional action, AWLs No. 28–AWL–25 and No. 28–AWL–26, as identified in Subsection G of Boeing TR 09–008, dated March 2008, to Section 9, ''Airworthiness Limitations (AWLs) and Certification Maintenance Requirements (CMRs),'' of the Boeing 757 MPD Document, D622N001–9, also may be incorporated into the AWLs section of the ICA.

(h) Retained Initial Inspections and Repair, With Revised Service Information

(1) This paragraph restates the requirements of paragraph (h) of AD 2012–12–15, Amendment 39–17095 (77 FR 42964, July 23, 2012), with a revised paragraph reference. Do the inspections specified in table 1 to paragraph (h)(1) of this AD at the compliance time identified in table 1 to paragraph (h)(1) of this AD, and repair any discrepancy, in accordance with Subsection G of Boeing TR 09–008, dated March 2008, to Section 9, ''Airworthiness Limitations (AWLs) and Certification Maintenance Requirements (CMRs),'' of the Boeing 757 MPD Document, D622N001–9; Section 9, ''Airworthiness Limitations (AWLs) and Certification Maintenance Requirements (CMRs),'' of the Boeing 757 MPD Document, D622N001–9, Revision December 2008; Boeing TR 09–010, dated July 2010, to Section 9, ''Airworthiness Limitations (AWLs) and Certification Maintenance Requirements (CMRs),'' of Boeing 757 MPD Document, D622N001–9; or Boeing TR 09–011, dated November 2010, to Section 9, ''Airworthiness Limitations (AWLs) and Certification Maintenance Requirements (CMRs),'' of the Boeing 757 MPD Document, D622N001–9; except as required by paragraph (l) of this AD. The repair must be done before further flight. Accomplishing the inspections identified in table 1 to paragraph (h)(1) of this AD as part of a maintenance program before the applicable compliance time specified in table 1 to paragraph (h)(1) of this AD constitutes compliance with the requirements of this paragraph. As of 6 months after August 27, 2012 (the effective date of AD 2012–12–15), only Section 9,

''Airworthiness Limitations (AWLs) and Certification Maintenance Requirements (CMRs),'' of the Boeing 757 MPD Document, D622N001–9, Revision December 2008; Boeing TR 09–010, dated July 2010, to Section 9, ''Airworthiness Limitations (AWLs) and Certification Maintenance Requirements (CMRs),'' of Boeing 757 MPD Document, D622N001–9; or Boeing TR 09–011, dated November 2010, to Section 9, ''Airworthiness Limitations (AWLs) and Certification Maintenance Requirements (CMRs),'' of the Boeing 757 MPD Document, D622N001–9; may be used.

TABLE 1 TO PARAGRAPH (H)(1) OF THIS AD—INITIAL INSPECTIONS

AWL No.	Description	Compliance time (whichever occurs later)	
		Threshold	Grace period
(i) 28–AWL–01	A detailed inspection of external wires over the center fuel tank for damaged clamps, wire chafing, and wire bundles in contact with the surface of the center fuel tank.	Within 120 months since the date of issuance of the original standard airworthiness certificate or the date of issuance of the original export certificate of airworthiness.	Within 72 months after June 12, 2008 (the effective date of AD 2008–10–11, Amendment 39-15517 (73 FR 25974, May 8, 2008)).
(ii) 28–AWL–03	A special detailed inspection of the lightning shield to ground termination on the out-of-tank fuel quantity indicating system to verify functional integrity.	Within 120 months since the date of issuance of the original standard airworthiness certificate or the date of issuance of the original export certificate of airworthiness.	Within 24 months after June 12, 2008 (the effective date of AD 2008–10–11, Amendment 39-15517 (73 FR 25974, May 8, 2008)).
(iii) 28-AWL-14	A special detailed inspection of the fault current bond of the fueling shutoff valve actuator of the center wing tank to verify electrical bond.	Within 120 months since the date of issuance of the original standard airworthiness certificate or the date of issuance of the original export certificate of airworthiness.	Within 60 months after June 12, 2008 (the effective date of AD 2008–10–11, Amendment 39-15517 (73 FR 25974, May 8, 2008)).

(2) For the purposes of this AD, a detailed inspection is: ''An intensive examination of a specific item, installation, or assembly to detect damage, failure, or irregularity. Available lighting is normally supplemented with a direct source of good lighting at an intensity deemed appropriate. Inspection aids such as mirror, magnifying lenses, etc., may be necessary. Surface cleaning and elaborate procedures may be required.''

(3) For the purposes of this AD, a special detailed inspection is: ''An intensive examination of a specific item, installation, or assembly to detect damage, failure, or irregularity. The examination is likely to make extensive use of specialized inspection techniques and/or equipment. Intricate cleaning and substantial access or disassembly procedure may be required.''

(i) No Alternative Inspections, Inspection Intervals, or CDCCLs for Paragraphs (g) and (h) of This AD

This paragraph restates the requirements of paragraph (i) of AD 2012–12–15, Amendment 39–17095 (77 FR 42964, July 23, 2012). Except as required by paragraph (k) of this AD, after accomplishing the actions specified in paragraphs (g) and (h) of this AD, no alternative inspections, inspection intervals, or CDCCLs may be used unless the inspections, intervals, or CDCCLs are approved as an AMOC in accordance with the procedures specified in paragraph (s) of this AD.

(j) Terminating Action for AD 2008–06–03, Amendment 39–15415 (73 FR 13081, March 12, 2008)

This paragraph restates the requirements of paragraph (j) of AD 2012–12–15, Amendment 39–17095 (77 FR 42964, July 23, 2012). Incorporating AWLs No. 28–AWL–23, No. 28–AWL–24, and No. 28–AWL–25 into the AWLs section of the ICA in accordance with paragraph (g)(3) of this AD or the maintenance program in accordance with paragraph (k)(3) of this AD terminates the action required by paragraph (h)(2) of AD 2008–06–03, Amendment 39–15415 (73 FR 13081, March 12, 2008).

(k) Additional Revision of Airworthiness Limitations (AWLs) Section

This paragraph restates the requirements of paragraph (k) of AD 2012–12–15, Amendment 39–17095 (77 FR 42964, July 23, 2012). Within 6 months after August 27, 2012 (the effective date of AD 2012–12–15), revise the maintenance program by incorporating the information in the subsections specified in paragraphs (k)(1) through (k)(3) of this AD. Accomplishing the actions required by this paragraph terminates the requirements of paragraph (g) of this AD.

(1) Subsection E, ''AIRWORTHINESS LIMITATIONS—FUEL SYSTEMS,'' of Section 9, ''Airworthiness Limitations (AWLs) and Certification Maintenance Requirements (CMRs),'' of the Boeing 757 MPD Document, D622N001–9, Revision December 2008; Boeing TR 09–010, dated July 2010, to Section 9, ''Airworthiness Limitations (AWLs) and Certification Maintenance Requirements (CMRs),'' of Boeing 757 MPD Document, D622N001–9; or Boeing TR 09–011, dated November 2010, to Section 9, ''Airworthiness Limitations (AWLs) and Certification Maintenance Requirements (CMRs),'' of the Boeing 757 MPD Document, D622N001–9.

(2) Subsection F, ''PAGE FORMAT: FUEL SYSTEMS AIRWORTHINESS LIMITATIONS,'' of Section 9, ''Airworthiness Limitations (AWLs) and Certification Maintenance Requirements (CMRs),'' of the Boeing 757 MPD Document, D622N001–9, Revision December 2008; Boeing TR 09–010, dated July 2010, to Section 9, ''Airworthiness Limitations (AWLs) and Certification Maintenance Requirements (CMRs),'' of Boeing 757 MPD Document, D622N001–9; or Boeing TR 09–011, dated November 2010, to Section 9, ''Airworthiness Limitations (AWLs) and Certification Maintenance Requirements (CMRs),'' of the Boeing 757 MPD Document, D622N001–9.

(3) Subsection G, ''AIRWORTHINESS LIMITATIONS—FUEL SYSTEM AWLs,'' AWLs No. 28–AWL–01 through No. 28–AWL–26 inclusive, of Section 9, ''Airworthiness Limitations (AWLs) and Certification Maintenance Requirements (CMRs),'' of the Boeing 757 MPD Document, D622N001–9, Revision December 2008; Boeing TR 09–010, dated July 2010, to Section 9, ''Airworthiness Limitations (AWLs) and Certification Maintenance Requirements (CMRs),'' of Boeing 757 MPD Document, D622N001–9; or Boeing TR 09–011, dated November 2010, to Section 9, ''Airworthiness Limitations (AWLs) and Certification Maintenance Requirements (CMRs),'' of the Boeing 757 MPD Document, D622N001–9.

(4) Notwithstanding any other maintenance or operational requirements, components that have been identified as airworthy or installed on the affected airplanes before the revision of the maintenance program, as required by paragraph (g) of this AD, do not need to be reworked in accordance with the CDCCLs. However, once the maintenance program has been revised, future maintenance actions on these components must be done in accordance with the CDCCLs.

(l) Compliance Time for AWL No. 28–AWL–03

This paragraph restates the requirements of paragraph (l) of AD 2012–12–15, Amendment 39–17095 (77 FR 42964, July 23, 2012), with a revised paragraph reference. The initial compliance time for AWL No. 28–AWL–03 of Section 9, ''Airworthiness Limitations (AWLs) and Certification Maintenance Requirements (CMRs),'' of the Boeing 757

MPD Document, D622N001–9, Revision December 2008; Boeing TR 09–010, dated July 2010, to Section 9, ''Airworthiness Limitations (AWLs) and Certification Maintenance Requirements (CMRs),'' of Boeing 757 MPD Document, D622N001–9; or Boeing TR 09–011, dated November 2010, to Section 9, ''Airworthiness Limitations (AWLs) and Certification Maintenance Requirements (CMRs),'' of the Boeing 757 MPD Document, D622N001–9; is within 120 months since the date of issuance of the original standard airworthiness certificate or the date of issuance of the original export certificate of airworthiness, or within 24 months after August 27, 2012 (the effective date of AD 2012–12–15), whichever occurs later. Accomplishing the actions required by this paragraph terminates the requirements of paragraph (h)(1)(ii) of this AD.

(m) Initial Inspection Compliance Times for AWL No. 28–AWL–25

This paragraph restates the requirements of paragraph (m) of AD 2012–12–15, Amendment 39–17095 (77 FR 42964, July 23, 2012). The initial inspection compliance time for AWL No. 28–AWL–25 of Section 9, ''Airworthiness Limitations (AWLs) and Certification Maintenance Requirements (CMRs),'' of the Boeing 757 MPD Document, D622N001–9, Revision December 2008; Boeing TR 09–010, dated July 2010, to Section 9, ''Airworthiness Limitations (AWLs) and Certification Maintenance Requirements (CMRs),'' of Boeing 757 MPD Document, D622N001–9; or Boeing TR 09–011, dated November 2010, to Section 9, ''Airworthiness Limitations (AWLs) and Certification Maintenance Requirements (CMRs),'' of the Boeing 757 MPD Document, D622N001–9; is within 72 months after accomplishing the actions specified in Boeing Service Bulletin 757–28A0088 (which is not incorporated by reference in this AD).

(n) Initial Inspection Compliance Times for AWL No. 28–AWL–26

This paragraph restates the requirements of paragraph (n) of AD 2012–12–15, Amendment 39–17095 (77 FR 42964, July 23, 2012). The initial inspection compliance time for AWL No. 28–AWL–26 of Section 9, ''Airworthiness Limitations (AWLs) and Certification Maintenance Requirements (CMRs),'' of the Boeing 757 MPD Document, D622N001–9, Revision December 2008; Boeing TR 09–010, dated July 2010, to Section 9, ''Airworthiness Limitations (AWLs) and Certification Maintenance Requirements (CMRs),'' of Boeing 757 MPD Document, D622N001–9; or Boeing TR 09–011, dated November 2010, to Section 9, ''Airworthiness Limitations (AWLs) and Certification Maintenance Requirements (CMRs),'' of the Boeing 757 MPD Document, D622N001–9; is within 12 months after accomplishing the actions specified in Boeing Service Bulletin 757–28A0105 (which is not incorporated by reference in this AD).

(o) No Alternative Inspections, Inspection Intervals, or CDCCLs After the Actions Required by Paragraph (k) of This AD Are Done

This paragraph restates the requirements of paragraph (o) of AD 2012–12–15, Amendment 39–17095 (77 FR 42964, July 23, 2012). After accomplishing the actions specified in paragraph (k) of this AD, no alternative inspections, inspection intervals, or CDCCLs may be used unless the inspections, intervals, or CDCCLs are approved as an AMOC in accordance with the procedures specified in paragraph (s) of this AD.

(p) Terminating Action for AD 2008–11–07, Amendment 39–15529 (73 FR 30755, May 29, 2008)

This paragraph restates the requirements of paragraph (p) of AD 2012–12–15, Amendment 39–17095 (77 FR 42964, July 23, 2012). Incorporating AWLs No. 28–AWL–20 and No. 28–AWL–26 into the maintenance program in accordance with paragraph (k)(3) of this AD terminates the actions required by paragraphs (j) and (m) of AD 2008–11–07, Amendment 39–15529 (73 FR 30755, May 29, 2008).

(q) Terminating Action for AD 2009–06–20, Amendment 39–15857 (74 FR 12236, March 24, 2009)

This paragraph restates the requirements of paragraph (q) of AD 2012–12–15, Amendment 39–17095 (77 FR 42964, July 23, 2012). Incorporating AWL No. 28–AWL–22 into the maintenance program in accordance with paragraph (k)(3) of this AD terminates the actions required by paragraph (h) of AD 2009–06–20, Amendment 39–15857 (74 FR 12236, March 24, 2009).

(r) Credit for Previous Actions

This paragraph restates the credit given for previous actions specified in paragraph (r) of AD 2012–12–15, Amendment 39–17095 (77 FR 42964, July 23, 2012).

(1) This paragraph provides credit for actions required by paragraphs (g) and (h) of this AD, if those actions were done before June 12, 2008 (the effective date of AD 2008–10–11, Amendment 39–15517 (73 FR 25974, May 8, 2008)), using Section 9, ''Airworthiness Limitations (AWLs) and Certification Maintenance Requirements (CMRs),'' of the Boeing 757 MPD Document, D622N001–9, Revision March 2006; Revision October 2006; Revision January 2007; or Revision November 2007 (which are not incorporated by reference in this AD).

(2) This paragraph provides credit for actions required by paragraphs (m) and (n) of this AD, if those actions were done before August 27, 2012 (the effective date of AD 2012–12–15, Amendment 39–17095 (77 FR 42964, July 23, 2012)), using Boeing TR 09–008, dated March 2008, to Section 9, ''Airworthiness Limitations (AWLs) and Certification Maintenance Requirements (CMRs),'' of the Boeing 757 MPD Document, D622N001–9 (which was incorporated by reference in AD 2008–10–11, Amendment 39–15517 (73 FR 25974, May 8, 2008)).

(s) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Seattle Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ACO, send it to the attention of the person identified in the Related Information section of this AD. Information may be emailed to: *9-ANM-Seattle-ACO-AMOC-Requests@faa.gov.*

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(3) AMOCs approved previously for AD 2008–10–11, Amendment 39–15517 (73 FR 25974, May 8, 2008); or for 2012–12–15, Amendment 39–17095 (77 FR 42964, July 23, 2012); are approved as AMOCs for the corresponding provisions of this AD.

(t) Related Information

(1) For more information about this AD, contact Kevin Nguyen, Aerospace Engineer, Propulsion Branch, ANM–140S, FAA, Seattle ACO, 1601 Lind Avenue SW., Renton, Washington 98057–3356; phone: 425–917–6501; fax: 425–917–6590; email: *kevin.nguyen@faa.gov.*

(2) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, WA 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; Internet *https://www.myboeingfleet.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Issued in Renton, Washington, on January 17, 2013.

Michael Kaszycki,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2013–01953 Filed 1–29–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–1320; Directorate Identifier 2012–NM–095–AD]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for certain The Boeing Company Model 767 airplanes. This proposed AD was prompted by reports of cracks and heat damage on pivot joint components found during main landing gear (MLG)

overhaul. For certain airplanes, this proposed AD would require repetitive inspections of the MLG pivots, truck beam bushings, and inner cylinder bushings. For all airplanes, this proposed AD would require a maintenance program revision, one-time inspections of the MLG truck beam, and related investigative and corrective actions (including configuration changes) if necessary; accomplishment of these actions would terminate the repetitive inspections. We are proposing this AD to detect and correct heat damage and cracks in the pivot pin, truck beam lugs, and inner cylinder lugs, which could result in fracture of the pivot joint components and consequent MLG collapse.

DATES: We must receive comments on this proposed AD by March 18, 2013.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, WA 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; Internet *https://www.myboeingfleet.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov*; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received and other information. The street address for the Docket Office (phone: 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Berhane Alazar, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office (ACO), 1601 Lind Avenue SW., Renton, Washington 98057–3356; phone: 425–917–6577; fax: 425–917–6590; email: *berhane.alazar@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2012–1320; Directorate Identifier 2012–NM–095–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov*, including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

During overhaul of the MLG, pivot joint components have been found with cracks or heat damage. There have been 11 such findings on Model 767–400ER series airplanes, and 42 findings on Model 767–200, –300, and –300F series airplanes. The damage was found on Model 767–400ER series airplanes as early as 8 years from delivery, and on Model 767–200, –300, and –300F series airplanes as early as 7 years from delivery. Heat damage and cracks were found at the pivot joint location, caused by the truck pitching motion during normal airplane operations. High levels of heat in the pivot joint can result in damage and cracks in the pivot pin, truck beam lugs, and inner cylinder lugs. These conditions, if not corrected, could result in fracture of the pivot joint components and consequent MLG collapse.

Relevant Service Information

We reviewed Boeing Service Bulletin 767–32A0227, Revision 1, dated September 13, 2012. For information on the procedures and compliance times, see this service information at *http://www.regulations.gov* by searching for Docket No. FAA–2012–1320.

FAA's Determination

We are proposing this AD because we evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

Proposed AD Requirements

This proposed AD would require accomplishing the actions specified in the service information described previously.

The phrase ''related investigative actions'' might be used in this proposed AD. ''Related investigative actions'' are follow-on actions that (1) are related to the primary actions, and (2) further investigate the nature of any condition found. Related investigative actions in an AD could include, for example, inspections.

In addition, the phrase ''corrective actions'' might be used in this proposed AD. ''Corrective actions'' are actions that correct or address any condition found. Corrective actions in an AD could include, for example, repairs.

Costs of Compliance

We estimate that this proposed AD affects 420 airplanes of U.S. registry. We estimate the following costs to comply with this proposed AD:

Action	Labor cost	Parts cost	Cost per product	Number of affected U.S. airplanes	Cost on U.S. operators
Maintenance program revision	1 work-hour × $85 per hour = $85	$0	$85	420	$35,700
Repetitive inspections	59 work-hours × $85 per hour = $5,015 per inspection cycle.	0	5,015	38	190,570
One-time inspections	147 work-hours × $85 per hour = $12,495.	0	12,495	420	5,247,900

We have received no definitive data that would enable us to provide cost estimates for the on-condition actions (including related investigative actions, configuration changes, and corrective actions) specified in this proposed AD.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. Subtitle VII: Aviation Programs, describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701: ''General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this proposed regulation:

(1) Is not a ''significant regulatory action'' under Executive Order 12866,

(2) Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979),

(3) Will not affect intrastate aviation in Alaska, and

(4) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new airworthiness directive (AD):

The Boeing Company: Docket No. FAA–2012–1320; Directorate Identifier 2012–NM–095–AD.

(a) Comments Due Date

We must receive comments by March 18, 2013.

(b) Affected ADs

None.

(c) Applicability

This AD applies to The Boeing Company Model 767–200, –300, –300F, and –400ER series airplanes, certificated in any category, as identified in Boeing Service Bulletin 767–32A0227, Revision 1, dated September 13, 2012.

(d) Subject

Joint Aircraft System Component (JASC)/Air Transport Association (ATA) of America Code 32, Landing Gear.

(e) Unsafe Condition

This AD was prompted by reports of cracks and heat damage found on pivot joint components found during main landing gear (MLG) overhaul. We are issuing this AD to detect and correct heat damage and cracks in the pivot pin, truck beam lugs, and inner cylinder lugs, which could result in fracture of the pivot joint components and consequent MLG collapse.

(f) Compliance

Comply with this AD within the compliance times specified, unless already done.

(g) Maintenance Program Revision

At the applicable times specified in paragraph 1.E., ''Compliance,'' of Boeing Service Bulletin 767–32A0227, Revision 1, dated September 13, 2012, except as provided by paragraph (j) of this AD, revise the maintenance program to incorporate the specified maintenance review board (MRB) item, in accordance with Part 1 of the Accomplishment Instructions of Boeing Service Bulletin 767–32A0227, Revision 1, dated September 13, 2012.

(h) Repetitive Pivot Pin and Bushing Inspections

For airplanes identified as Group 1 in Boeing Service Bulletin 767–32A0227, Revision 1, dated September 13, 2012: At the applicable times specified in paragraph 1.E., ''Compliance,'' of Boeing Service Bulletin 767–32A0227, Revision 1, dated September 13, 2012, except as provided by paragraph (j) of this AD, do detailed and etch inspections to detect discrepancies (including bronze transfer, heat discoloration, darkened streaks, thermal spray coating distress, wear, cracking, smearing of material into the lubrication grooves, or grease not present in the bushing inner diameter) of the MLG pivots, truck beam bushings, and inner cylinder bushings, and do all applicable corrective actions, in accordance with the Accomplishment Instructions of Boeing Service Bulletin 767–32A0227, Revision 1, dated September 13, 2012. Do all applicable corrective actions before further flight. Repeat the inspections thereafter at the applicable times specified in paragraph 1.E., ''Compliance,'' of Boeing Service Bulletin 767–32A0227, Revision 1, dated September 13, 2012.

(i) MLG Truck Beam Inspections

For all airplanes: At the applicable time specified in paragraph 1.E., ''Compliance,'' of Boeing Service Bulletin 767–32A0227, Revision 1, dated September 13, 2012, except as provided by paragraph (j) of this AD, inspect the MLG truck beam, using a detailed inspection, etch inspection, and fluorescent penetrant inspection (FPI), as applicable, to detect discrepancies (including distress, corrosion, and cracking), and do all applicable related investigative and corrective actions (including configuration changes), in accordance with the Accomplishment Instructions of Boeing Service Bulletin 767–32A0227, Revision 1, dated September 13, 2012. Do all applicable related investigative and corrective actions before further flight. Boeing Service Bulletin 767–32A0227, Revision 1, dated September 13, 2012, provides options for accomplishing certain corrective actions.

(j) Service Information Exception

Where Boeing Service Bulletin 767–32A0227, Revision 1, dated September 13, 2012, specifies a compliance time ''after the original issue date of this service bulletin,'' this AD requires compliance within the specified compliance time after the effective date of this AD.

(k) Terminating Action

(1) Accomplishment of the actions required by paragraphs (g) and (i) of this AD terminates the requirements of paragraph (h) of this AD.

(2) Overhaul of the MLG and installation of truck beam and inner cylinder bushings having applicable part numbers identified in Appendix ''B'' of Boeing Service Bulletin 767–32A0227, Revision 1, dated September 13, 2012, terminate the requirements of paragraphs (h) and (i) of this AD, if the actions are done using a method approved in accordance with the procedures specified in paragraph (n) of this AD.

(l) No Alternative Actions or Intervals

After accomplishing the revision required by paragraph (g) of this AD, no alternative actions (e.g., inspections) or intervals may be used unless the actions or intervals are approved as an alternative method of compliance (AMOC) in accordance with the procedures specified in paragraph (n) of this AD.

(m) Credit for Previous Actions

This paragraph provides credit for the actions specified in paragraphs (g), (h), (i), and (k) of this AD, if those actions were performed before the effective date of this AD using Boeing Alert Service Bulletin 767–32A0227, dated April 25, 2012, which is not incorporated by reference in this AD.

(n) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Seattle Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ACO, send it to the attention of the person identified in the Related Information section of this AD. Information may be emailed to *9-ANM-Seattle-ACO-AMOC-Requests@faa.gov.*

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(3) An AMOC that provides an acceptable level of safety may be used for any repair required by this AD if it is approved by the Boeing Commercial Airplanes Organization Designation Authorization (ODA) that has been authorized by the Manager, Seattle ACO, to make those findings. For a repair method to be approved, the repair must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

(o) Related Information

(1) For more information about this AD, contact Berhane Alazar, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office (ACO), 1601 Lind Avenue SW., Renton, Washington 98057–3356; phone: 425–917–6577; fax: 425–917–6590; email: *berhane.alazar@faa.gov.*

(2) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, Washington 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; Internet *https://www.myboeingfleet.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

Issued in Renton, Washington, on January 23, 2013.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2013–01972 Filed 1–29–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–0614; Directorate Identifier 2007–NM–351–AD]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Supplemental notice of proposed rulemaking (NPRM); reopening of comment period.

SUMMARY: We are revising an earlier proposed airworthiness directive (AD) for all The Boeing Company Model 737–300, –400, and –500 series airplanes. That NPRM proposed to require repetitive operational tests of the engine fuel suction feed of the fuel system, and other related testing if necessary. That NPRM was prompted by reports of two in-service occurrences on Model 737–400 airplanes of total loss of boost pump pressure of the fuel feed system, followed by loss of fuel system suction feed capability on one engine, and in-flight shutdown of the engine. This action revises that NPRM by proposing to require repetitive operational tests, and corrective actions if necessary. We are proposing this supplemental NPRM to detect and correct loss of the engine fuel suction feed capability of the fuel system, which, in the event of total loss of the fuel boost pumps, could result in dual engine flameout, inability to restart the engines, and consequent forced landing of the airplane. Since these actions impose an additional burden over that proposed in the previous NPRM, we are reopening the comment period to allow the public the chance to comment on these proposed changes.

DATES: We must receive comments on this supplemental NPRM by March 18, 2013.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, WA 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; Internet *https://www.myboeingfleet.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov*; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (phone: 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Sue Lucier, Aerospace Engineer, Propulsion Branch, ANM–140S, 1601 Lind Avenue SW., Renton, Washington 98057–3356; phone: 425–917–6438; fax: 425–917–6590; email: *suzanne.lucier@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2008–0614; Directorate Identifier 2007–NM–351–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov*, including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

We issued an NPRM to amend 14 CFR part 39 to include an AD that would apply to all The Boeing Company Model 737–300, –400, and –500 series airplanes. That NPRM published in the **Federal Register** on June 6, 2008 (73 FR 32258). That NPRM proposed to require repetitive operational tests of the engine fuel suction feed of the fuel system, and other related testing if necessary. That NPRM proposed that those actions be done according to a method approved by the FAA.

Actions Since Previous NPRM (73 FR 32258, June 6, 2008) Was Issued

Since we issued the previous NPRM (73 FR 32258, June 6, 2008), we have received comments from operators indicating a high level of difficulty performing the actions in the previous NPRM during maintenance operations.

Relevant Service Information

We reviewed Boeing Alert Service Bulletin 737–28A1307, dated May 14, 2012. This service information describes procedures for repetitive operational tests of the engine fuel suction feed of the fuel system, and corrective actions if necessary. The corrective actions include isolating the cause of any leakage and repairing the leak.

Comments

We gave the public the opportunity to comment on the previous NPRM (73 FR 32258, June 6, 2008). The following presents the comments received on the previous NPRM and the FAA's response to each comment.

Requests To Revise Compliance Time

Boeing asked that we revise the compliance time in paragraph (f) of the previous NPRM (73 FR 32258, June 6, 2008) (referred to as paragraph (g) in this supplemental NPRM) to include a calendar time of 3 years for the low-utilization airplanes. Boeing stated that low-utilization airplanes may not meet the 7,500-flight-hour threshold for several years.

We do not agree with the 3-year calendar time. As specified previously, Boeing has issued Alert Service Bulletin 737–28A1307, dated May 14, 2012, which specifies a compliance time of 24 months. Therefore, we have revised paragraph (g) of this supplemental NPRM to include doing the initial test within 7,500 flight hours or 24 months, whichever occurs first. We have also included a repetitive interval of 7,500 flight hours or 24 months, whichever occurs first.

Continental Airlines (CAL), British Airways (BA), KLM Royal Dutch Airlines, and Lufthansa Basis (LBA) asked that we extend the repetitive operational test interval required by paragraph (f) of the previous NPRM (73 FR 32258, June 6, 2008). CAL stated that a re-evaluation of the proposed repetitive interval limit after doing the initial inspection should be done, since its service history has revealed no reported engine flameout events or related operational discrepancies. CAL asked that the repetitive interval be extended to repeating the inspection during a normal maintenance 2C-check or within 8,000 flight cycles, whichever occurs first. LBA stated that the repetitive interval of 7,500 flight hours does not match maintenance planning data (MPD) or maintenance review board (MRB) intervals of every 1 C-check and 4,000 flight hours, and asked for clarification and revision. KLM stated that if an airplane does not pass the operational test, a tank entry is required, which has an impact on the downtime requirements for C-checks. KLM asked that the initial compliance time be extended from within 7,500 flight hours to within 8,000 flight hours or at the next 2 C-check, with the same interval for the repetitive tests. BA stated that the test is already covered in the MPD task with a compliance time of 4,000 flight hours.

We do not agree with the requests to revise the compliance time by extending the flight-hour compliance time or adding maintenance check intervals. The compliance time in the MPD is not required by this supplemental NPRM because we have determined that the 7,500-flight-hour or 24-month interval, whichever occurs first, addresses the identified unsafe condition. In developing an appropriate compliance time for the actions specified in paragraph (g) of this supplemental NPRM (paragraph (f) of the previous NPRM (73 FR 32258, June 6, 2008)), we considered the safety implications and normal maintenance schedules for the timely accomplishment of the specified actions. We have determined that the proposed compliance time will ensure an acceptable level of safety and allow the actions to be done during scheduled maintenance intervals for most affected operators.

However, affected operators may request approval of an alternative method of compliance (AMOC) for an extension of the repetitive operational test interval under the provisions of paragraph (h) of this supplemental NPRM by submitting data substantiating that the change would provide an acceptable level of safety. We have not changed the supplemental NPRM in this regard.

Request To Include Corrective Action

Boeing asked that the related testing language specified in the ''Summary,'' ''FAA's Conclusions,'' and ''FAA's Determination and Requirements of this Proposed AD'' sections of the previous NPRM (73 FR 32258, June 6, 2008) be changed. Boeing stated that it should specify correcting discrepancies before further flight if the engine fails the operational test.

We agree with the request. We have revised the language describing the proposed actions as appropriate throughout this supplemental NPRM. We also have changed paragraph (g) of this supplemental NPRM to specify doing all applicable corrective actions before further flight in accordance with Boeing Alert Service Bulletin 737–28A1307, dated May 14, 2012.

Request To Clarify if Engine Fuel Suction Feed Test Is Allowed in Lieu of the Operational Test

KLM asked that we clarify if the fuel feed manifold air pressure leak check procedure specified in airplane maintenance manual (AMM) 28–22–15 is an alternative to performing the operational test. KLM added that this alternative test is allowed by AMM 28–22–00.

We agree to provide clarification. The manifold leak test (Task 28–22–00–710–801) is not equivalent to the operational test (Task 28–22–00–710–802) for the purposes of this proposed action. The positive internal fuel line pressure applied during the manifold test does not simulate the same conditions encountered during fuel suction feed (i.e., vacuum), and might mask a failure. Therefore, we have not changed the supplemental NPRM in this regard.

Requests To Add AMM Task Card and MPD Tasks or Remove Existing Reference

BA, LBA, and Air Nippon (ANK) asked that AMM MSG3 Task Card be added to paragraph (f) of the previous NPRM (73 FR 32258, June 6, 2008) as a method of compliance for performing the operational test. BA also asked that the NPRM reference the MPD tasks associated with the check. The commenters stated that the task card is equivalent to AMM Task Card B28–22–00–2B, which is specified in paragraph (f) of the previous NPRM. Boeing asked that the NPRM only include AMM Task Card B28–22–00–2B in paragraph (f) of the previous NPRM, and remove reference to AMM 28–22–00. Boeing stated that the fewer references, the less chance of errors.

We do not agree to add a reference to the task cards and MPD tasks, or to remove the reference to AMM 28–22–00. However, we have revised paragraph (g) of this supplemental NPRM to require accomplishing operational tests and applicable corrective actions in accordance with Boeing Alert Service Bulletin 737–28A1307, dated May 14, 2012.

Requests To Allow the Use of Later Revisions of the Maintenance Documents

Boeing asked that we allow using later revisions of the Boeing 737–300/400/500 Task Card B28–22–00–2B, dated July 12, 2006, because the task card date could be revised over time and would require frequent requests for AMOCs. BA asked that we allow for using the AMM and Boeing task cards having Revision July 12, 2006 or later.

We do not agree with the request. Allowing later revisions of service documents in an AD is not allowed by the Office of the Federal Register regulations for approving materials incorporated by reference. Affected operators may, however, request approval to use a later revision of referenced service information as an AMOC in accordance with paragraph (h) of this supplemental NPRM. We have not changed the supplemental NPRM in this regard.

Request To Include Warning Information

CAL suggested that the Boeing service manuals include a warning identification statement to alert maintenance personnel of the importance of regulatory compliance. CAL did not include any justification for this request.

We agree that a warning statement would serve as direct communication to maintenance personnel that there is an AD associated with certain maintenance actions, but do not find this additional measure necessary to adequately address the unsafe condition. We have made no change to the supplemental NPRM in this regard.

Change to Previous NPRM (73 FR 32258, June 6, 2008)

The Costs of Compliance section in the previous NPRM (73 FR 32258, June 6, 2008) has been changed to correct the number of U.S.-registered airplanes affected. The data source used in 2007, which specified a total of 669 airplanes of U.S. registry, did not provide an accurate count; therefore, we have used the current information available to determine that 827 airplanes of U.S. registry are affected by the actions in this supplemental NPRM.

We have clarified the unsafe condition identified in the previous NPRM (73 FR 32258, June 6, 2008) by specifying that the previous NPRM results from two in-service occurrences on Model 737–400 airplanes of total loss of boost pump pressure of the fuel feed system, followed by loss of fuel system suction feed capability on one engine, and in-flight shutdown of the engine.

FAA's Determination

We are proposing this supplemental NPRM because we evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design. Certain changes described above expand the scope of the previous NPRM (73 FR 32258, June 6, 2008). As a result, we have determined that it is necessary to reopen the comment period to provide additional opportunity for the public to comment on this supplemental NPRM.

Proposed Requirements of the Supplemental NPRM

This supplemental NPRM would revise the previous NPRM (73 FR 32258, June 6, 2008) by proposing to require repetitive operational tests of the engine fuel suction feed of the fuel system, and corrective actions if necessary.

Costs of Compliance

We estimate that this proposed AD would affect 827 airplanes of U.S. registry. We estimate the following costs to comply with this proposed AD:

Action	Labor cost	Cost per product	Cost on U.S. operators
Operational Test	Up to 12 work-hours × $85 per hour = $1,020 per engine, per test.	Up to $2,040	Up to $1,687,080.

We have received no definitive data that would enable us to provide a cost estimate for the on-condition actions specified in this proposed AD.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. ''Subtitle VII: Aviation Programs'' describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701: ''General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this proposed regulation:

(1) Is not a ''significant regulatory action'' under Executive Order 12866,

(2) Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979),

(3) Will not affect intrastate aviation in Alaska, and

(4) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new airworthiness directive (AD):

The Boeing Company: Docket No. FAA–2008–0614; Directorate Identifier 2007–NM–351–AD.

(a) Comments Due Date

We must receive comments by March 18, 2013.

(b) Affected ADs

None.

(c) Applicability

This AD applies to all The Boeing Company Model 737–300, –400, and –500 series airplanes, certificated in any category.

(d) Subject

Joint Aircraft System Component (JASC)/Air Transport Association (ATA) of America Code 2800, Aircraft Fuel System.

(e) Unsafe Condition

This AD was prompted by reports of two in-service occurrences on Model 737–400 airplanes of total loss of boost pump pressure of the fuel feed system, followed by loss of fuel system suction feed capability on one engine, and in-flight shutdown of the engine. We are issuing this AD to detect and correct loss of the engine fuel suction feed capability of the fuel system, which in the event of total loss of the fuel boost pumps could result in dual engine flameout, inability to restart the engines, and consequent forced landing of the airplane.

(f) Compliance

Comply with this AD within the compliance times specified, unless already done.

(g) Operational Test and Corrective Actions

Within 7,500 flight hours or 24 months after the effective date of this AD, whichever occurs first: Perform an operational test of the engine fuel suction feed of the fuel system, and do all applicable corrective actions, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 737–28A1307, dated May 14, 2012. Do all applicable corrective actions before further flight. Repeat the operational test thereafter at intervals not to exceed 7,500 flight hours or 24 months, whichever occurs first. Thereafter, except as provided in paragraph (h) of this AD, no alternative procedures or repetitive test intervals are allowed.

(h) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Seattle Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ACO, send it to the attention of the person identified in the Related Information section of this AD. Information may be emailed to: *9-ANM-Seattle-ACO-AMOC-Requests@faa.gov*.

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(i) Related Information

(1) For more information about this AD, contact Sue Lucier, Aerospace Engineer, Propulsion Branch, ANM–140S, 1601 Lind Avenue SW., Renton, Washington 98057–3356; phone: 425–917–6438; fax: 425–917–6590; email: *suzanne.lucier@faa.gov*.

(2) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, WA 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; Internet *https://www.myboeingfleet.com*. You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

Issued in Renton, Washington on January 18, 2013.

Michael Kaszycki,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2013–01954 Filed 1–29–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2013–0031; Airspace Docket No. 12–AWA–7]

RIN 2120–AA66

Proposed Amendment of Class C Airspace; Nashville International Airport, TN

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to modify the Nashville International Airport, TN, Class C airspace area by removing a cutout from the surface area that was put in place to accommodate operations around an airport that is now permanently closed. The FAA is proposing this action to return the Class C airspace area to the standard configuration and enable more efficient operations at the Nashville International Airport.

DATES: Comments must be received on or before April 1, 2013.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, M–30, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001; telephone: (202) 366–9826. You must identify FAA Docket No. FAA–2013–0031 and Airspace Docket No. 12–AWA–7, at the beginning of your comments. You may also submit comments through the Internet at *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Paul Gallant, Airspace Policy and ATC Procedures Group, Office of Airspace Services, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone: (202) 267–8783.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal.

Communications should identify both docket numbers (FAA Docket No. FAA–2013–0031 and Airspace Docket No. 12–AWA–7) and be submitted in triplicate to the Docket Management Facility (see **ADDRESSES** section for address and phone number). You may also submit comments through the Internet at *http://www.regulations.gov*.

Commenters wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket Nos. FAA–2013–0031 and Airspace Docket No. 12–AWA–7.'' The postcard will be date/time stamped and returned to the commenter.

All communications received on or before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this action may be changed in light of comments received. All comments submitted will be available for examination in the public docket both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRMs

An electronic copy of this document may be downloaded through the Internet at *http://www.regulations.gov*.

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Office (see **ADDRESSES** section for address and phone number) between 9:00 a.m. and 5.00 p.m., Monday through Friday, except Federal holidays. An informal docket may also be examined during normal business hours at the office of the Eastern Service Center, Federal Aviation Administration, Room 210, 1701 Columbia Ave., College Park, GA 30337.

Persons interested in being placed on a mailing list for future NPRMs should contact the FAA's Office of Rulemaking, (202) 267–9677, for a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

The Proposal

The FAA is proposing an amendment to Title 14, Code of Federal Regulations (14 CFR) part 71 to modify the Nashville International Airport Class C airspace area by removing a cutout from the Class C surface area that excluded the airspace within a 1.5 NM radius of the former Cornelia Fort Airpark from the Class C surface area. The exclusion was in place to solely accommodate operations at the Airpark, which was located about 4 NM north northwest of Nashville International Airport. The Airpark is now permanently closed and the property sold for non-aviation uses. Since the original purpose of the exclusion no longer exists, the FAA is proposing to remove the words " * * * excluding that airspace within a 1.5-mile radius of lat. 36°12′00″ N., long. 86°42′10″ W. (in the vicinity of Cornelia Fort Airpark) * * * " from the Class C airspace description. This would restore the Class C surface area to the standard configuration of a 5 NM radius around Nashville International Airport and would enhance the management of aircraft operations at the airport.

Also, a minor correction would be made to update the geographic coordinates of the Nashville International Airport to reflect the current information in the FAA's aeronautical database. This change would remove "lat. 36°07′31″ N., long. 86°40′35″ W.," and insert "lat. 36°07′28″ N., long. 86°40′42″ W." in its place.

Class C airspace areas are published in paragraph 4000 of FAA Order 7400.9W, dated August 8, 2012 and effective September 15, 2012, which is incorporated by reference in 14 CFR 71.1. The Class C airspace area modification proposed in this document would be published subsequently in the Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this proposed regulation: (1) Is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under Department of Transportation (DOT) Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this proposed rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority.

This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would modify terminal airspace as required to preserve the safe and efficient flow of air traffic in the Nashville, TN, area.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.9W, Airspace Designations and Reporting Points, dated August 8, 2012, and effective September 15, 2012, is amended as follows:

Paragraph 4000 Subpart C—Class C Airspace.

* * * * *

ASO TN C Nashville International Airport, TN [Amended]

Nashville International Airport, TN
(Lat. 36°07′28″ N., long. 86°40′42″ W.)

Boundaries

That airspace extending upward from the surface to and including 4,600 feet MSL within a 5-mile radius of the Nashville International Airport; and that airspace extending upward from 2,100 feet MSL to and including 4,600 feet MSL within a 10-mile radius of Nashville International Airport from the 018° bearing from the airport clockwise to the 198° bearing from the airport, and that airspace extending upward from 2,400 feet MSL to and including 4,600 feet MSL within a 10-mile radius of the airport from the 198° bearing from the airport clockwise to the 018° bearing from the airport.

Issued in Washington, DC, on January 17, 2013.

Gary A. Norek,

Manager, Airspace Policy and ATC Procedures Group.

[FR Doc. 2013–02053 Filed 1–29–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2012–0922; Airspace Docket No. 12–ASO–38]

Proposed Amendment of Class E Airspace; West Palm Beach, FL

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to amend Class E Airspace in the West

Palm Beach, FL area, as new Standard Instrument Approach Procedures (SIAPs) have been developed at Palm Beach County Park Airport. Airspace reconfiguration is necessary for the continued safety and management of instrument flight rules (IFR) operations within the West Palm Beach, FL airspace area. This action also would update the geographic coordinates of the airport.

DATES: Comments must be received on or before March 18, 2013.

ADDRESSES: Send comments on this rule to: U.S. Department of Transportation, Docket Operations, West Building Ground Floor, Room W12–140, 1200 New Jersey SE., Washington, DC 20590–0001; Telephone: 1–800–647–5527; Fax: 202–493–2251. You must identify the Docket Number FAA–2012–0922; Airspace Docket No. 12–ASO–38, at the beginning of your comments. You may also submit and review received comments through the Internet at *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: John Fornito, Operations Support Group, Eastern Service Center, Federal Aviation Administration, P.O. Box 20636, Atlanta, Georgia 30320; telephone (404) 305–6364.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to comment on this rule by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal.

Communications should identify both docket numbers (FAA Docket No. FAA–2012–0922; Airspace Docket No. 12–ASO–38) and be submitted in triplicate to the Docket Management System (see **ADDRESSES** section for address and phone number). You may also submit comments through the Internet at *http://www.regulations.gov*.

Persons wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed stamped postcard on which the following statement is made: ''Comments to Docket No. FAA–2012–0922; Airspace Docket No. 12–ASO–38.'' The postcard will be date/time stamped and returned to the commenter.

All communications received before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in light of the comments received. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRMs

An electronic copy of this document may be downloaded from and comments submitted through *http://www.regulations.gov*. Recently published rulemaking documents can also be accessed through the FAA's Web page at *http://www.faa.gov/airports_airtraffic/air_traffic/publications/airspace_amendments/*.

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Office (see the **ADDRESSES** section for address and phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal Holidays. An informal docket may also be examined during normal business hours at the office of the Eastern Service Center, Federal Aviation Administration, room 350, 1701 Columbia Avenue, College Park, Georgia 30337.

Persons interested in being placed on a mailing list for future NPRMs should contact the FAA's Office of Rulemaking, (202) 267–9677, to request a copy of Advisory circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

The Proposal

The FAA is considering an amendment to Title 14, Code of Federal Regulations (14 CFR) part 71 to amend Class E airspace extending upward from 700 feet above the surface in the West Palm Beach, FL area. New Standard Instrument Approach Procedures have been developed for Palm Beach County Park Airport. Airspace reconfiguration is necessary for the continued safety and management of IFR operations within the West Palm Beach, FL, airspace area. The geographic coordinates for Palm Beach County Park Airport also would be adjusted to coincide with the FAAs aeronautical database.

Class E airspace designations are published in Paragraph 6005 of FAA order 7400.9W, dated August 8, 2012, and effective September 15, 2012, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document will be published subsequently in the Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore, (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this proposed rule, when promulgated, would not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This proposed rulemaking is promulgated under the authority described in Subtitle VII, Part, A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This proposed regulation is within the scope of that authority as it would amend Class E airspace in the West Palm Beach, FL, area.

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1E, ''Environmental Impacts: Policies and Procedures'' prior to any FAA final regulatory action.

Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (Air).

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9W, Airspace Designations and Reporting Points, dated August 8, 2012, effective September 15, 2012, is amended as follows:

Paragraph 6005 Class E Airspace Areas Extending Upward From 700 Feet or More Above the Surface of the Earth.

* * * * *

ASO FL E5 West Palm Beach, FL [Amended]

West Palm Beach, Palm Beach International Airport, FL
(Lat. 26°40′59″ N., long. 80°5′44″ W.)
Palm Beach County Park Airport
(Lat. 26°35′35″ N., long. 80°5′6″ W.)

That airspace extending upward from 700 feet above the surface within a 10-mile radius of Palm Beach International Airport, and within a 6.7-mile radius of Palm Beach County Park Airport.

Issued in College Park, Georgia, on January 18, 2012.

Barry A. Knight,

Manager, Operations Support Group, Eastern Service Center, Air Traffic Organization.

[FR Doc. 2013–02050 Filed 1–29–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2012–0831; Airspace Docket No. 12–AEA–13]

Proposed Amendment of Class E Airspace; Kingston, NY

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to amend Class E Airspace at Kingston, NY, creating controlled airspace to accommodate new Standard Instrument Approach Procedures at Kingston-Ulster Airport. This action would enhance the safety and airspace management of Instrument Flight Rules (IFR) operations at the airport. This action also would update the airport's geographic coordinates.

DATES: Comments must be received on or before March 18, 2013. The Director of the Federal Register approves this incorporation by reference action under title 1, Code of Federal Regulations, part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

ADDRESSES: Send comments on this rule to: U.S. Department of Transportation, Docket Operations, West Building Ground Floor, Room W12–140, 1200 New Jersey SE., Washington, DC 20590–0001; Telephone: 1–800–647–5527; Fax: 202–493–2251. You must identify the Docket Number FAA–2012–0831; Airspace Docket No. 12–AEA–13 at the beginning of your comments. You may also submit and review received comments through the Internet at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: John Fornito, Operations Support Group, Eastern Service Center, Federal Aviation Administration, P.O. Box 20636, Atlanta, Georgia 30320; telephone (404) 305–6364.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to comment on this rule by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal.

Communications should identify both docket numbers (FAA Docket No. FAA–2011–0831; Airspace Docket No. 12–AEA–13) and be submitted in triplicate to the Docket Management System (see **ADDRESSES** section for address and phone number). You may also submit comments through the Internet at *http://www.regulations.gov*.

Persons wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed stamped postcard on which the following statement is made: ''Comments to Docket No. FAA–2012–0831; Airspace Docket No. 12–AEA–13.'' The postcard will be date/time stamped and returned to the commenter.

All communications received before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in light of the comments received. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRMs

An electronic copy of this document may be downloaded from and comments submitted through *http://www.regulations.gov*. Recently published rulemaking documents can also be accessed through the FAA's Web page at *http://www.faa.gov/airports_airtraffic/air_traffic/publications/airspace_amendments/*.

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Office (see the **ADDRESSES** section for address and phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal Holidays. An informal docket may also be examined during normal business hours at the office of the Eastern Service Center, Federal Aviation Administration, Room 210, 1701 Columbia Avenue, College Park, Georgia 30337.

Persons interested in being placed on a mailing list for future NPRM's should contact the FAA's Office of Rulemaking, (202) 267–9677, to request a copy of Advisory circular No. 11–2A, Notice of Proposed Rulemaking distribution System, which describes the application procedure.

The Proposal

The FAA is considering an amendment to Title 14, Code of Federal Regulations (14 CFR) part 71 to amend Class E airspace at Kingston, NY providing the controlled airspace required to support the new RNAV GPS standard instrument approach procedures for Kingston-Ulster Airport. Controlled airspace extending upward from 700 feet above the surface would be created for the safety and management of IFR operations at the airport. The geographic coordinates for Kingston-Ulster Airport also would be adjusted to coincide with the FAAs aeronautical database.

Class E airspace designations are published in Paragraph 6005 of FAA Order 7400.9W, dated August 8, 2012, and effective September 15, 2012, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document will be published subsequently in the Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore, (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal.

Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this proposed rule, when promulgated, would not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This proposed rulemaking is promulgated under the authority described in Subtitle VII, Part, A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This proposed regulation is within the scope of that authority as it would amend Class E airspace at Kingston-Ulster Airport, Kingston, NY.

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1E, ''Environmental Impacts: Policies and Procedures'' prior to any FAA final regulatory action.

Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (Air).

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9W, Airspace Designations and Reporting Points, dated August 8, 2012, effective September 15, 2012, is amended as follows:

Paragraph 6005 Class E Airspace Areas Extending Upward From 700 Feet or More Above the Surface of the Earth.

* * * * *

AEA NY E5 Kingston, NY [Amended]

Kingston-Ulster Airport
(Lat. 41°59′07″ N., long 73°57′52″ W.)

That airspace extending upward from 700 feet above the surface of the Earth within an 8.6-mile radius of Kingston-Ulster Airport.

Issued in College Park, Georgia, on January 18, 2012.

Barry A. Knight,

Manager, Operations Support Group, Eastern Service Center, Air Traffic Organization.

[FR Doc. 2013–02042 Filed 1–29–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2012–1219; Airspace Docket No. 12–ASO–43]

Proposed Amendment of Class E Airspace; Griffin, GA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to amend Class E Airspace at Griffin, GA, as the Griffin Non-Directional Beacon (NDB) has been decommissioned and new Standard Instrument Approach Procedures (SIAPs) have been developed at Griffin-Spalding County Airport. This action would enhance the safety and airspace management of Instrument Flight Rules (IFR) operations at the airport.

DATES: Comments must be received on or before March 18, 2013.

ADDRESSES: Send comments on this rule to: U.S. Department of Transportation, Docket Operations, West Building Ground Floor, Room W12–140, 1200 New Jersey SE., Washington, DC 20590–0001; Telephone: 1–800–647–5527; Fax: 202–493–2251. You must identify the Docket Number FAA–2012–1219; Airspace Docket No. 12–ASO–43, at the beginning of your comments. You may also submit and review received comments through the Internet at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: John Fornito, Operations Support Group, Eastern Service Center, Federal Aviation Administration, P.O. Box 20636, Atlanta, Georgia 30320; telephone (404) 305–6364.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to comment on this rule by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal.

Communications should identify both docket numbers (FAA Docket No. FAA–2012–1219; Airspace Docket No. 12–ASO–43) and be submitted in triplicate to the Docket Management System (see **ADDRESSES** section for address and phone number). You may also submit comments through the Internet at *http://www.regulations.gov*.

Persons wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed stamped postcard on which the following statement is made: ''Comments to Docket No. FAA–2012–1219; Airspace Docket No. 12–ASO–43.'' The postcard will be date/time stamped and returned to the commenter.

All communications received before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in light of the comments received. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRMs

An electronic copy of this document may be downloaded from and comments submitted through *http://www.regulations.gov*. Recently published rulemaking documents can also be accessed through the FAA's web page at *http://www.faa.gov/airports_airtraffic/air_traffic/publications/airspace_amendments/*.

You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office (see the **ADDRESSES** section for address and phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal Holidays. An informal docket may also be examined during normal business hours at the office of the Eastern Service Center, Federal Aviation Administration, room 350, 1701 Columbia Avenue, College Park, Georgia 30337.

Persons interested in being placed on a mailing list for future NPRM's should contact the FAA's Office of Rulemaking, (202) 267–9677, to request a copy of

Advisory circular No. 11–2A, Notice of Proposed Rulemaking distribution System, which describes the application procedure.

The Proposal

The FAA is considering an amendment to Title 14, Code of Federal Regulations (14 CFR) part 71 to amend Class E airspace extending upward from 700 feet above the surface to support new Standard Instrument Approach Procedures developed at Griffin-Spalding County Airport, Griffin, GA. Airspace reconfiguration is necessary due to the decommissioning of the Griffin NDB and cancellation of the NDB approach, and for continued safety and management of IFR operations at the airport.

Class E airspace designations are published in Paragraph 6005 of FAA Order 7400.9W, dated August 8, 2012, and effective September 15, 2012, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document will be published subsequently in the Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore, (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this proposed rule, when promulgated, would not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This proposed rulemaking is promulgated under the authority described in Subtitle VII, Part, A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This proposed regulation is within the scope of that authority as it would amend Class E airspace at Griffin-Spalding County Airport, Griffin, GA.

This proposal would be subject to an environmental analysis in accordance with FAA Order 1050.1E, ''Environmental Impacts: Policies and Procedures'' prior to any FAA final regulatory action.

Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9W, Airspace Designations and Reporting Points, dated August 8, 2012, effective September 15, 2012, is amended as follows:

Paragraph 6005 Class E airspace areas extending upward from 700 feet or more above the surface of the earth.

* * * * *

ASO GA E5 Griffin, GA [Amended]

Griffin-Spalding County Airport, Griffin, GA
(Lat. 33°13′37″ N., long. 84°16′30″ W.)

That airspace extending upward from 700 feet above the surface within a 6.3-mile radius of the Griffin-Spalding County Airport, and within 2 miles either side of a 137° bearing from the airport, extending from the 6.3-mile radius to 10.3 miles southeast of the airport, and within 2 miles either side of a 317° bearing from the airport, extending from the 6.3-mile radius to 10.3 miles northwest of the airport.

Issued in College Park, Georgia, on January 18, 2012.

Barry A. Knight,

Manager, Operations Support Group, Eastern Service Center, Air Traffic Organization.

[FR Doc. 2013–02048 Filed 1–29–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2012–1051; Airspace Docket No. 12–ASO–39]

Proposed Establishment of Class E Airspace; Immokalee, FL

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to establish Class E Airspace at Immokalee, FL, to accommodate the Area Navigation (RNAV) Global Positioning System (GPS) Standard Instrument Approach Procedures at Big Cypress Airfield. This action would enhance the safety and airspace management of Instrument Flight Rules (IFR) operations at the airport.

DATES: Comments must be received on or before March 18, 2013. The Director of the Federal Register approves this incorporation by reference action under title 1, Code of Federal Regulations, part 51, subject to the annual revision of FAA, Order 7400.9 and publication of conforming amendments.

ADDRESSES: Send comments on this rule to: U.S. Department of Transportation, Docket Operations, West Building Ground Floor, Room W12–140, 1200 New Jersey SE., Washington, DC 20590–0001; Telephone: 1–800–647–5527; Fax: 202–493–2251. You must identify the Docket Number FAA–2012–1051; Airspace Docket No. 12–ASO–39, at the beginning of your comments. You may also submit and review received comments through the Internet at *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: John Fornito, Operations Support Group, Eastern Service Center, Federal Aviation Administration, P.O. Box 20636, Atlanta, Georgia 30320; telephone (404) 305–6364.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to comment on this rule by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal.

Communications should identify both docket numbers (FAA Docket No. FAA–2012–1051; Airspace Docket No. 12–ASO–39) and be submitted in triplicate to the Docket Management System (see **ADDRESSES** section for address and phone number). You may also submit comments through the Internet at *http://www.regulations.gov*.

Persons wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed stamped postcard on which the following statement is made: ''Comments to Docket No. FAA–2012–1051; Airspace Docket No. 12–ASO–39.'' The postcard will be date/time stamped and returned to the commenter.

All communications received before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in light of the comments received. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRMs

An electronic copy of this document may be downloaded from and comments submitted through *http://www.regulations.gov*. Recently published rulemaking documents can also be accessed through the FAA's Web page at *http://www.faa.gov/airports_airtraffic/air_traffic/publications/airspace_amendments/*.

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Office (see the **ADDRESSES** section for address and phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal Holidays. An informal docket may also be examined during normal business hours at the office of the Eastern Service Center, Federal Aviation Administration, room 350, 1701 Columbia Avenue, College Park, Georgia 30337.

Persons interested in being placed on a mailing list for future NPRM's should contact the FAA's Office of Rulemaking, (202) 267–9677, to request a copy of Advisory circular No. 11–2A, Notice of Proposed Rulemaking distribution System, which describes the application procedure.

The Proposal

The FAA is considering an amendment to Title 14, Code of Federal Regulations (14 CFR) part 71 to establish Class E airspace at Immokalee, FL, providing the controlled airspace required to support the RNAV GPS standard instrument approach procedures for Big Cypress Airfield. Controlled airspace extending upward from 700 feet above the surface would be established for the safety and management of IFR operations at the airport.

Class E airspace designations are published in Paragraph 6005 of FAA Order 7400.9W, dated August 8, 2012, and effective September 15, 2012, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document will be published subsequently in the Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore, (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this proposed rule, when promulgated, would not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This proposed rulemaking is promulgated under the authority described in Subtitle VII, Part, A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This proposed regulation is within the scope of that authority as it would establish Class E airspace at Big Cypress Airfield, Immokalee, FL.

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1E, ''Environmental Impacts: Policies and Procedures'' prior to any FAA final regulatory action.

Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (Air).

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9W, Airspace Designations and Reporting Points, dated August 8, 2012, effective September 15, 2012, is amended as follows:

Paragraph 6005 Class E airspace areas extending upward from 700 feet or more above the surface of the earth.

* * * * *

ASO FL E5 Immokalee, FL [New]

Big Cypress Airfield, FL
(Lat. 26°19′34″ N., long. 80°59′17″ W.)

That airspace extending upward from 700 feet above the surface within a 6.7-mile radius of Big Cypress Airfield.

Issued in College Park, Georgia, on January 16, 2013.

Michael Vermuth,

Acting Manager, Operations Support Group, Eastern Service Center, Air Traffic Organization.

[FR Doc. 2013–02047 Filed 1–29–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF STATE

22 CFR Part 62

[Public Notice 8163]

RIN 1400–AD28

Exchange Visitor Program—Fees and Charges

AGENCY: U.S. Department of State.

ACTION: Proposed rule with request for comment.

SUMMARY: The U.S. Department of State (Department) is proposing to revise regulations to increase the Application Fee for Sponsor Designation or Redesignation and the Administrative Fee for Exchange Visitor (J–1 Visa Holder) Benefits assessed for providing Exchange Visitor Program (EVP) services, in order to recoup the costs

incurred by the Department's Bureau of Educational and Cultural Affairs associated with operating aspects of the Exchange Visitor Program.

DATES: The Department will accept comments from the public up to April 1, 2013.

ADDRESSES: You may submit comments, identified by any of the following methods:

• Persons with access to the Internet will be able to view and comment on the rule and supporting documentation, including the supporting cost study, by going to the Regulations.gov Web site *http://www.regulations.gov/search/Regs/home.html#home*, and searching on docket ID DOS–2010–0214.

• Mail (paper, disk, or CD–ROM submissions): U.S. Department of State, Office of Designation, SA–5, Floor 5, 2200 C Street NW., Washington, DC 20522.

• Email: *JExchanges@state.gov*. You must include the title and RIN (1400–AD28) in the subject line of your message.

FOR FURTHER INFORMATION CONTACT: Robin J. Lerner, Deputy Assistant Secretary for Private Sector Exchange, U.S. Department of State, SA–5, Floor 5, 2200 C Street NW., Washington, DC 20522, 202–632–2805, or email at *JExchanges@state.gov*.

SUPPLEMENTARY INFORMATION: Under the authority of Section 810 of the United States Information and Educational Exchange Act of 1948, as amended, 22 U.S.C. 1475e, and the Independent Offices Appropriations Act of 1952 (IOAA), 31 U.S.C. 9701, and following the guidelines set forth in Office of Management and Budget (OMB) Circular No. A–25, fees for the Exchange Visitor Program (EVP) Services were adopted for the first time in 2000. The Department issued regulations to establish sufficient fees to recover the cost of administrative processing of requests for program designation or redesignation, and certain services for exchange visitor status changes. OMB Circular No. A–25 directs the Agency review of fees and services every two years.

The two fees for the Exchange Visitor Program under review are those set forth in 22 CFR 62.17(b)(1) and (2): the Application Fee for Sponsor Designation or Redesignation and the Administrative Fee for Exchange Visitor (J–1 Visa Holder) Benefits. The Exchange Visitor Program (EVP) provides foreign nationals, utilizing the J–1 Exchange Visitor Visa (J–1 Visa), opportunities to participate in exchange programs in the United States. It is administered and overseen by the Office of Private Sector Exchange in the Bureau of Educational and Cultural Affairs (ECA/EC). ECA/EC is responsible for designating eligible U.S. government agencies and public and private organizations as EVP sponsors. Upon designation, ECA/EC is also responsible for the oversight of the EVP sponsors. ECA/EC is comprised of a Front Office and three supporting offices: The Office of Private Sector Designation, the Office of Exchange Coordination and Compliance, the Office of Private Sector Exchange Program Administration. Three different funding streams fund all of the ECA/EC units administering and overseeing the EVP, including all of the EVP's program administration activities and the ECA/EC personnel conducting those activities.

These funding streams are:

• Application Fee for Sponsor Designation or Redesignation and the Administrative Fee for Exchange Visitor (J–1 Visa Holder) Benefits: The Application Fee is paid by prospective and current EVP sponsors for Designation and Redesignation, respectively. The Administrative Fee is paid by EVP sponsors on behalf of J–1 participants seeking an administrative benefit such as reinstatement or other request related to their current exchange visitor program. Both fees primarily fund the Office of Private Sector Designation labor (salary) and ancillary costs (e.g., staff travel, communications, and utilities). Both fees also fund the Office of Exchange Coordination and Compliance ancillary costs and will fund the ancillary costs of the future Office of Private Sector Exchange Program Administration.

• SEVIS Fees paid by J–1 Visa Applicants and Participants to the U.S. Department of Homeland Security (DHS): These fees, via transfer on a reimbursable basis from DHS to the Department of State, fund the Office of Exchange Coordination and Compliance labor (salary) costs; and, in the future, will fund the Office of Private Sector Exchange Program Administration labor (salary) costs.

• Bureau of Educational and Cultural Affairs (ECA) Budget: Appropriated funds support certain ECA/EC personnel salaries (or portions of salaries) and portions of salaries of Bureau of Education and Cultural Affairs Support Services personnel who assist the administration of the EVP.

This rulemaking only proposes changes to the Application Fee for Sponsor Designation or Redesignation, and the Administrative Fee for Exchange Visitor (J–1 Visa Holder) Benefits.

The current Application Fee for Sponsor Designation or Redesignation is $2700 and the Administrative Fee for Exchange Visitor (J–1 Visa Holder) Benefits is currently $233 per request. The Department proposes amendment of both fees to: $3,982 (an increase of $1,282) and $367 (an increase of $134), respectively. The proposed increase in the Application and Administrative Fees is primarily attributable to three initiatives related to ongoing or planned process improvements and technology implementations. These initiatives are expected to increase the efficiency and accuracy of the Designation and Redesignation Application review processes and the level of service provided to EVP sponsors by the Office of Private Sector Exchange. Costs assessments were developed by Deloitte Consulting LLP for each initiative and added into the total cost basis that must be recovered by the two EVP fees.

The three initiatives are:

• Development of a Learning Management System (an expansion of the currently existing Local Coordinator Training Certification Module) needed to meet EVP local coordinator training requirements established in new or future EVP regulations.

• Development and implementation of the Designation Processing System, which consists of:

◦ Robust electronic content management system for storing and reviewing new and historical sponsor files;

◦ Electric file migration of all hard copy sponsor files; and

◦ Complaint Management Workflow Module for tracking, managing, and reporting on all complaints and incidents reported to the Department (e.g., serious incidents reported by EVP sponsors and complaints reported by Exchange Visitors and any interested persons on behalf of Exchange Visitors or of a general nature).

• Addition of a new Office of Private Sector Exchange Program Administration in the Office of Private Sector Exchange (ECA/EC) and the addition of four Full-time Equivalent employees (FTEs) in the ECA/EC Front Office, which will increase the ancillary costs factored into the cost basis.

	Current	Proposed	Increase/ Decrease
Designation/Redesignation	$2,700	$3,982	$1,282
Individual Applications	233	367	134

History of EVP Fees

The Department's Bureau of Educational and Cultural Affairs, Office of Private Sector Exchange, designates the U.S. government, academic, and private sector entities to conduct educational and cultural exchange programs pursuant to a broad grant of authority provided by the Mutual Educational and Cultural Exchange Act of 1961, as amended (Fulbright-Hays Act), 22 U.S.C. 2451 et seq.; the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(J); the Foreign Affairs Reform and Restructuring Act of 1998, Public Law 105–277; as well as other statutory enactments, Reorganization Plans and Executive Orders. Under those authorities, over 1,400 sponsor organizations facilitate the entry of more than 300,000 exchange participants each year.

The Fulbright-Hays Act is the primary statutory authority for the Exchange Visitor Program. The purpose of the Act, set forth in Section 101, is ''to enable the Government of the United States to increase mutual understanding between the people of the United States and the people of other countries by means of educational and cultural exchange.'' The Act authorizes the President to provide for such exchanges when he considers that it would strengthen international cooperative relations. The language of the Act and its legislative history make it clear that Congress considered international educational and cultural exchanges to be a significant part of the public diplomacy efforts of the President in connection with his Constitutional prerogatives in conducting foreign affairs.

In 2006, the Department examined its current Exchange Visitor Program fee structure (which had been instituted by the former USIA, prior to its merger with the Department) for compliance with applicable laws and policies, and to determine the appropriate level of fees given the expansion of the offices providing services. This analysis was grounded on the guiding principle that fees should be fair and reflect the full cost to perform the service; and that services performed on behalf of distinct, identifiable beneficiaries (versus the public at large) should, to the extent possible, be self-sustaining. As a result of the review, it was determined that additional fee categories and increased fees were required, and the Department published a final rule on November 1, 2007 (72 FR 61800), which became effective December 3, 2007.

The 2007 fee rule identified the program re-designation process as a separate and identifiable service for which the cost of such service should be recouped. This fee (Application Fee) is collected from over 1,400 academic, governmental, and private sector sponsor organizations. This fee also includes the cost of services arising from a program sponsor's requests for amendments to programs, allotment requests, and updates of information, as well as the costs for program compliance, regulatory review and development, outreach, and general program administration. Also established in the 2007 fee rule was the Administrative Fee paid by sponsors on behalf of J–1 foreign national exchange participants for services provided on an individual basis and for the sole benefit of the exchange participant (i.e., requests for exchange visitor status changes of program category, extension beyond maximum duration, requests for reinstatement, requests to update the Student and Exchange Visitor Information System (SEVIS) status, and similar requests). The fees received for these individual services also include an apportioned share of costs for regulatory review and development, outreach, and general program administration.

In 2009, per guidelines set forth in OMB Circular A–25, the Department conducted a biennial review of fees established in 2007. In accordance with the Statement of Federal Finance and Accounting Standards No. 4 (SFFAS 4), the Department used an ''activity-based costing'' (ABC) approach to develop a sustainable model to align the costs of the program to the specific services performed by Office of Private Sector Exchange's Office of Designation on behalf of program sponsors and other program stakeholders. ABC is a method of identifying the work that is performed, how resources are consumed by that work, and how that work contributes to the production of required outputs. The ABC methodology enabled the development of a bottom-up budget that factored in forecasts for expected demand of program services in the years when the fees are effective and would provide the program with adequate resources to meet that future program demand. Based on this review, the Department established a user application fee of $2,700 for designation or redesignation, and a fee of $233 to be paid by program sponsors on behalf of J–1 foreign national exchange participants requesting individual program services. The Department published a final rule on February 25, 2011 (76 FR 10498), which became effective March 28, 2011.

In 2011, Deloitte Consulting LLP (hereafter referred to as Deloitte) began its fee study as part of the biennial review of the fees charged by the Department, consistent with the guidelines set forth in OMB Circular A–25. In accordance with SFFAS 4, Deloitte used an ABC approach to align the costs of the program to the administration of the Exchange Visitor Program and the associated administrative activities. The methodology and the results of this study are examined in the following sections.

Results of Fiscal Year (FY) 2012 Fee Study

Methodology

In accordance with the *Statement of Federal Finance and Accounting Standards No. 4 (SFFAS 4),* Deloitte used an ''activity-based costing'' (ABC) approach to develop a sustainable model to align the associated costs of the EVP to the specific services performed by the Office of Private Sector Designation on behalf of EVP applicants, sponsors, participants and other program stakeholders. ABC is a method of identifying the work that is performed, how resources are consumed by that work, and how that work contributes to the production of required outputs. This methodology enabled the development of a cost model that factored in forecasts for expected demand of program services in the years when the fees are effective (FY2013 and FY2014) and would provide the program with adequate resources to meet that future program demand.

According to legislative and regulatory guidance, user charges should be based on the full cost to the government of providing the services or things of value. OMB Circular A–25 defines full cost as all direct and indirect costs to any part of the Federal government of providing a good, resource, or service. These costs include, but are not limited to, an appropriate share of:

- Direct and indirect personnel costs, including salaries and fringe benefits such as medical insurance and retirement.
- Physical overhead, consulting, and other indirect costs including material and supply costs, utilities, insurance, travel, and rents or imputed rents on land, buildings, and equipment.
- Management and supervisory costs.
- Costs of enforcement, collection, research, establishment of standards, and regulation, including any required environmental impact statements.

The generally accepted government accounting practices for managerial cost accounting, published in *Federal Accounting Standards Advisory Board (FASAB) Statement of Federal Financial Accounting Standards (SFFAS) No. 4,* provide the standards for cost definition, recognition, accumulation and assignment as they relate to the recognition of full cost. These standards have been applied to the determination of what costs to include in or exclude from the Exchange Visitor Program fees.

To obtain data needed for the cost model using the ABC methodology, a Labor Survey was conducted to determine the time spent by the Office of Private Sector Designation personnel on EVP activities. The survey results were taken into account when determining the two fees.

The results of the Labor Survey were analyzed in conjunction with Office of Private Sector Designation salary data (escalated for benefits) to determine the cost basis of activities supporting the EVP. Added to the cost basis were Office of Private Sector Exchange ancillary costs (including the projected ancillary costs of a planned, new third office and four additional FTEs in the ECA/EC Front Office), costs for the development of a new Designation Processing System and a new Learning Management System, and Bureau of Educational and Cultural Affairs and Department of State labor (salary) costs that support the EVP.

The model then assigned direct costs and allocated indirect and General and Administrative (G&A) costs using allocation ratios to isolate direct, indirect, and G&A costs. The sum of direct, indirect and G&A costs for Designation and Redesignation Applications were divided by the projected number of FY 2013 and FY 2014 Designation and Redesignation Applications to determine the Application Fee for Sponsor Designation or Redesignation. To determine the Administrative Fee for Exchange Visitor (J–1 Visa Holder) Benefits, the sum of direct, indirect and G&A costs for Exchange Visitor Activity Counts were divided by the projected number of FY 2013 and FY 2014 Exchange Visitor Activity Counts; i.e., the expected number of benefit applications.

The following section describes the cost model structure driving the proposed fee changes.

Cost Model Structure

Model Overview

In summary, the *EVP Cost Accounting Model* takes cost data from the *GS Schedule Rates, Baseline ECA Budget, Civilian Pay Cost Data, Activity Model Cost Pools, FTE Capacity Calculation, LCC Cost Assessment, DPS Cost Assessment, and Other Cost Pools* modules, assigns direct costs or allocates indirect and General and Administrative (G&A) costs using allocation ratios, and then uses the direct, indirect, and G&A cost pools to calculate the two fees for the Fiscal Year (FY) 2013–2014 time frame.

The Cost Accounting Model contains twelve modules described in detail in the following sections. Most modules include an FY 2013 section and an FY 2014 section, given the need to enter separate data for each fiscal year. The modules that only have one tab are *Home, GS Schedule Rates, ECA Baseline Budget, FTE Capacity Calculation, LCC Cost Assessment, Designation Processing System, SEVIS & FTE Data,* and *Final EVP Fees FY 2013–2014.* The modules are sequenced to follow the general flow of calculations performed by the model.

GS Schedule Rates

The *GS Schedule Rates* module contains the General Schedule (GS) pay scale figures for FY 2012–FY 2014. The figures for FY 2013 and FY 2014 are based on the 2012 General Schedule pay scale. These figures inform the *Civilian Pay Cost Data FY13 and FY14* and the *Activity Model Cost Pools FY2013 and FY2014* modules and are used to determine Department labor costs.

Baseline ECA Budget

The *Baseline ECA Budget* module contains the actual and projected Bureau of Education and Cultural Affairs (ECA) budget and budget breakdowns for FY 2012–FY 2014. These estimates inform the *Other Cost Pools FY 2013 and FY 2014* modules.

This module also calculates the ancillary costs associated with Office of Exchange Coordination and Compliance, Office of Private Sector Exchange Program Administration, and ECA/EC Front Office personnel. The results of this calculation are documented in the *Other Cost Pools FY 2013 and FY 2014* tabs in the ''Adjustment to Cost'' column in the ECA/EC Non-Labor Cost Pool table.

Civilian Pay Cost Data FY 2013 & FY 2014

This module pulls Civilian Pay data by General Schedule (GS) Level for ECA/EC/D personnel from the *GS Schedule Rates* module. The salaries of the personnel are escalated for benefits according to OMB Circular A–76. This calculation is detailed further in the Cost Accounting Model Data Sources section.

Activity Model Cost Pools FY 2013 & FY 2014

This module displays the results of the Labor Survey that was conducted by the *2012 Deloitte Fee Study* to determine the time spent by ECA/EC/D personnel performing activities related to the administration of the Exchange Visitor Program. The results are displayed by personnel position in the form of percentages. This data is then multiplied by the escalated salary calculated in the *Civilian Pay Cost Data* module to create Activity Model Cost Pools to determine the costs associated with the time spent by ECA/EC/D personnel performing activities related to the administration of the Exchange Visitor Program. Finally, this module includes a self-check feature to verify the completeness and accuracy of user entries.

FTE Capacity Calculation

This module displays the calculation the *2012 Deloitte Fee Study* performed in order to determine ECA/EC's current staffing needs related to fulfilling its mission of administering and overseeing the EVP.

Local Coordinator Certification (LCC) Trainings Cost Assessment

This module displays the costs of administering the training certifications for EVP sponsors' field staff (regional and/or local coordinators) through the development of an in-house Learning Management System (LMS). The module also contains the total expenditures paid to an external LMS vendor to administer the trainings while the LMS is in development. The results of these calculations are documented in *the Other Cost Pools FY 2013 & FY 2014* tabs in the ECA/EC Non-Labor Cost Pool tables.

Designation Processing System (DPS) Cost Assessment

This module displays the estimated costs of the Designation Processing System and Workflow Module designed to fully automate the designation and redesignation process in order to increase the Office of Private Sector Exchange's efficiency required for sponsor reviews and to eventually integrate with the SEVIS II. The results of this cost estimate are documented in the ECA/EC Non-Labor Cost Pool tables of the *Other Cost Pools FY2013 & FY2014* modules.

Other Cost Pools FY 2013 & FY 2014

This module displays other costs associated with the Exchange Visitor Program, including the following:

• Bureau of Educational and Cultural Affairs, Office of Private Sector Exchange (ECA/EC) non-labor costs including costs estimates of the Local Coordinator Training Certifications, Designation Processing System, and the value of the JASZ Technology Call Center Contract (provides call center services for the J–1 Visa Helpline).
• Bureau of Educational and Cultural Affairs (ECA) labor costs.
• Department of State labor costs.
• Department of State non-labor costs.

Not all of the costs outlined above are allocated to the two fees since they support the Bureau of Educational and Cultural Affairs or the entire Department. The *2012 Deloitte Fee Study* allocated appropriate portions of these costs to the EVP by FTE ratios. The FTE ratios are calculated from data provided by *SEVIS & FTE Data* module.

SEVIS & FTE Data

There is only one tab for the *SEVIS & FTE Data* module. It displays historical SEVIS and FTE data. It includes projected CY 2013 and CY 2014 Designation and Redesignation Applications, and Exchange Visitor Activity Counts. Data in this module also generate FTE projections for FY 2013 and FY 2014. This module contains the following specific FTE data for the following organizational areas:

• Bureau of Educational and Cultural Affairs, Office of Private Sector Exchange, Office of Private Sector Designation (ECA/EC/D) and Office of Exchange Coordination and Compliance (ECA/EC/ECC).
• Human Resources.
• Support Services.
• IIP Budget Office (Bureau of International Information Programs).
• ECA Budget Office.
• Program Management Office.
• Bureau of Educational and Cultural Affairs (ECA).
• Department of State.

Cost Assignment & Allocation FY 2013 & FY 2014

This module pulls the data from the previous modules in order to assign direct costs or allocate indirect or G&A costs to each fee. The method in which costs are assigned or allocated varies by cost classification:

• Direct costs are costs that can be specifically identified with an output. For direct costs, Deloitte followed the Direct Cost Assignment method to assign all resource cost to one cost object. In this case, the full cost of activities is assigned to the fee for which it is determined to be a direct cost.
• Indirect costs are costs of resources that are jointly or commonly used to produce two or more outputs but are not specifically identifiable with any one output. For indirect costs, Deloitte followed the Prorated Cost Allocation method to allocate indirect costs to all cost objects based on percentage of total direct cost of the destination cost objects. In this case, the full cost in each indirect cost pool is split and each portion is then assigned to the appropriate fee. Indirect costs were split based on the labor survey allocations to each activity type (i.e., Application or Administrative).
• G&A costs are the costs of support services that an office or segment receives from other segments or entities. G&A costs calculated and apportioned in Other Cost Pools FY2013 and FY2014 are allocated to each of the fees in the same way indirect costs are allocated.

This method for allocating indirect and general and administrative (G&A) cost is fully consistent with cost allocation guidance found in Sections 133 and 134 of *Federal Accounting Standards Advisory Board (FASAB) Statement of Federal Financial Accounting Standards (SFFAS) No. 4* as follows:

''133. Sometimes, it might not be economically feasible to directly trace or assign costs on a cause-and-effect basis. These may include general management and support costs, depreciation, rent, maintenance, security, and utilities associated with facilities that are commonly used by various segments.''

''134. These supporting costs can be allocated to segments and outputs on a prorated basis. The cost allocations may involve two steps. The first step allocates the costs of support services to segments, and the second step allocates those costs to the outputs of each segment. The cost allocations are usually based on a relevant common denominator such as the number of employees, square footage of office space, or the amount of direct costs incurred in segments.''

Fee Cost Pools FY 2013 & FY 2014

This module pulls data from the *Cost Assignment and Allocation* module and groups it into total direct, indirect, and G&A cost pools. It then divides each of those cost pool amounts by the total projected SEVIS activity units to determine each fee's direct, indirect, and G&A components. It also sums each of these cost components to provide the total for each fee for FY 2013 and FY 2014. Finally, this module includes a self-check feature to verify the completeness and accuracy of user entries.

Final EVP Fees FY 2013–2014

This module adds the total costs and SEVIS Activity Units for FY 2013 and FY2014 from the *Fee Cost Pool* module in order to provide fees that are based on a two-year fee lifecycle consistent with the guidelines set forth in OMB Circular A–25 requiring current Program Sponsors to apply for Redesignation status every two years. It also includes a self-check feature to verify the completeness and accuracy of user entries.

Cost Accounting Model Data Sources

GS Schedule Rates

The 2009, 2010, 2011, and 2012 General Schedule Pay Tables and the 2011 SES Pay Rates for the Washington-Baltimore-Northern Virginia Locality were obtained from the U.S. Office of Personnel Management.

Baseline ECA Budget

Bureau of Educational and Cultural Affairs (ECA) provided the actual Educational and Cultural Exchange Programs budgetary data for FY 2011, and projected budgetary data for FY 2012, FY 2013, and FY 2014.

Civilian Pay Cost Data

For the data in the *Civilian Pay Cost Data* module, ECA provided Deloitte with each ECA/EC/D employee's GS level, and then Deloitte used the Step 5 salary assumption for each level to determine the salary to be entered for each employee. This figure was then escalated by 36.25% to capture benefits. This percentage is the guidance given for average benefits escalation in OMB Circular A–76 Performance of Commercial Activities, Attachment C—Calculating Public-Private Competition Costs.

Activity Model Cost Pools

The only data in the *Activity Model Cost Pools* module is the Labor Survey results. This input was accomplished by converting the hours each respondent recorded for their position and for each activity they performed during the Labor Survey into percentages of FTEs.

Local Coordinator Certification (LCC) Trainings Cost Assessment

ECA provided the expenditures to date spent on external Learning Management System (LMS) vendor. The cost estimate for the in-house LMS was based on Deloitte's own estimate using interviews, training system requirements, subject-matter experts, and industry standards.

Designation Processing System (DPS) Cost Assessment

The cost estimates for the development of the Designation Processing System, Electronic File Conversion, and Complaint Management Workflow Module were based on Deloitte's own estimate using interviews, ECA/EC system requirements, subject-matter experts, and industry standards.

Other Cost Pools

The data from Other Cost Pools is derived from *the GS Schedule Rates, Baseline ECA Budget, LCC Cost Assessment, DPS Cost Assessment,* and *SEVIS & FTE Data* modules.

- Deloitte used the following methods to derive ECA/EC non-labor cost data:

—The FY2013 and FY2014 budgetary data has been taken from ECA projected data found in the *Baseline ECA Budget* module.
—The Local Coordinator Certification Training Cost Assessment and the Designation Processing Cost Assessment are derived from the calculations in *LCC Cost Assessment* and *DPS Cost Assessment* modules, respectively.
—JASZ Technology Call Center contract value was provided by ECA/EC.

- All ECA labor cost data is derived from the FY 2012 Employment Compensation and Benefits figure in the *ECA Budget* module. This figure is pro-rated by the respective ECA organizational area's FTEs, and based on the FY 2012 Employment Compensation and Benefits figure for FY 2013 and FY 2014 estimates.
- For Department non-labor costs, Deloitte obtained the Total Department-wide GSA Rents from the *Department of State Congressional Budget Justification—Fiscal Year 2012.*

SEVIS & FTE Data

ECA/EC provided Deloitte with historical SEVIS activity counts associated with each fee for calendar years (CY) 2007–2011. ECA/EC also provided Deloitte with actual Department, ECA, and ECA/EC FTE levels for FY 2009 through FY 2011 and projected levels for FY 2012. Using these figures, Deloitte projected for FY 2013 and FY 2014 SEVIS and FTE data in the following manner:

- For SEVIS data projections:

—ECA/EC provided CY 2007 through CY 2011 data.
—ECA/EC directed the use of constant CY 2011 counts for CY 2012–CY 2014.

- For FTE data projections:

—ECA/EC provided actual FY2009 through FY2011 data.
—ECA/EC provided projected FY2012 data.
—ECA/EC/D FY 2013 and FY 2014 data were projected at FY 2012 levels with the additional nine FTEs calculated from the FTE Capacity Calculation (Section 3.5) and four additional FTEs that joined ECA/EC/D after the Labor Survey was conducted.

Regulatory Findings

Administrative Procedure Act

The Department of State is of the opinion that the Exchange Visitor Program is a foreign affairs function of the U.S. Government and that rules implementing this function are exempt from Sec 553 (Rulemaking) and Sec 554 (Adjudications) of the Administrative Procedure Act (APA). The U.S. Government supervises programs that invite foreign nationals to come to the United States to participate in exchange visitor programs, either directly or through private sector program sponsors or grantees. When problems occur, the U.S. Government often has been, and likely will be, held accountable by foreign governments for the treatment of their nationals, regardless of who is responsible for the problems.

The purpose of this rule is to set the fees that will fund services provided by the Exchange Visitor Program Office of Designation to more than 1,400 sponsor organizations and 300,000 Exchange Visitor Program participants. These services include oversight and compliance with program requirements as well as the monitoring of programs to ensure the health, safety and well-being of foreign nationals entering the United States (many of these exchange programs and participants are often funded by the U.S. Government) under the aegis of the Exchange Visitor Program and in furtherance of its foreign relations mission. The Department of State represents that failure to protect the health and well-being of these foreign nationals and their appropriate placement with reputable organizations will have direct and substantial adverse effects on the foreign affairs of the United States.

Although the Department is of the opinion that this rule is exempt from the rulemaking provisions of the APA, the Department is publishing this rule as a proposed rule, with a 60-day provision for public comment and without prejudice to its determination that the Exchange Visitor Program is a foreign affairs function.

Regulatory Flexibility Act/Executive Order 13272: Small Business

As discussed above, the Department believes that this proposed rule is exempt from the provisions of 5 U.S.C. 553, and that no other law requires the Department to give notice of proposed rulemaking. Accordingly the Department believes that this proposed rule is not subject to the requirements of the Regulatory Flexibility Act (5 U.S.C.601, et seq.) or Executive Order 13272, Sec. 3 (b).

Unfunded Mandates Reform Act of 1995

This proposed rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of $100 million in any year and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

The Department has determined that this rulemaking will not have tribal implications, will not impose substantial direct compliance costs on Indian tribal governments, and will not pre-empt tribal law. Accordingly, the provisions of Executive Order 13175 do not apply to this rulemaking.

Small Business Regulatory Enforcement Fairness Act of 1996

This proposed rule is not a major rule as defined by 5 U.S.C. 804 for the purposes of Congressional review of agency rulemaking under the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801–808). This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Executive Order 13563 and Executive Order 12866

As discussed above, the Department is of the opinion that the Exchange Visitor Program is a foreign affairs function of the United States Government and that rules governing the conduct of this function are exempt from the requirements of Executive Order 12866. However, the Department has nevertheless reviewed this proposed regulation to ensure its consistency with the regulatory philosophy and principles set forth in that Executive Order.

The Department has examined the economic benefits, costs, and transfers associated with this proposed rule, and declare that educational and cultural exchanges are both the cornerstone of U.S. public diplomacy and an integral component of American foreign policy. The benefits of these exchanges to the United States and its people are invaluable and cannot be monetized; in the same way, even one instance of an exchange visitor having a bad experience or, worse, being mistreated, could result in embarrassment and incalculable harm to the foreign policy of the United States. Therefore, the Department is of the opinion that these benefits of this rulemaking outweigh its costs.

Executive Order 12988

The Department has reviewed this regulation in light of sections 3(a) and 3(b)(2) of Executive Order 12988 to eliminate ambiguity, minimize litigation, establish clear legal standards, and reduce burden.

Executive Orders 12372 and Executive Order 13132

This regulation will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to require consultations or warrant the preparation of a federalism summary impact statement. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this regulation.

Paperwork Reduction Act

The information collection requirements contained in this rulemaking are pursuant to the Paperwork Reduction Act, 44 U.S.C. Chapter 35 and OMB Control Number 1405–0147, expiring on November 30, 2013.

List of Subjects in 22 CFR Part 62

Cultural Exchange Program.

Accordingly, 22 CFR part 62 is proposed to be amended as follows:

PART 62—EXCHANGE VISITOR PROGRAM

■ 1. The authority citation for part 62 continues to read as follows:

Authority: 8 U.S.C. 1101(a)(15)(J), 1182, 1184, 1258; 22 U.S.C. 1431–1442, 2451 et seq.; Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. 105–277, Div. G, 112 Stat. 2681 et seq.; Reorganization Plan No. 2 of 1977, 3 CFR, 1977 Comp. p. 200; E.O. 12048 of March 27, 1978; 3 CFR, 1978 Comp. p. 168; the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. 104–208, Div. C, 110 Stat. 3009–546, as amended; Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT ACT), Pub. L. 107–56, Sec. 416, 115 Stat. 354; and the Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. 107–173, 116 Stat. 543.

■ 2. Revise § 62.17 to read as follows:

§ 62.17 Fees and charges.

(a) Remittances. Fees prescribed within the framework of 31 U.S.C. 9701 must be submitted as directed by the Department and must be in the amount prescribed by law or regulation.

(b) Amounts of fees. The following fees are prescribed.

(1) For filing an application for program designation and/or redesignation (Form DS–3036)—$3,982.00.

(2) For filing an application for exchange visitor status changes (i.e., extension beyond the maximum duration, change of category, reinstatement, reinstatement-update SEVIS status, ECFMG sponsorship authorization, and permission to issue)—$367.00.

Dated: January 22, 2013.

Robin J. Lerner,

Deputy Assistant Secretary for Private Sector Exchange, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2013–01555 Filed 1–29–13; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

22 CFR Parts 121, 123, 124, 125, and 129

[Public Notice 8166]

RIN 1400–AD18

Amendment to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Category XVI

AGENCY: Department of State.

ACTION: Proposed rule.

SUMMARY: As part of the President's Export Control Reform effort, the Department of State proposes to amend the International Traffic in Arms Regulations (ITAR) to revise Category XVI (nuclear weapons related articles) of the U.S. Munitions List (USML). The revisions contained in this rule are part of the Department of State's retrospective plan under E.O. 13563 completed on August 17, 2011. The Department of State's full plan can be accessed at *http://www.state.gov/documents/organization/181028.pdf.*

DATES: The Department of State will accept comments on this proposed rule until March 18, 2013.

ADDRESSES: Interested parties may submit comments within 45 days of the date of publication by one of the following methods:

- *Email: DDTCResponseTeam@state.gov* with the subject line, ''ITAR Amendment—Category XVI.''
- *Internet:* At *www.regulations.gov,* search for this notice by using this rule's RIN (1400–AD18).

Comments received after that date will be considered if feasible, but consideration cannot be assured. Those submitting comments should not include any personally identifying information they do not desire to be made public or information for which a claim of confidentiality is asserted because those comments and/or transmittal emails will be made available for public inspection and copying after the close of the comment period via the Directorate of Defense Trade Controls Web site at *www.pmddtc.state.gov.* Parties who wish to comment anonymously may do so by submitting their comments via *www.regulations.gov,* leaving the fields that would identify the commenter blank and including no identifying information in the comment itself. Comments submitted via *www.regulations.gov* are immediately available for public inspection.

FOR FURTHER INFORMATION CONTACT: Ms. Candace M. J. Goforth, Director, Office of Defense Trade Controls Policy, U.S. Department of State, telephone (202) 663–2792, or email *DDTCResponseTeam@state.gov.* ATTN: Regulatory Change, USML Category XVI.

SUPPLEMENTARY INFORMATION: The Directorate of Defense Trade Controls (DDTC), U.S. Department of State, administers the International Traffic in Arms Regulations (ITAR) (22 CFR parts 120–130). The items subject to the jurisdiction of the ITAR, *i.e.,* ''defense articles,'' are identified on the ITAR's U.S. Munitions List (USML) (22 CFR 121.1). With few exceptions, items not subject to the export control jurisdiction of the ITAR are subject to the jurisdiction of the Export Administration Regulations (''EAR,'' 15 CFR parts 730–774, which includes the Commerce Control List (CCL) in Supplement No. 1 to part 774), administered by the Bureau of Industry and Security (BIS), U.S. Department of Commerce. Both the ITAR and the EAR impose license requirements on exports and reexports. Items not subject to the ITAR or to the exclusive licensing jurisdiction of any other agency of the U.S. government, such as the Department of Energy, are subject to the EAR.

Export Control Reform Update

The Departments of State and Commerce described in their respective Advanced Notices of Proposed Rulemaking (ANPRM) in December 2010 the Administration's plan to make the USML and the CCL positive, tiered, and aligned so that eventually they can be combined into a single control list (*see* ''Commerce Control List: Revising Descriptions of Items and Foreign Availability,'' 75 FR 76664 (December 9, 2010) and ''Revisions to the United States Munitions List,'' 75 FR 76935 (December 10, 2010)). The notices also called for the establishment of jurisdictional ''bright lines'' between items controlled by the Department of State and items other departments, primarily the Department of Commerce, control. This notice seeks to draw a jurisdictional bright line, but largely with respect to items that are now subject to the jurisdiction of the Department of Energy.

Revision of Category XVI

This proposed rule removes most of the articles enumerated in USML Category XVI (nuclear weapons related articles). The provisions of 22 CFR parts 120–130 do not apply to all equipment, technical data, or services currently described in Category XVI to the extent that exports of most such equipment, technical data, or services are under the control of the Department of Energy pursuant to the Atomic Energy Act of 1954, as amended, and the Nuclear Non-Proliferation Act of 1978, as amended, or is a government transfer authorized pursuant to these Acts.

The only articles now covered under Category XVI that would remain subject to USML control are modeling or simulation tools that model or simulate the environments generated by nuclear detonations or the effects of these environments on systems, subsystems, components, structures, or humans, and technical data and defense services directly related to those defense articles. In addition, nuclear radiation detection and measurement devices currently controlled in paragraph (c) would become subject to the jurisdiction of the Department of Commerce under already existing Export Control Classification Number (ECCN) 1A004.c.2 or 2A291.e.

Conforming changes are made to ITAR parts 123, 124, 125, and 129 to remove reference to USML Category XVI. In addition, Supplement No. 1 to Part 126 will be revised to remove the following entries: (1) Nuclear weapons strategic delivery systems and all components, parts, accessories, and attachments specifically designed for such systems and associated equipment; (2) defense articles and services specific to design and testing of nuclear weapons; and (3) nuclear radiation measuring devices manufactured to military specifications.

Request for Comments

As the U.S. Government works through the proposed revisions to the USML, some solutions have been adopted that were determined to be the best of available options. With the thought that multiple perspectives would be beneficial to the USML revision process, the public is asked to provide specific examples of nuclear-related items whose jurisdiction would be in doubt based on this revision. In particular, the Department seeks comments on whether the proposed paragraph (b) is appropriately captured in USML Category XVI or if there is a more suitable control within the USML or CCL.

Regulatory Analysis and Notices

Administrative Procedure Act

The Department of State is of the opinion that controlling the import and export of defense articles and services is a foreign affairs function of the United States Government and that rules implementing this function are exempt from sections 553 (rulemaking) and 554 (adjudications) of the Administrative Procedure Act (APA). Although the Department is of the opinion that this rule is exempt from the rulemaking provisions of the APA, the Department is publishing this rule with a 45-day provision for public comment and without prejudice to its determination that controlling the import and export of defense services is a foreign affairs function. As noted above, and also without prejudice to the Department position that this rulemaking is not subject to the APA, the Department previously published a related Advance Notice of Proposed Rulemaking (RIN 1400–AC78) on December 10, 2010 (75 FR 76935), and accepted comments for 60 days.

Regulatory Flexibility Act

Since the Department is of the opinion that this proposed rule is exempt from the provisions of 5 U.S.C. 553, there is no requirement for an analysis under the Regulatory Flexibility Act.

Unfunded Mandates Reform Act of 1995

This proposed rulemaking does not involve a mandate that will result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any year and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This proposed rulemaking has been found not to be a major rule within the meaning of the Small Business Regulatory Enforcement Fairness Act of 1996.

Executive Orders 12372 and 13132

This proposed rulemaking will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this proposed rulemaking does not have sufficient federalism implications to require consultations or warrant the preparation of a federalism summary impact statement. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this proposed rulemaking.

Executive Orders 12866 and 13563

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributed impacts, and equity). These Executive Orders stress the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. These rules have been designated ''significant regulatory actions,'' although not economically significant, under section 3(f) of Executive Order 12866. Accordingly, this proposed rule has been reviewed by the Office of Management and Budget (OMB).

Executive Order 12988

The Department of State has reviewed the proposed rulemaking in light of sections 3(a) and 3(b)(2) of Executive Order 12988 to eliminate ambiguity, minimize litigation, establish clear legal standards, and reduce burden.

Executive Order 13175

The Department of State has determined that this proposed rulemaking will not have tribal implications, will not impose substantial direct compliance costs on Indian tribal governments, and will not preempt tribal law. Accordingly, Executive Order 13175 does not apply to this proposed rulemaking.

Paperwork Reduction Act

Notwithstanding any other provision of law, no person is required to respond to, nor is subject to a penalty for failure to comply with, a collection of information, subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA), unless that collection of information displays a currently valid OMB control number. This proposed rule would affect the following approved collections: (1) Statement of Registration, DS–2032, OMB No. 1405–0002; (2) Application/License for Permanent Export of Unclassified Defense Articles and Related Unclassified Technical Data, DSP–5, OMB No. 1405–0003; (3) Application/License for Temporary Import of Unclassified Defense Articles, DSP–61, OMB No. 1405–0013; (4) Nontransfer and Use Certificate, DSP–83, OMB No. 1405–0021; (5) Application/License for Permanent/Temporary Export or Temporary Import of Classified Defense Articles and Classified Technical Data, DSP–85, OMB No. 1405–0022; (6) Application/License for Temporary Export of Unclassified Defense Articles, DSP–73, OMB No. 1405–0023; (7) Statement of Political Contributions, Fees, or Commissions in Connection with the Sale of Defense Articles or Services, OMB No. 1405–0025; (8) Authority to Export Defense Articles and Services Sold Under the Foreign Military Sales (FMS) Program, DSP–94, OMB No. 1405–0051; (9) Application for Amendment to License for Export or Import of Classified or Unclassified Defense Articles and Related Technical Data, DSP–6, –62, –74, –119, OMB No. 1405–0092; (10) Request for Approval of Manufacturing License Agreements, Technical Assistance Agreements, and Other Agreements, DSP–5, OMB No. 1405–0093; (11) Maintenance of Records by Registrants, OMB No. 1405–0111; (12) Annual Brokering Report, DS–4142, OMB No. 1405–0141; (13) Brokering Prior Approval (License), DS–4143, OMB No. 1405–0142; (14) Projected Sale of Major Weapons in Support of Section 25(a)(1) of the Arms Export Control Act, DS–4048, OMB No. 1405–0156; (15) Export Declaration of Defense Technical Data or Services, DS–4071, OMB No. 1405–0157; (16) Request for Commodity Jurisdiction Determination, DS–4076, OMB No. 1405–0163; (17) Request to Change End-User, End-Use, and/or Destination of Hardware, DS–6004, OMB No. 1405–0173; (18) Request for Advisory Opinion, DS–6001, OMB No. 1405–0174; (19) Voluntary Disclosure, OMB No. 1405–0179; and (20) Technology Security/Clearance Plans, Screening Records, and Non-Disclosure Agreements Pursuant to 22 CFR 126.18, OMB No. 1405–0195. The Department of State believes there will be minimal changes to these collections. The Department of State believes the combined effect of all rules to be published moving commodities from the USML to the EAR as part of the Administration's Export Control Reform would decrease the number of license applications by approximately 30,000 annually. The Department of State is looking for comments on the potential reduction in burden.

List of Subjects in Part 121, 123, 124, 125, and 129

Arms and munitions, Exports.

Accordingly, for the reasons set forth above, Title 22, Chapter I, Subchapter M, parts 121, 123, 124, 125, and 129 are proposed to be amended as follows:

PART 121—THE UNITED STATES MUNITIONS LIST

■ 1. The authority citation for part 121 continues to read as follows:

Authority: Secs. 2, 38, and 71, Pub. L. 90–629, 90 Stat. 744 (22 U.S.C. 2752, 2778, 2797); E.O. 11958, 42 FR 4311; 3 CFR, 1977 Comp. p. 79; 22 U.S.C. 2651a; Pub. L. 105–261, 112 Stat. 1920.

■ 2. Section 121.1 is amended by revising U.S. Munitions List Category XVI to read as follows:

§ 121.1 General. The United States Munitions List.

* * * * *

Category XVI—Nuclear Weapons Related Articles

(a) [Reserved]

(b) Modeling or simulation tools that model or simulate the environments generated by nuclear detonations or the effects of these environments on systems, subsystems, components, structures, or humans.

(c) [Reserved]

(d) [Reserved]

(e) Technical data (*see* § 120.10 of this subchapter) and defense services (*see* § 120.9 of this subchapter) directly related to the defense articles enumerated in paragraph (b) of this category. (*See* § 123.20 of this subchapter for nuclear related controls and § 125.4 of this subchapter for exemptions.)

PART 123—LICENSES FOR THE EXPORT OF DEFENSE ARTICLES

■ 3. The authority citation for part 123 continues to read as follows:

Authority: Secs. 2, 38, and 71, Pub. L. 90–629, 90 Stat. 744 (22 U.S.C. 2752, 2778, 2797); 22 U.S.C. 2753; E.O. 11958, 42 FR 4311; 3 CFR, 1977 Comp. p. 79; 22 U.S.C. 2651a; 22 U.S.C. 2776; Pub. L. 105–261, 112 Stat. 1920; Sec 1205(a), Pub. L. 107–228.

■ 4. Section 123.20 is amended by revising paragraph (a) to read as follows:

§ 123.20 Nuclear related controls.

(a) The provisions of this subchapter do not apply to equipment, technical data, or services in Category VI and Category XX of § 121.1 of this subchapter to the extent that the export of such equipment, technical data, or services is controlled by the Department of Energy pursuant to the Atomic Energy Act of 1954, as amended, and the Nuclear Non-Proliferation Act of 1978, as amended, or is a government transfer authorized pursuant to these Acts, or is controlled by the Department of Commerce pursuant to the Export Administration Regulations.

* * * * *

PART 124—AGREEMENTS, OFF-SHORE PROCUREMENT, AND OTHER DEFENSE SERVICES

■ 5. The authority citation for part 124 continues to read as follows:

Authority: Secs. 2, 38, and 71, Pub. L. 90–629, 90 Stat. 744 (22 U.S.C. 2752, 2778, 2797); E.O. 11958, 42 FR 4311; 3 CFR, 1977 Comp., p. 79; 22 U.S.C. 2651a; 22 U.S.C. 2776; Pub. L. 105–261; Pub. L. 111–266.

■ 6. Section 124.2 is amended by revising introductory paragraph (c), removing paragraphs (c)(5)(iii), (c)(5)(ix), and (c)(5)(xi), redesignating paragraphs (c)(5)(iv), (c)(5)(v), (c)(5)(vi), (c)(5)(vii), (c)(5)(viii), (c)(5)(x), (c)(5)(xii), and (c)(5)(xiii) as (c)(5)(iii), (c)(5)(iv), (c)(5)(v), (c)(5)(vi), (c)(5)(vii), (c)(5)(viii), (c)(5)(ix), and (c)(5)(x), respectively, and then revising redesignated paragraphs (c)(5)(iv), (c)(5)(vii), and (c)(5)(x), to read as follows:

§ 124.2 Exemptions for training and military service.

* * * * *

(c) In addition to the basic maintenance training exemption provided in paragraph (a) of this section and the basic maintenance information exemption in § 125.4(b)(5) of this subchapter, no technical assistance agreement is required for maintenance training or the performance of maintenance, including the export of supporting unclassified technical data, to NATO countries, Australia, Japan, and Sweden when the following criteria can be met:

* * * * *

(5) * * *

* * * * *

(iv) Gas turbine engine hot section components covered by USML Category XIX(f)(2);

* * * * *

(vii) Chemical agents listed in USML Category XIV(a), biological agents listed in USML Category XIV(b), and equipment listed in USML Category XIV(f)(1)(i) for dissemination of the chemical and biological agents listed in USML Categories XIV(a) and (b);

* * * * *

(x) Articles covered by USML Categories XVII and XXI.

* * * * *

PART 125—LICENSES FOR THE EXPORT OF TECHNICAL DATA AND CLASSIFIED DEFENSE ARTICLES

■ 7. The authority citation for part 125 continues to read as follows:

Authority: Secs. 2 and 38, Pub. L. 90–629, 90 Stat. 744 (22 U.S.C. 2752, 2778); E.O. 11958, 42 FR 4311; 3 CFR, 1977 Comp. p. 79; 22 U.S.C. 2651a.

■ 8. Section 125.1 is amended by revising paragraph (e) to read as follows:

* * * * *

§ 125.1 Exports subject to this part.

(e) The provisions of this subchapter do not apply to technical data related to articles in Category VI(e) and Category XX(b) of § 121.1 of this subchapter, to the extent that the export of such data is controlled by the Department of Energy pursuant to the Atomic Energy Act of 1954, as amended, and the Nuclear Non-Proliferation Act of 1978, as amended.

PART 129—REGISTRATION AND LICENSING OF BROKERS

■ 9. The authority citation for part 129 continues to read as follows:

Authority: Sec. 38, Pub. L. 104–164, 110 Stat. 1437, (22 U.S.C. 2778).

■ 10. Section 129.7 is amended by removing and reserving paragraphs (a)(1)(ii) and (a)(1)(iii), as follows:

§ 129.7 Prior approval (license).

(a) * * *

(1) * * *

(ii) [Reserved]

(iii) [Reserved]

* * * * *

Dated: January 22, 2013.

Rose E. Gottemoeller,

Acting Under Secretary, Arms Control and International Security, Department of State.

[FR Doc. 2013–01825 Filed 1–29–13; 8:45 am]

BILLING CODE 4710–25–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–130074–11]

RIN 1545–BK54

Rules Relating to Additional Medicare Tax; Correction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Correction to notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains corrections to a notice of proposed rulemaking and notice of public hearing (REG–130074–11) that was published in the **Federal Register** on Wednesday, December 5, 2012 (77 FR 72268). The proposed regulations are relating to Additional Hospital Insurance Tax on income above threshold amounts (''Additional Medicare Tax''), as added by the Affordable Care Act. Specifically, these proposed regulations provide guidance for employers and individuals relating to the implementation of Additional Medicare Tax.

FOR FURTHER INFORMATION CONTACT: Andrew K. Holubeck or Ligeia M. Donis at (202) 622–6040 (not a toll free number).

SUPPLEMENTARY INFORMATION:

Background

The notice of proposed rulemaking and notice of public hearing (REG–130074–11) that is the subject of these corrections is under Section 1.1401–1 of the Income Tax Regulations.

Need for Correction

As published, the notice of proposed rulemaking and notice of public hearing (REG–130074–11) contains errors that may prove to be misleading and are in need of clarification.

Correction of Publication

Accordingly, the notice of proposed rulemaking and notice of public hearing (REG–130074–11), that was the subject of FR Doc. 2012–29237, is corrected as follows:

1. On page 72268, in the preamble, column 2, under the caption **DATES**, line 6, the language ''Must be received by March 5, 2013.'' is corrected to read ''Must be received by February 28, 2013.''.

2. On page 72272, in the preamble, column 3, under the paragraph heading ''Comments and Public Hearing'', line 16, the language ''*www.regulations.gov.* or upon request. A'' is corrected to read ''*www.regulations.gov* or upon request. A''.

3. On page 72273, in the preamble, column 1, under the paragraph heading ''Drafting Information'', line 3, the language ''Gerstein and Ligeia M. Donis of the'' is corrected to read ''Gerstein, formerly of the Office of the Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities), Andrew Holubeck and Ligeia M. Donis of the''.

LaNita VanDyke,

Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedure and Administration).

[FR Doc. 2013–01885 Filed 1–29–13; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 301

[REG–148873–09]

RIN 1545–BJ16

IRS Truncated Taxpayer Identification Numbers; Correction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Correction to notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains corrections to a notice of proposed rulemaking (REG–148873–09) and notice of public hearing that was published in the **Federal Register** on Monday, January 7, 2013 (78 FR 913). The proposed regulation provides guidance regarding creating a new taxpayer identifying number known as an IRS truncated taxpayer identification number, a TTIN.

FOR FURTHER INFORMATION CONTACT: Tammie A. Geier, (202) 622–3620 (not a toll free number).

SUPPLEMENTARY INFORMATION:

Background

The notice of proposed rulemaking (REG–148873–09) that is the subject of these corrections is under section 6045 of the Internal Revenue Code.

Need for Correction

As published, the notice of proposed rulemaking (REG–148873–09) contains errors that may prove to be misleading and are in need of clarification.

Correction of Publication

Accordingly, the notice of proposed rulemaking (REG–148873–09), that was the subject of FR Doc. 2012–31745, is corrected as follows:

1. On page 914, in the preamble, column 2, under the paragraph heading *II. Taxpayer Identifying Numbers,* line 8 from the bottom of the first full paragraph, the language ''employee identification number (EINs).'' is corrected to read ''employer identification numbers (EINs).''.

2. On page 914, in the preamble, column 2, under the caption ''Summary of Comments'', line 8 from the bottom of the page, the language ''income tax processing. Treasury and the'' is corrected to read ''income tax processing. The Treasury Department and the''.

3. On page 914, in the preamble, column 3, under the same caption, lines 6 and 7 of the first full paragraph of the column, the language ''so that filers are permitted to furnish payee statements by electronic means.'' is corrected to read ''so that filers are permitted to use TTINs on payee statements furnished by electronic means.''.

4. On page 915, in the preamble, column 3, under the caption ''Comments and Public Hearing'', line 2 of the first paragraph, the language ''for February 21, 2013 beginning at 10:00'' is corrected to read ''for March 12, 2013 beginning at 10:00''.

§ 1.6045–4 [Corrected]

5. On Page 916, column 2, the paragraph heading ''§ 1.6045–4 Information reporting on real estate transactions with dates of closing on or after January 1,1991.''. is corrected to read ''§ 1.6045–4 Information reporting on real estate transactions with dates of closing on or after January 1, 1991.''.

LaNita Van Dyke,

Branch Chief, Publication and Regulation Branch, Legal Processing Division, Associate Chief Counsel, (Procedure and Administration).

[FR Doc. 2013–01764 Filed 1–29–13; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 31

[REG–130074–11]

RIN 1545–BK54

Rules Relating to Additional Medicare Tax

Correction

In proposed rule document 2012–29237, appearing on pages 72268–72277 in the issue of Wednesday, December 5, 2012, make the following correction:

§ 31.6205–1 Adjustments of Underpayments. [Corrected]

On page 72276, in the second column, in the middle of the column, immediately below ''6. Adding a new paragraph (c).'', ''The revisions and additions read as follows:'' should appear.

[FR Doc. C1–2012–29237 Filed 1–29–13; 8:45 am]

BILLING CODE 1505–01–D

THE PRESIDIO TRUST

36 CFR Part 1002

Public Use Limit on Commercial Dog Walking; Revised Disposal Conditions

AGENCY: The Presidio Trust.

ACTION: Proposed rule; extension of comment period.

SUMMARY: The Presidio Trust (Trust) is requesting public comment on a proposed public use limit on persons who are walking four or more dogs at one time in Area B of the Presidio of San Francisco for consideration (Commercial Dog Walkers). The limit will require any person walking four or more dogs at one time for consideration in Area B to possess a valid Commercial Dog Walking permit obtained from the City and County of San Francisco (City). Commercial Dog Walkers with four or more dogs at one time in Area B will be required to comply with the terms and conditions of the City permit as well as those rules and regulations otherwise applicable to Area B. The Trust is also proposing that throughout Area B, all pet walkers, whether or not for consideration, shall remove pet excrement and deposit it in refuse containers.

DATES: The comment period for the proposed rule published November 21, 2012 (77 FR 69785–69788) is extended. Comments are due February 25, 2013. Comments already submitted in response to the November 21, 2012 proposed rule need not be resubmitted.

ADDRESSES: Electronic comments may be sent to *jpelka@presidiotrust.gov.* Written comments may be mailed or hand delivered to John Pelka, The Presidio Trust, 103 Montgomery Street, P.O. Box 29052, San Francisco, CA 94129. All written comments submitted to the Trust will be considered, and these proposals may be modified accordingly. The final decision of the Trust will be published in the **Federal Register**.

Public Availability of Comments: If individuals submitting comments request that their address or other contact information be withheld from public disclosure, it will be honored to the extent allowable by law. Such requests must be stated prominently at the beginning of the comments. The Trust will make available for public inspection all submissions from organizations or businesses and from persons identifying themselves as representatives or officials of organizations and businesses.

Anonymous comments may not be considered.

FOR FURTHER INFORMATION CONTACT: Joshua Steinberger (415.561.5300), or visit *http://www.presidio.gov/about/Pages/commercial-dog-walking.aspx.*

SUPPLEMENTARY INFORMATION: The proposed rule originally was published in the **Federal Register** on November 21, 2012, with a 65-day comment period set to end on January 25, 2013. In response to public comments, the comment period has been extended to February 25, 2013.

Dated: January 23, 2013.

Karen A. Cook,

General Counsel.

[FR Doc. 2013–01796 Filed 1–29–13; 8:45 am]

BILLING CODE 4310–4R–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2012–0001; FRL–9376–3]

Withdrawal of Pesticide Petitions for Residues of Pesticide Chemicals in or on Various Commodities

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of withdrawal of pesticide petitions.

SUMMARY: This document announces the withdrawal of pesticide petitions requesting the establishment or modification of regulations for residues of pesticide chemicals in or on various commodities. The petitions were either withdrawn voluntarily by the petitioners or administratively by the Agency.

FOR FURTHER INFORMATION CONTACT: A contact person, with telephone number and email address, is listed at the end of each pesticide petition summary. You may also reach each contact person by mail at Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

Although this action only applies to the petitioners in question, it is directed to the public in general. Since various individuals or entities may be interested, the Agency has not attempted to describe all the specific entities that may be interested in this action. If you have any questions regarding this action, please consult the person listed at the end of the withdrawal summary for the pesticide petition of interest.

B. How can I get copies of this document and other related information?

The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2012–0001, is available at *http://www.regulations.gov* or at the OPP Docket in the Environmental Protection Agency Docket Center (EPA/DC), located in EPA West, Rm. 3334, 1301 Constitution Ave. NW., Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets.*

II. What action is the agency taking?

EPA is announcing the withdrawal of pesticide petitions received under section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a, requesting the establishment or modification of regulations in 40 CFR part 180 for residues of pesticide chemicals in or on various food commodities.

Pursuant to 40 CFR 180.7(f), a summary of each of the petitions covered by this document, prepared by the petitioner, was included in a docket EPA created for each rulemaking. The docket for each of the petitions is available online at *http://www.regulations.gov.*

Withdrawals by Petitioners

1. PP 0E7754 (Gentamicin). EPA issued a notice in the **Federal Register** of July 6, 2011 (76 FR 39358) (FRL–8875–6) (EPA–HQ–OPP–2010–0820), which announced the filing of a pesticide petition (PP 0E7754) by Quimica Agronomica de Mexico, S. de R.L. MI., Calle 18 N[deg] 20501, Colonia Impulso, C.P. 31183, Chihuahua, Chih., Mexico c/o Gowan Company, P.O. Box 5569, Yuma, AZ 85366. The petition proposed to establish a tolerance in 40 CFR 180.642 for residues of the fungicide gentamicin, in or on cucurbits (crop group 9) at 0.05 parts per million (ppm) and fruiting vegetables (crop group 8) at 0.05 ppm. On June 18, 2012, Gowan Company (U.S. agent on behalf of Quimica Agronomica de Mexico) notified EPA that it was withdrawing this petition. Contact: Shaunta Hill, (703) 347–8961, email address: *hill.shaunta@epa.gov.*

2. PP 0E7755 (Oxytetracycline). EPA issued a notice in the **Federal Register** of September 23, 2010 (75 FR 57942) (FRL–8845–4) (EPA–HQ–OPP–2010–0740), which announced the filing of pesticide petition (PP 0E7755) by Quimica Agronomica de Mexico, S. de R.L. MI., Calle 18 N 20501, Colonia Impulso, C.P. 31183, Chihuahua, Chih., Mexico. The petition proposed to establish a tolerance in 40 CFR 180.337 for residues of the fungicide oxytetracycline, in or on cucurbits, crop group 9; and fruiting vegetables, crop group 8 at 0.03 ppm. On June 18, 2012, Gowan Company (U.S. agent on behalf of Quimica Agronomica de Mexico) notified EPA that it was withdrawing this petition. Contact: Heather Garvie, (703) 308–0034, email address: *garvie.heather@epa.gov.*

3. PP 1F7887 (Phosphine). EPA issued a notice in the **Federal Register** of October 5, 2011 (76 FR 61649) (FRL–8890–5) (EPA–HQ–OPP–2011–0741), which announced the filing of a pesticide petition (PP 1F7887) by Cytec Industries, Inc., 5 Garret Mountain Plaza, Woodland Park, NJ 07424. The petition proposed to establish tolerances in 40 CFR 180.225 for residues of phosphine, in or on asparagus; cherimoya; dates, fresh; figs, fresh; globe artichokes; pawpaws; pineapple, water chestnuts and watercress, and for all fresh fruit and vegetable crop groups (including berry and small fruit; citrus fruit; pome fruit; stone fruit; herbs and spices; Brassica leafy vegetables; leafy vegetables; bulb vegetables; cucurbits; fruiting vegetables except cucurbits; legume vegetables, except soybeans; foliage of legume vegetables; root and tuber group; and root and tuber leaves group) at 0.01 ppm. On April 5, 2012, Cytec Industries notified EPA that it was withdrawing the petition. Contact: Gene Benbow, 703–347–0235, email address: *benbow.gene@epa.gov.*

4. PP 4F4281 (Iprodione). EPA issued a notice in the **Federal Register** of August 2, 2006 (71 FR 43760) (FRL–8082–8) (EPA–HQ–OPP–2006–0637), which announced the filing of pesticide petition (PP 4F4281) by Bayer CropScience, Research Triangle Park, North Carolina 27709. The petition proposed to establish a tolerance for iprodione, [3-(3,5-dichlorophenyl)-*N*-(1-methylethyl)-2,4- dioxo-1-imidazolidinecarboxamide, its isomer 3-(1-methylethyl)-*N*-(3,5- dichlorophenyl)-2,4-dioxo-1-imidazolidinecarboxamide, and its metabolite 3-(3,5-dichlorophenyl)-2,4-dioxo-1-imidazolidinecarboxamide in or on the food commodity rapeseed (canola) at 1.0 ppm. On March 7, 2012, Bayer Crop Science, notified EPA that it was withdrawing its petition. Contact: Tamue L. Gibson, (703) 305–9096, email address: *gibson.tamue@epa.gov.*

5. PP 9F7565 (Iprodione). EPA issued a notice in the **Federal Register** of September 4, 2009 (74 FR 45848) (FRL–8434–4) (EPA–HQ–OPP–2009–0550), which announced the filing of pesticide petition (PP 9F7565) by Devgen US, Inc., 413 McFarlan Road, Suite B, Kennett Square, PA 19348, which proposed to establish a tolerance in 40 CFR 180.399 for residues of iprodione, in or on cucurbit crop group at 0.3 ppm; and fruiting vegetables, except cucurbits at 2.0 ppm. On June 22, 2012, Devgen US, Inc., notified EPA that it was withdrawing its petition. Contact: Tamue L. Gibson, (703) 305–9096, email address: *gibson.tamue@epa.gov.*

6. PP 2E7993 (Ethephon). EPA issued a notice in the **Federal Register** of May 23, 2012 (77 FR 30481) (FRL–9347–8) (EPA–HQ–OPP–2012–0241), which announced the filing of pesticide petition (PP 2E7993) by Interregional Research Project Number 4 (IR–4), 500 College Road East, Suite 201 W, Princeton, NJ 08540. The petition proposed to increase a tolerance in 40 CFR 180.300 for residues of the plant regulator ethephon in or on tomato from 2.0 ppm to 3.5 ppm. On January 3, 2013, IR–4 notified EPA that it was withdrawing this petition. Contact: Andrew Ertman, (703) 308–9367, email address: *ertman.andrew@epa.gov*.

List of Subjects in 40 CFR Part 180

Environmental protection, Agricultural commodities, Feed additives, Food additives, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: January 23, 2013.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 2013–02009 Filed 1–29–13; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Parts 430, 431, 433, 435, 440, 447, and 457

Office of the Secretary

45 CFR Part 155

[CMS–2334–CN]

RIN 0938–AR04

Medicaid, Children's Health Insurance Programs, and Exchanges: Essential Health Benefits in Alternative Benefit Plans, Eligibility Notices, Fair Hearing and Appeal Processes for Medicaid and Exchange Eligibility Appeals and Other Provisions Related to Eligibility and Enrollment for Exchanges, Medicaid and CHIP, and Medicaid Premiums and Cost Sharing; Correction

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Proposed rule; correction.

SUMMARY: This document makes a technical correction to the proposed rule published in the January 22, 2013 **Federal Register** entitled ''Medicaid, Children's Health Insurance Programs, and Exchanges: Essential Health Benefits in Alternative Benefit Plans, Eligibility Notices, Fair Hearing and Appeal Processes for Medicaid and Exchange Eligibility Appeals and Other Provisions Related to Eligibility and Enrollment for Exchanges, Medicaid and CHIP, and Medicaid Premiums and Cost Sharing.'' The proposed rule provided for the close of the comment period to be February 13, 2013, whereas the close of the comment period was intended to be February 21, 2013. This document makes this technical correction.

DATES: The comment close date for the proposed rule under the same heading published in the January 22, 2013 **Federal Register** is correctly extended to February 21, 2013.

FOR FURTHER INFORMATION CONTACT: Annette Brewer, (410) 786–6580.

SUPPLEMENTARY INFORMATION:

I. Background

In FR Doc. 2013–00659 of January 22, 2013 (78 FR 4594), there was a technical error that is identified and corrected in the Correction of Errors section below. The provision in this correction document is effective as if it had been included in the document published on January 22, 2013.

II. Summary of Errors

In the **DATES** section of the proposed rule, we established a closing date of the 30-day comment period as February 13, 2013. In this notice we are making a technical correction to the comment period, which now closes on February 21, 2013.

III. Waiver of Proposed Rulemaking

We ordinarily publish a notice of proposed rulemaking in the **Federal Register** to provide a period for public comment before the provisions of a rule take effect in accordance with section 553(b) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). However, we can waive this notice and comment procedure if the Secretary finds, for good cause, that the notice and comment process is impracticable, unnecessary, or contrary to the public interest, and incorporates a statement of the finding and the reasons therefore in the notice. This correction notice has the effect of extending the period for public comment that was initially established in the proposed rule published in the **Federal Register** on January 22, 2013 (78 FR 4594). This correction notice makes no changes to any of the substantive matters discussed in the proposed rule. Rather, this correction notice makes a technical correction to the date on which the period for public comment on the previously published proposed rule ends. This technical correction will not disadvantage any member of the public, and it is in the public interest to permit the full intended time period for comment. Therefore, we find it unnecessary to issue a notice of proposed rulemaking for this correction notice.

IV. Correction of Errors

In FR Doc. 2013–00659 of January 22, 2013 (78 FR 4594), make the following corrections:

In the **DATES** section, the date ''February 13, 2013'' is corrected to read ''February 21, 2013''.

(Catalog of Federal Domestic Assistance Program No. 93.778, Medical Assistance Program)

Dated: January 25, 2013.

Jennifer M. Cannistra,

Executive Secretary to the Department.

[FR Doc. 2013–02094 Filed 1–28–13; 4:15 pm]

BILLING CODE 4120–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 87

[WT Docket No. 01–289; FCC 13–2]

Aviation Communications

AGENCY: Federal Communications Commission.

ACTION: Proposed rules.

SUMMARY: In this document, the Federal Communications Commission (Commission) invites comment on issues regarding 121.5 MHz emergency locator transmitters (ELTs), in effort to ensure that it's rules pertaining to Aviation Communications remain up-to-date and continues to further the Commission's goals of accommodating new technologies, facilitating the efficient and effective use of the aeronautical spectrum, avoiding unnecessary regulation, and, above all, enhancing the safety of flight.

DATES: Submit comments on or before March 1, 2013, and reply comments are due on or before March 18, 2013.

ADDRESSES: You may submit comments, identified by WT Docket No. 01–289, FCC 13–2, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Federal Communications Commission's Web Site: http://www.fcc.gov/cgb/ecfs/*. Follow the instructions for submitting comments.
- *People With Disabilities:* Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by email: *FCC504@fcc.gov* or phone 202–418–0530 or TTY: 202–418–0432.

For detailed instructions for submitting comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Jeffrey Tobias, *Jeff.Tobias@FCC.gov,* Wireless Telecommunications Bureau, (202) 418–1617, or TTY (202) 418–7233.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Third Further Notice of Proposed Rule Making* (''*Third FNPRM''*) in WT Docket No. 01–289, FCC 13–2, adopted on January 7, 2013, and released on January 8, 2013. The full text of this document is available for inspection and copying during normal business hours in the FCC Reference Center, 445 12th Street SW., Washington, DC 20554. The complete text may be purchased from the Commission's copy contractor, Best Copy and Printing, Inc., 445 12th Street SW., Room CY–B402, Washington, DC 20554. The full text may also be downloaded at: *www.fcc.gov*. Alternative formats are available to persons with disabilities by sending an email to *fcc504@fcc.gov* or by calling the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (tty).

1. The WT Docket No. 01–289 rulemaking proceeding was established to ensure that part 87 of the Commission's rules remains up-to-date and continues to further the Commission's goals of accommodating new technologies, facilitating the efficient and effective use of the aeronautical spectrum, avoiding unnecessary regulation, and, above all, enhancing the safety of flight. In the *Third FNPRM,* the Commission invites further comment on the appropriate treatment of 121.5 MHz ELTs under part 87 of the rules. ELTs are radiobeacons that are activated manually or automatically to alert search and rescue personnel that an aircraft has crashed, and to identify the location of the aircraft and any survivors. In the *Third Report and Order,* at 76 FR 17347, March 29, 2011, in this proceeding, the Commission amended § 87.195 of its rules to prohibit the certification, manufacture, importation, sale or use of 121.5 MHz ELTs. It adopted this amendment because, among other reasons, the international Cospas-Sarsat satellite system, which relays distress alerts to search and rescue authorities, stopped monitoring frequency 121.5 MHz on February 1, 2009.

2. After the Commission released the *Third Report and Order,* it received a letter from the Federal Aviation Administration (FAA) asking that the Commission not implement the modification to § 87.195. The FAA stated that 121.5 MHz ELTs can continue to provide beneficial means of locating missing aircraft even without satellite monitoring because the frequency is still monitored by the search and rescue community, including the Civil Air Patrol. The FAA also expressed concerns about the costs and availability of replacements for the 121.5 MHz ELTs.

3. Following its receipt of the FAA letter, the Commission determined that it would be in the public interest to stay its amendment to § 87.195. In the *Stay Order,* at 76 FR 17353, March 29, 2011, which was published in the **Federal Register** on the same day as the summary of the *Third Report and Order,* the Commission stated that no additional action would be taken regarding 121.5 MHz ELTs until further notice and an additional opportunity for public comment. This *Third FNPRM* requests such comment.

I. Procedural Matters

A. Ex Parte Rules—Permit-But-Disclose Proceeding

4. This is a permit-but-disclose notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's rules.

B. Comment Dates

5. Pursuant to §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments on or before March 1, 2013 and reply comments on or before March 18, 2013. All filings related to this *Third FNPRM* should refer to WT Docket No. 01–289.

6. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS), the Federal Government's eRulemaking Portal, or by filing paper copies. *See* Electronic Filing of Documents in Rulemaking Proceedings, 63 FR 24121 (1998).

7. Comments may be filed electronically using the Internet by accessing the ECFS: *http://www.fcc.gov/cgb/ecfs/* or the Federal eRulemaking Portal: *http://www.regulations.gov*. Filers should follow the instructions provided on the Web site for submitting comments.

8. For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet email. To get filing instructions, filers should send an email to *ecfs@fcc.gov,* and include the following words in the body of the message, ''get form.'' A sample form and directions will be sent in response.

9. Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

10. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or

overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

11. The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue NE, Suite 110, Washington DC 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.

12. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

13. U.S. Postal Service first-class, Express, and Priority mail should be addressed to 445 12th Street SW., Washington, DC 20554.

14. All filings must be addressed to the Commission's Secretary, Marlene H. Dortch, Office of the Secretary, Federal Communications Commission, 445 12th Street SW., Washington, DC 20554. Parties shall also serve one copy with the Commission's copy contractor, Best Copy and Printing, Inc. (BCPI), Portals II, 445 12th Street SW., Room CY–B402, Washington, DC 20554, (202) 488–5300, or via email to *fcc@bcpiweb.com.*

15. *Availability of documents.* The public may view the documents filed in this proceeding during regular business hours in the FCC Reference Information Center, Federal Communications Commission, 445 12th Street SW., Room CY–A257, Washington, DC 20554, and on the Commission's Internet Home Page: *http://www.fcc.gov.* Copies of comments and reply comments are also available through the Commission's duplicating contractor: Best Copy and Printing, Inc. (BCPI), Portals II, 445 12th Street SW., Room CY–B402, Washington, DC 20554, telephone 1–800–378–3160, may be reached by email at *fcc@bcpiweb.com* or via BCPI's Web site at *www.bcpiweb.com.* To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (tty).

C. Paperwork Reduction Act

16. This document does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. In addition, therefore, it does not contain any new or modified ''information collection burden for small business concerns with fewer than 25 employees,'' pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4).

II. Supplemental Initial Regulatory Flexibility Analysis

17. As required by the Regulatory Flexibility Act (RFA), the Commission has prepared this Supplemental Initial Regulatory Flexibility Analysis (Supplemental IRFA) of the possible significant economic impact on small entities of the policies and rules proposed in the *Third FNPRM* in WT Docket No. 01–289. Written public comments are requested on this Supplemental IRFA. Comments must be identified as responses to the Supplemental IRFA and must be filed by the deadlines for comments on the *Third FNPRM* as provided in paragraph 5 above. The Commission will send a copy of the *Third FNPRM,* including this Supplemental IRFA, to the Chief Counsel for Advocacy of the Small Business Administration. In addition, the *Third FNPRM* and Supplemental IRFA (or summaries thereof) will be published in the **Federal Register**.

Need for, and Objectives of, the Proposed Rules

18. The proposed rules in the *Third FNPRM* are intended to address the appropriate regulatory treatment of 121.5 MHz emergency locator transmitters (ELTs) now that they are no longer monitored by the Cospas-Sarsat satellite system.

Legal Basis for Proposed Rules

19. Authority for issuance of this item is contained in sections 4(i), 303(r) and 403 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303(r) and 403.

Description and Estimate of the Number of Small Entities To Which the Proposed Rules Will Apply

20. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted. The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. A small business concern is one that: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA. Pursuant to 5 U.S.C. 601(3), the statutory definition of a small business applies ''unless an agency after consultation with the Office of Advocacy of the SBA, and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the **Federal Register**.''

21. Small businesses in the aviation and marine radio services use a marine very high frequency (VHF), medium frequency (MF), or high frequency (HF) radio, any type of emergency position indicating radio beacon (EPIRB) and/or radar, an aircraft radio, and/or any type of emergency locator transmitter (ELT). The Commission has not developed a definition of small entities specifically applicable to these small businesses. For purposes of this analysis, the Commission uses the SBA small business size standard for the category Wireless Telecommunications Carriers (except satellite),'' which is 1,500 or fewer employees. Census data for 2007 shows that there were 1,383 firms that operated that year. Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small.

22. Some of the rules adopted herein may also affect small businesses that manufacture aviation radio equipment. The Census Bureau does not have a category specific to aviation radio equipment manufacturers. The appropriate category is that for wireless communications equipment manufacturers. The Census Bureau defines this category as follows: ''This industry comprises establishments primarily engaged in manufacturing radio and television broadcast and wireless communications equipment. Examples of products made by these establishments are: Transmitting and receiving antennas, cable television equipment, GPS equipment, pagers, cellular phones, mobile communications equipment, and radio and television studio and broadcasting equipment.'' The SBA has developed a small business size standard for Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing, which is: All such firms having 750 or fewer employees. According to Census bureau data for 2007, there were a total of 919 firms in this category that operated for the entire

year. Of this total, 771 had fewer than 100 employees and 148 had more than 100 employees. Thus, under this size standard, the majority of firms can be considered small.

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

23. We are considering in the *Third FNPRM* whether to prohibit the certification, manufacture, importation, sale or use of 121.5 MHz ELTs, and, if so, under what timetable. We request comment on whether the manufacturers, importers, sellers, and, in particular, users of 121.5 MHz ELTs are small entities, and the extent to which a total or partial prohibition of 121.5 MHz ELTs might impose burdens on them. We request specific data on the costs of purchasing and installing a 406 MHz ELT to replace a 121.5 MHz ELT, the availability of 406 MHz ELTs, and the possibility that some general aviation aircraft may be grounded due to an inability to acquire a 406 MHz ELT.

Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

24. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives: (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.

25. It is not economically or technologically feasible to retrofit 121.5 MHz ELTs to transmit a 406 MHz distress alert. We believe, however, that the safety benefits of 406 MHz ELTs outweigh the cost of replacing 121.5 MHz ELTs. The *Third FNPRM* seeks comment on how best to minimize the economic impact of migrating to 406 MHz ELTs. Specifically, we propose to amend § 87.195 of the Commission's rules to prohibit further certification of new models of 121.5 MHz ELTs on the effective date of the rule amendment, and to prohibit any further manufacture, importation, and sale of 121.5 MHz ELTs beginning one year after the effective date of the rule amendment. We also seek comment on alternatives to these proposals, including those that may minimize any economic impact on small entities. Commenters may advocate, for example, for an immediate prohibition of all actions that would enable additional installations of 121.5 MHz ELTs, for different transition periods, or for taking no action at all, and leaving § 87.195 as is. In addition, the *Third NPRM* invites comment, but makes no specific proposals, regarding the continued use of 121.5 MHz ELTs. We request comment on whether we should grandfather the continued use of 121.5 MHz ELTs already installed on aircraft, and, if so, for how long. Commenters favoring a grandfathering period of limited duration are asked to recommend a specific date, and commenters may also advocate for indefinite grandfathering of installed 121.5 MHz ELTs, so that the equipment may continue to be used until the end of its useful life. We also propose to amend § 87.147(b) of the Commission's rules to remove an obsolete cross-reference to subpart N of part 2 of the Commission's rules.

Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules

26. None.

III. Ordering Clauses

27. Pursuant to sections 4(i), 303(r), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303(r) and 403, this *Third FNPRM* is adopted.

28. Pursuant to the applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, and 1.419, interested parties may file comments on this *Third FNPRM* on or before 30 days after publication in the **Federal Register**, and reply comments on or before 45 days after publication in the **Federal Register**.

29. The Commission's Consumer Information Bureau, Reference Information Center, *shall*

SEND a copy of this *Third FNPRM,* including the Supplemental Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Proposed Rules

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 87 as follows:

■ 1. The authority citation for part 87 continues to read as follows:

PART 87—AVIATION SERVICES

Authority: 47 U.S.C. 154, 303 and 307(e), unless otherwise noted.

■ 2. Section 87.147 is amended by revising paragraph (b) to read as follows:

§ 87.147 Authorization of equipment.

* * * * *

(b) ELTs manufactured after October 1, 1988, must meet the output power characteristics contained in § 87.141(i). A report of the measurements must be submitted with each application for certification. ELTs that meet the output power characteristics of the section must have a permanent label prominently displayed on the outer casing state, ''Meets FCC Rule for improved satellite detection.'' This label, however, must not be placed on the equipment without authorization to do so by the Commission. Application for such authorization may be made either by submission of a new application for certification accompanied by the required fee and all information and test data required by parts 2 and 87 of this chapter or, for ELTs approved prior to October 1, 1988, a letter requesting such authorization, including appropriate test data and a showing that all units produced under the original equipment authorization comply with the requirements of this paragraph without change to the original circuitry.

* * * * *

■ 3. Section 87.195 is revised to read as follows:

§ 87.195 121.5 MHz ELTs.

ELTs that operate only on frequency 121.5 MHz will no longer be certified. The manufacture, importation, and sale of ELTs that operate only on frequency 121.5 MHz is prohibited beginning [ONE YEAR AFTER EFFECTIVE DATE]. Existing ELTs that operate only on frequency 121.5 MHz must be operated as certified.

[FR Doc. 2013–01871 Filed 1–29–13; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 680

[Docket No. 110207108–2709–01]

RIN 0648–BA82

Fisheries of the Exclusive Economic Zone Off Alaska; Bering Sea and Aleutian Islands Crab Rationalization Program

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule, request for comments.

SUMMARY: NMFS proposes regulations to implement Amendment 41 to the Fishery Management Plan for Bering Sea/Aleutian Islands King and Tanner Crabs (FMP). If approved, these regulations will amend the Bering Sea/Aleutian Islands Crab Rationalization Program (CR Program) by establishing a process whereby holders of regionally designated individual fishing quota (IFQ) and individual processor quota (IPQ) in six CR Program fisheries may receive an exemption from regional delivery requirements in the North or South Region. The six CR Program fisheries are Bristol Bay red king crab, Bering Sea snow crab, Saint Matthew Island blue king crab, Eastern Aleutian Islands golden king crab, Western Aleutian Islands red king crab, and Pribilof Islands red and blue king crab. Current regulations require that a portion of crab harvested in these fisheries be delivered and processed within the boundaries of the North or South Region. This action is necessary to mitigate disruptions in a CR Program fishery that prevent participants from complying with regional delivery requirements. This proposed action is intended to promote the goals and objectives of the Magnuson-Stevens Fishery Conservation and Management Act, the FMP, and other applicable law.

DATES: Written comments must be received no later than 5:00 p.m. Alaska local time (A.l.t.) March 1, 2013.

ADDRESSES: You may submit comments, identified by NOAA–NMFS–2011–0032, by any one of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal eRulemaking Portal at *http://www.regulations.gov.* To submit comments via the e-Rulemaking Portal, first click the ''submit a comment'' icon, then enter NOAA–NMFS–2011–0032 in the keyword search. Locate the document you wish to comment on from the resulting list and click on the ''Submit a Comment'' icon on that line.
- *Fax:* Address written comments to Glenn Merrill, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region NMFS, Attn: Ellen Sebastian. Fax comments to 907–586–7557.
- *Mail:* Address written comments to Glenn Merrill, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region NMFS, Attn: Ellen Sebastian. Mail comments to P. O. Box 21668, Juneau, AK 99802.
- *Hand delivery to the Federal Building:* Address written comments to Glenn Merrill, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region NMFS, Attn: Ellen Sebastian. Deliver comments to 709 West 9th Street, Room 420A, Juneau, AK.

Instructions: Comments must be submitted by one of the above methods to ensure that the comments are received, documented, and considered by NMFS. Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered. All comments received are a part of the public record and will generally be posted for public viewing on *http://www.regulations.gov* without change. All Personal Identifying Information (for example, name, address) voluntarily submitted by the commenter will be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information. NMFS will accept anonymous comments (enter N/A in the required fields, if you wish to remain anonymous). You may submit attachments to electronic comments in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

Electronic copies of Amendment 41 to the FMP, the Regulatory Impact Review (RIR)/Initial Regulatory Flexibility Analysis (IRFA), and the Categorical Exclusion prepared for this action may be obtained from *http://www.regulations.gov* or from the Alaska Region Web site at *http://alaskafisheries.noaa.gov.* The Environmental Impact Statement (EIS), RIR, and Social Impact Assessment prepared for the CR Program are available from the NMFS Alaska Region Web site at *http://alaskafisheries.noaa.gov.*

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this rule may be submitted to NMFS at the above address; emailed to *OIRA_Submission@omb.eop.gov* or faxed to 202–395–7285.

FOR FURTHER INFORMATION CONTACT: Gretchen Harrington, 907–586–7228.

SUPPLEMENTARY INFORMATION: The king and Tanner crab fisheries in the exclusive economic zone of the Bering Sea and Aleutian Islands (BSAI) are managed under the FMP. The North Pacific Fishery Management Council (Council) prepared the FMP under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

NMFS published the final rule to implement the CR Program, Amendments 18 and 19 to the FMP, on March 2, 2005 (70 FR 10174). Regulations implementing the FMP and all amendments to the CR Program are at 50 CFR part 680.

The CR Program is a catch share program for nine BSAI crab fisheries that allocates those resources among harvesters, processors, and coastal communities. Under the CR Program, NMFS issued quota share (QS) to eligible harvesters based on their participation during a set of qualifying years in one or more of the nine CR Program fisheries. QS is an exclusive, revocable privilege allowing the holder to harvest a specific percentage of the annual total allowable catch (TAC) in a CR Program fishery.

A QS holder's annual allocation, called IFQ, is expressed in pounds and is based on the amount of QS held in relation to the total QS pool for that fishery. NMFS issues IFQ in three classes: Class A IFQ, Class B IFQ, and Class C IFQ. Three percent of IFQ is issued as Class C IFQ for captains and crew. Of the remaining IFQ, 90 percent is Class A IFQ and 10 percent is Class B IFQ.

NMFS issued processor quota share (PQS) to qualified individuals and entities based on processing activities in CR Program fisheries during a period of qualifying years. PQS is an exclusive, revocable privilege to receive deliveries of a fixed percentage of the annual TAC from a CR Program fishery. A PQS holder's annual allocation is individual processing quota (IPQ). NMFS issues IPQ at a one-to-one correlation between the amount of IPQ and Class A IFQ issued for each CR Program fishery. Class A IFQ must be delivered to a processor holding a matching amount of IPQ; Class C IFQ and Class B IFQ may be delivered to any registered crab receiver.

Regional Delivery Requirements

The CR Program established regional delivery requirements to preserve the historic geographic distribution of deliveries in the crab fisheries. NMFS assigned a regional designation to QS and PQS for seven of the nine CR Program fisheries. Regional designations of QS and PQS are described, respectively, in § 680.40(b)(2) and (d)(2).

Amendment 41 and this proposed rule would apply to QS and PQS that have a regional designation for the North Region or South Region. NMFS assigned a North Region designation or a South Region designation to the QS and PQS in six CR Program fisheries: Bristol Bay red king crab, Bering Sea snow crab, Eastern Aleutian Islands golden king crab, Western Aleutian Islands red king crab, Saint Matthew Island blue king crab, and Pribilof Islands red and blue king crab. The North Region is north of 54°20″ N. latitude. The South Region is south of 54°20″ N. latitude.

NMFS also assigned a West Region designation to a portion of the Western Aleutian Islands golden king crab QS and PQS; the remaining QS and PQS in that fishery is undesignated and may be delivered without regional limitation. Eastern Bering Sea Tanner crab QS and PQS, and Western Bering Sea Tanner crab fishery QS and PQS do not have a regional designation. Amendment 41 and this proposed rule would not apply to QS and PQS issued for these fisheries.

Class A IFQ has the same regional designation as the underlying QS. Class B IFQ and Class C IFQ do not have regional designations: the crab harvested under Class B IFQ or Class C IFQ can be delivered to any registered crab receiver. For Class A IFQ with a regional designation, CR Program regulations at § 680.7(a)(2) prohibit a processor from receiving crab in any region other than the region designated on the IFQ permit.

IPQ has the same regional designation as the underlying PQS. CR Program regulations at § 680.7(a)(4) prohibit the use of IPQ to process crab in any region other than the region designated on the IPQ permit.

Environmental or man-made conditions have created obstacles to regional deliveries in every year since implementation of the CR Program. Each year, icing conditions have been an obstacle to delivering crab harvested with North Region IFQ in the North Region. For an entire season, deliveries to a floating processor that served most of the North Region were prevented by a fire that disabled the processor. Whether a delivery is prevented depends on the circumstances, such as the spatial distribution and type of ice, the specific vessel, the location of the vessel relative to the processing facility, the amount and condition of crab on board, and any factors affecting the willingness of the captain to wait for conditions to change.

Despite these circumstances, participants have met regional delivery requirements in all CR Program fisheries except Western Aleutian Islands golden king crab. Amendment 37, described below, addressed the problems in that fishery. In the North Region, IFQ holders have complied with regional delivery requirements by using their harvesting cooperatives to adjust the timing of crab harvests and using other available IFQ in lieu of North Region IFQ. Such ad hoc responses to severe weather conditions or other circumstances that restrict landings have enabled the participants in the North Region to meet regional delivery requirements; however, these measures have not provided long-term solutions that sufficiently address timeliness, safety, economic efficiency, and other factors.

Western Aleutian Islands golden king crab fishery had suffered from a chronic lack of processing capacity in the West Region. Amendment 37 to the FMP addressed the difficulties of IFQ and IPQ holders meeting the regional delivery requirement in this fishery. Under regulations implementing Amendment 37, eligible participants in the Western Aleutian Islands golden king crab fishery may enter into a contractual agreement and request that NMFS exempt them from regional delivery requirements for West Region Class A IFQ and corresponding IPQ. Upon approval of a completed application, NMFS will exempt holders of West Region Class A IFQ and corresponding IPQ from regional delivery requirements, thereby allowing eligible participants to deliver and receive crab at facilities outside of the West Region. Additional information on Amendment 37 is contained in the final rule (76 FR 35781, June 20, 2011).

Because the conditions that have impeded deliveries within the West Region (e.g., limited, or no, available processing capacity) differ from the conditions impeding deliveries in the North Region (e.g., icing conditions), the Council chose to develop Amendment 41 to respond to the specific delivery conditions in CR fisheries subject to North and South regional designations.

IPQ Use Caps

The CR Program has PQS and IPQ use caps. When the Council recommended the CR Program, it was concerned that excessive consolidation of PQS could reduce competition and reduce processing in communities where processing had historically occurred. Therefore, the Council created limits on the total amount of PQS that a person can hold, the amount of IPQ that a person can use, and the amount of IPQ that can be processed at a single facility. For a complete discussion of the PQS and IPQ use caps, please see the proposed rule for the CR Program (69 FR 63200; October 29, 2004). As discussed below, this proposed rule modifies the CR Program use caps so that NMFS would not count crab delivered pursuant to an exemption toward those caps. This change is necessary to allow IPQ holders and facilities to accept crab for delivery and processing once the crab is subject to an exemption from the regional delivery requirements.

Amendment 41

The Council adopted Amendment 41 to the FMP at its December 2010 meeting. Amendment 41 would promote the safety of human life at sea and mitigate economic harm by allowing participants to receive an exemption from regional delivery requirements in situations where events prevent participants from delivering crab harvested with North Region IFQ in the North Region or South Region IFQ in the South Region.

In recommending Amendment 41, the Council recognized that weather conditions or other natural or man-made circumstances can hinder harvesting activities and restrict access to processing facilities in the North or South Region. Natural or man-made catastrophes could result in lost revenue to harvesters, processors, and communities. Safety risks increase when harvesters attempt to meet regional delivery requirements in inclement weather (e.g., icing conditions) and other potentially unsafe situations. Unforeseen delays in delivering crab could result in deadloss (crab that die before being processed). Harvesters may avoid or delay the harvest of regionally designated IFQ, thereby increasing the potential for unharvested crab or crab harvested later in the fishing season than would have been otherwise required for a given TAC level. Such changes in fishing behavior could result in unused IPQ, increased processing cost, loss of market share, and loss of revenue to remote communities dependent on revenues from crab deliveries and processing.

The Council recognized that the purpose of prohibiting holders of regionally designated Class A IFQ and IPQ from delivering and processing crab outside the designated region is to ensure that each region retains the economic benefits from deliveries within the region. Therefore, under Amendment 41, the Council recommended an exemption process in which deliveries of regionally designated Class A IFQ outside the region would need to be negotiated among IFQ holders, IPQ holders, and representatives of affected communities. The Council also recognized that any exemption must include requirements for IFQ holders and IPQ holders to make efforts to avoid the need for an exemption and, if an exemption is needed, to limit the amount of IFQ and IPQ that would be subject to an exemption. The Council recommended a process that supports the existing regional delivery requirements while establishing a process to mitigate disruptions in a CR Program fishery that restrict the ability of participants to comply with the delivery requirements.

The Council also recognized the potential for insurmountable administrative difficulties if NMFS specified the conditions for granting an exemption and then determined whether those conditions existed in a particular situation. Therefore, the Council recommended a system of civil contracts among harvesters, processors, and community representatives as the means of establishing the exemption from the regional delivery requirements.

Under Amendment 41, the parties—Class A IFQ holders, IPQ holders, and affected communities—would develop private contractual arrangements that specify when, and under what terms, they could request and receive an exemption from regional delivery requirements in the North or South Region. The contract terms would not be established in the FMP or in regulation. The parties would enter into two private contractual arrangements—a preseason framework agreement and an inseason exemption contract—before the specified IFQ and IPQ would be exempt from the regional delivery requirements. These contracts would govern the roles and responsibilities of the parties to the contract and would establish each party's specific obligations. The goal is that, through the framework agreement process, before the crab season, the parties would plan for adverse conditions and would agree to take actions to reduce the need for an exemption. Then, in the event that these actions were unsuccessful in averting the need for an exemption, the parties would execute an exemption contract. The parties would notify NMFS and certify that they had executed an exemption contract as required by the regulation. The exemption would go into effect the day after NMFS receives the inseason notice. If any party to a framework agreement or exemption contract believes that any other party did not comply with their contractual obligation, that party could seek redress as a private civil matter.

Overall, the exemption process in the proposed rule seeks to allow fishery participants to respond to an emergency situation during the crab fishing season in accord with ground rules that they themselves established before the season.

Amendment 41 and this proposed rule do not prescribe specific conditions or terms of agreement for the framework agreement or exemption contract. But the Council's Statement of Council Intent should guide the parties in establishing the required contracts. Additionally, section 2.4.2 of the RIR for this action provides background about the range of private arrangements that the Council considered and that the parties could put in the framework agreement and the exemption contract.

The following Statement of Council Intent was included in the Council's December 2010 motion:

> The Council intends that exemptions will be developed by agreement of the holders of Class A IFQ, holders of IPQ, and regional/community representatives. For emergency events of less than 2 million pounds in the aggregate, compensatory deliveries offer the opportunity to restore the landings to a region that are intended in current regulations; therefore no party should unreasonably withhold their agreement or unreasonably restrict the industry's ability to respond to those events. A prerequisite to an exemption will be that the parties have entered a nonbinding framework agreement. It is the Council's intent that this framework agreement will define certain terms of the exemption, including mitigation requirements and a range of terms of compensation, and that the exemption contract describes the conditions under which the exemption is being or would be requested, including mitigation requirements and terms of compensation specific to the exemption being sought. Mitigation would be intended to mitigate the effects on parties that might suffer some loss because of the granting of an exemption. Compensation would be intended to compensate parties for losses arising from the exemption. All framework agreements are expected to contain provisions for a reserve pool. A reserve pool would be intended to provide industry wide, civil contract based delivery relief without regulatory or administrative intervention. Specifically, a reserve pool would be an agreement among holders of IFQ to certain arrangements in the use of their IFQ to reduce the need for exemptions from the regional landing requirement. It is believed that an effective reserve pool must (1) commit each participant in the pool to be bound by its rules; and (2) include not less than 70% of the Class A IFQ held by:
>
> (a) unaffiliated cooperatives and unaffiliated IFQ holders not in a cooperative, in the aggregate; or
>
> (b) affiliated cooperatives and affiliated IFQ holders not in a cooperative, in the aggregate.
>
> Allowing several IFQ holders, IPQ holders, and community/regional entities to be a party to the same framework agreement is intended to streamline negotiations, facilitate the use of reserve pools, and allow for the incorporation of compensatory deliveries (should the parties believe compensating deliveries are appropriate). If an exemption is needed for compensatory deliveries, the process for receiving that exemption shall be the same as the process of affidavits used to make any other exempt deliveries under this action.

The framework agreement would define the steps that the parties would take prior to the crab fishing season to reduce the need for, and amount of, an exemption during the crab fishing year. A framework agreement could include an agreement among IFQ holders, whereby they aggregate a certain percentage of their IFQ to address inseason factors that could otherwise prevent compliance with regional delivery requirements. For example, the framework agreement could prioritize the harvest of North Region Class A IFQ while setting aside a portion of South Region Class A IFQ until the North Region Class A IFQ has been harvested and delivered to matching North Region IPQ. The framework agreement would also address the circumstances that would trigger an exemption. If those circumstances occurred, the framework agreement would describe the steps that the parties would take to mitigate the adverse effects of the exemption. The framework agreement might include steps to compensate the community that was losing the processing, the economic activity from the processing, and the tax revenues from the processing.

However, the Council did not recommend, and this proposed rule does not include, any terms that the parties must include in their framework agreement or exemption contract. The parties to the agreements would determine those terms.

The Proposed Rule

This proposed rule would establish a process by which IFQ holders, IPQ holders, and affected communities could jointly apply for and receive an exemption from regional delivery requirements. This proposed rule would apply to the following crab fisheries: Bristol Bay red king crab, Bering Sea snow crab, Eastern Aleutian Islands golden king crab, Western Aleutian Islands red king crab, Saint Matthew

Island blue king crab, and Pribilof Islands red and blue king crab.

This proposed rule would implement a two-step process for an exemption from regional delivery requirements: A preseason application and an inseason notice of exemption. Both parts of the application would be on one form: the Application for Exemption from CR Crab Regional Delivery Requirements. This application process would allow the parties to apply for an exemption from the regional delivery requirements without extensive administrative review by NMFS. Under this proposed rule, both the preseason application and the inseason notice must be signed by one or more members of the following three groups: (1) Holders of Class A IFQ in a CR Program fishery subject to this proposed rule; (2) holders of the IPQ in a CR Program fishery subject to this proposed rule; and (3) a representative of the affected community.

Preseason Application Process

The preseason application process itself has two parts: (1) The development of a framework agreement by the parties; and (2) the submission of a preseason application to NMFS. During the first part of the preseason process, Class A IFQ holders, IPQ holders, and representatives from affected communities could choose to work together to establish a framework agreement for that crab fishing year. The framework agreement is intended to provide participants in the crab fishery with the flexibility to prepare for, and agree upon, certain aspects of an exemption prior to the start of the crab fishing season. This proposed rule would not require fishery participants to enter a framework agreement; however, a framework agreement would be required for fishery participants to obtain an exemption from the regional delivery requirements in that crab fishing year.

Developing the provisions of a framework agreement preseason should prevent the parties from seeking an exemption for simple convenience as well as provide several benefits to the parties. First, agreement of all parties to a framework agreement should streamline the process for seeking an exemption from the regional delivery requirements inseason. A framework agreement would provide a means for IFQ holders and IPQ holders to quickly obtain an inseason exemption from the regional delivery requirement. Second, the framework agreement could prevent a party or parties from imposing unreasonable terms in the event that an exemption is needed. For example, absent a preseason agreement, an IFQ holder who is hampered from making a landing due to unsafe icing conditions could potentially be at a disadvantage when negotiating terms of the exemption.

Once the parties establish a framework agreement, the parties would submit the preseason application. A completed preseason application must be received by NMFS by October 15 of the crab fishing year for which the applicants may need an exemption. October 15 is the opening date of the fishing season established by the Alaska Department of Fish and Game for five of the six CR Program fisheries subject to this proposed rule. NMFS notes that the October 15 application deadline is after the August 15 opening of the Eastern Aleutian Islands golden king crab fishery season. However, participants in any of the crab fisheries subject to this rule could submit their application before October 15. Specifically, the participants in the Eastern Aleutian Islands golden king crab fishery could submit their preseason application before August 15.

The applicants would be responsible for ensuring that NMFS receives a complete application package. A complete preseason application would identify the CR program fishery for which the applicants are seeking an exemption. A complete preseason application must be signed by the holders of the IFQ and IPQ that are the subject of the preseason application and by the community representative.

A preseason application also includes an affidavit that the parties submitting the preseason application have signed a framework agreement that: (1) Specifies the CR crab fisheries that are the subject of the framework agreement; (2) specifies the actions that the parties will take to reduce the need for, and the amount of, an exemption; (3) specifies the circumstances under which the parties would execute an exemption contract and receive an exemption; (4) specifies the actions that the parties would take to mitigate the effects of an exemption; (5) specifies the compensation, if any, that any party would provide to any other party; and (6) affirms that the required parties have signed the framework agreement. The parties may include any other mutually agreeable terms in the framework agreement.

NMFS would review each preseason application. If a preseason application was timely and complete, NMFS would approve the application. If a preseason application was not received by October 15, NMFS would deny the application. If NMFS denied a preseason application for any reason, those applicants would not be eligible for an exemption from regional delivery requirements during the crab fishing year. However, the applicants would have the right to appeal the denial.

If NMFS approves a preseason application, the applicants who submitted the preseason application could make a delivery out-of-region during the crab fishing year if, before the delivery, the applicants took two actions that are specified in the regulation: (1) The applicants executed an exemption contract; and (2) the applicants submitted an inseason notice to NMFS that they are exercising the exemption.

The preseason application process in the proposed rule is consistent with the Council's intent that NMFS only determine whether the applicants have certified to NMFS that they have signed a framework agreement that contains the required elements. The preseason application process would allow the parties themselves to establish the terms of the framework agreement. The preseason application process would allow the affected parties to enter the fishing season knowing the steps that the parties would take to avoid an exemption, the circumstances that would trigger an exemption, the steps they would need to take to obtain an exemption, and any mutually-agreed upon compensatory actions that the parties would take as a result of exercising the exemption.

Inseason Process

If parties to an approved preseason application conclude during the crab fishing year that circumstances have occurred that justify an inseason exemption under the framework agreement, those applicants must do two things to obtain an exemption. They must enter into an exemption contract with each other and they must jointly submit an inseason notice of the exemption to NMFS.

First, the exemption contract: the proposed rule specifies that the parties to an exemption contract must be, at a minimum, one IFQ holder, one IPQ holder, and the representative of the affected community. The parties to an exemption contract may be multiple IFQ holders, IPQ holders, and one or more community representatives. The proposed rule also specifies subjects that must be addressed in the exemption contract: (1) The IFQ amount and IPQ amount, by crab fishery, that is subject to the exemption contract; (2) the circumstances under which the parties are exercising the exemption; (3) the actions that the parties must take to mitigate the effects of the exemption; (4)

the compensation, if any, that any party must make to any other party; (5) whether all required parties have signed the exemption contract. The parties may include any other mutually agreeable terms in the exemption contract.

Second, an inseason notice to NMFS: after the parties execute an exemption contract, the parties would jointly submit an inseason notice to NMFS. The parties would certify to NMFS that the required parties are submitting the inseason notice, namely the holders of the IFQ and IPQ that is the subject of the inseason notice and the community representative eligible to submit an inseason notice of exemption for this IFQ and IPQ. The parties would also certify to NMFS that they have signed an exemption contract that addresses the mandatory subjects in the contract. Each applicant would affirm that all information and claims in the inseason notice are true, correct and complete.

If the parties submit a complete inseason notice to NMFS, the exemption would automatically go into effect the day after submission. The exemption would be in effect only for the IFQ and IPQ specified on the inseason notice. NMFS would post the effective date of the exemption on the NMFS Alaska Region Web site.

Once an exemption is effective, crab harvested with the IFQ specified on the notice could be delivered outside the designated region (North or South) during the rest of the crab fishing year. Once an exemption is effective, crab processed with the IPQ specified on the notice could be processed outside the designated region during the rest of the crab fishing year. Deliveries of crab out-of-region that are not allowed by an exemption would continue to be fishery violations. The regulation has no limit on the number of times in a crab fishing year that applicants with an approved preseason application could submit an inseason notice of an exemption.

The exemption process under Amendment 41 for the North and South Region differs from the exemption process under Amendment 37 for the West Region in four ways. First, under Amendment 37, any person that holds more than 20 percent of the West Region QS or West Region PQS in the Western Aleutian Islands golden king crab fishery must be a party to any request for an exemption from the regional delivery requirements. Persons holding 20 percent or less of either share type have no direct input into the contract negotiations or application. Under Amendment 41, each IFQ holder and each IPQ applies for an exemption. It does not matter how much IFO and IPQ an applicant holds.

Second, an exemption granted under Amendment 37 applies to all West Region IFQ and West Region IPQ in the Western Aleutian Islands golden king crab fishery. Under Amendment 41, an exemption only applies to the IFQ and IPQ that is the subject of a preseason application and an inseason notice.

Third, under Amendment 37, only the IFQ holders and IPQ holders apply for an exemption. Under Amendment 41, the affected community would also apply for an exemption.

Finally, Amendment 37 has only a preseason application and, although the applicants must have entered into a master contract, the regulation does not specify subjects that must be addressed in the contract. Under Amendment 41, the parties enter into both a preseason framework contract and an inseason exemption contract and the regulation specifies subjects that must be addressed in both contracts.

Community Representatives

This proposed rule gives affected communities a role in the exemption process. The proposed rule would require that a representative of the affected community sign the framework agreement, the preseason application, the exemption contract, and the inseason notice. An affected community is the community that holds the Right of First Refusal (ROFR) on designated PQS. In communities holding or formerly holding the Right of First Refusal (ROFR) on designated PQS, the community representative would be the established non-profit eligible crab community (ECC) entity, defined at § 680.2. All these communities have designated EEC entities that NMFS has approved. For the communities of Saint Paul, Saint George, False Pass, and Akutan, the EEC entity is the local Community Development Quota (CDQ) group. For Unalaska, Port Moller, King Cove, and Kodiak, the ECC entity is designated by the municipal government.

NMFS also issued a portion of the PQS for the Bering Sea snow crab fishery and the Saint Matthew Island blue king crab fishery without a ROFR designation (non-ROFR PQS). Saint Paul and Saint George are the only two communities in the North Region that have historically received and processed Bering Sea snow crab and Saint Matthew Island blue king crab. Therefore, they would be the affected communities for the purposes of an exemption from the regional delivery requirements. The Council recommended that the CDQ entities representing Saint Paul (Central Bering Sea Fishermen's Association or CBSFA) and Saint George (Aleutian Pribilof Island Community Development Association or APICDA) select a single community representative to sign on their behalf, the framework agreement, the preseason application, the exemption contract, and the inseason notice for this non-ROFR PQS. The Council recommended one community representative for non-ROFR PQS to reduce the potential for additional administrative burden that may arise if representatives of both APICDA and CBSFA were required to sign these documents.

Under this proposed rule, APICDA and CBSFA would have 180 days from the effective date of the final rule to inform NMFS in writing that they have designated a single community representative responsible for signing the framework agreement, the preseason application, the exemption contract, and the inseason notice. After publication of the final rule, NMFS would notify APICDA and CBSFA of the deadline to designate a single community representative and provide instructions for informing NMFS of the community representative. The 180-day window should provide adequate time for the two CDQ entities to coordinate their recommendation but not create an undue delay.

The Council did not specify what would happen if APICDA and CBSFA do not designate a single community representative or if they want to revoke a designation in the future. NMFS therefore proposes that if APICDA and CBSFA do not designate a community representative to NMFS by the deadline, then both APICDA and CBSFA would need to sign the documents for the applicable North Region non-ROFR PQS. This provision ensures that both CDQ entities would participate in reaching these agreements if they did not designate a single community representative.

Additionally, NMFS proposes that APICDA or CBSFA may revoke its designation of a community representative by providing written notice to the other entity and to NMFS. If either APICDA or CBSFA revokes its designation of a community representative, then both APICDA and CBSFA would need to sign all documents related to the exemption: the framework agreement, the preseason application, the exemption contract, and the inseason notice. However, if APICDA or CBSFA revoke its designation after October 15, the revocation will not affect the validity of any action taken by the designated community representative pursuant to § 680.4(p) for that crab fishing year.

IPQ Use Caps

This proposed rule would not change existing IPQ use caps; however, it would add exemptions from IPQ use caps when NMFS approves an exemption from the regional delivery requirements. The CR Program at § 680.42(b) limits the amount of IPQ that a single person may hold. Under the proposed rule at § 680.42(b)(7), NMFS would not count crab processed outside the designated region pursuant to an exemption against this limit.

The CR Program at § 680.42(b) also limits how much IPQ an individual facility may use or process. Under the proposed rule at § 680.42(b)(8), NMFS would not count crab processed outside the designated region under an exemption toward the IPQ use cap of the processing facility. It is likely that a facility would likely process crab from outside the designated region through a custom processing arrangement. The receiving processor would likely have little notice to prepare for the delivery. An exemption from the IPQ use caps would help to ensure that a facility would not refuse delivery of the crab to avoid exceeding the facility's IPQ use cap.

NMFS notes that IPQ holders would continue to be subject to the IPQ use caps for all processing that does not occur through an exemption from the regional delivery requirements.

Regional Delivery Exemption Report

This proposed rule includes a reporting requirement to provide NMFS and the Council with the means to assess the exemption in terms of the Council's Statement of Council Intent for Amendment 41. In a crab fishing year when an IFQ holder submits a preseason application for an exemption from the regional delivery requirements, the IFQ holder must also submit an annual Regional Delivery Exemption Report to NMFS by June 30 of that crab fishing year. The Council did not recommend a deadline for submitting the Regional Delivery Exemption Report. To reduce the burden on fishery participants, NMFS is proposing the June 30 deadline to correspond with the end of the crab fishing year and with the deadline for the Eligible Crab Community Organization Annual Report in § 680.5(f).

The proposed rule requires that before IFQ holders submit the Regional Delivery Exemption Report to NMFS, they submit a copy of the report to the community representatives and IPQ holders that also signed the preseason application. NMFS proposes a deadline of June 15 for IFQ holders to take this action. In response to the IFQ holder's report, community representatives and IPQ holders may choose to submit, respectively, a Community Impact Report or IPQ Holder Report. These reports would offer community representatives and IPQ holders an opportunity to provide the Council and NMFS with their perspectives on the framework agreement and exemption contract and to provide an additional viewpoint to the Regional Delivery Exemption Report.

Under the proposed rule, the annual Regional Delivery Exemption Report must include the following: (1) The amount of IFQ, if any, set aside to reduce the need for, and to limit the extent, or amount of, the exemption; (2) the mitigation measures employed before submitting an inseason notice; (3) the number of times an exemption was requested and used; (4) whether the exemption was necessary; and (5) any impacts resulting from the exemption on the fishery participants and communities that signed the preseason application. NMFS is not proposing similar reporting requirements for the Community Impact Report or IPQ Holder Report because these reports are voluntary. The Regional Delivery Exemption Report, Community Impact Report, and the IPQ Holder Report will provide documentation and transparency needed by the Council and NMFS to evaluate the efficacy of privately administered contracts described in this action.

Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this proposed rule is consistent with the FMP, other provisions of the Magnuson-Stevens Act, and other applicable law, subject to further consideration of comments received during the public comment period.

This proposed rule has been determined to not be significant for the purposes of Executive Order 12866.

Regulatory Impact Review (RIR)

An RIR was prepared to assess all costs and benefits of available regulatory alternatives. The RIR considers all quantitative and qualitative measures. A copy of this analysis is available from NMFS (see **ADDRESSES**). The Council recommended Amendment 41 based on those measures that maximized net benefits to the Nation. Specific aspects of the economic analysis are discussed below in the initial regulatory flexibility analysis (IRFA) section.

Initial Regulatory Flexibility Analysis (IRFA)

An IRFA was prepared, as required by section 603 of the Regulatory Flexibility Act. The IRFA describes the economic impact this proposed rule, if adopted, would have on small entities. A description of the proposed action, why it is being considered, and the legal basis for this proposed action are contained in the **SUPPLEMENTARY INFORMATION** section of the preamble and are not repeated here. A summary of the IRFA follows. Copies of the IRFA are available from NMFS (see **ADDRESSES**).

The RIR/IRFA prepared for this proposed rule incorporates by reference an extensive RIR/IRFA prepared for Amendments 18 and 19 to the FMP that detailed the impacts of the CR Program on small entities.

Number and Description of Small Entities Regulated by the Proposed Action

The proposed rule would create a process whereby IFQ holders and IPQ holders who enter an agreement with an ECC entity or community representative may apply for and receive an exemption from regional delivery requirements. Estimates of the number of small entities holding IFQ are based on estimates of gross revenues. During the 2009–2010 fishing season, nine entities held IFQ subject to regional delivery requirements; three of these IFQ holders were small entities. In that same season, 14 of the 22 entities that held IPQ subject to regional delivery requirements were small entities. Six small community entities, including two CDQ entities, would be directly regulated by this action.

Description of Significant Alternatives That Minimize Adverse Impacts on Small Entities

The Council considered two alternatives; status quo and the proposed action. The status quo is no exemption from the regional delivery requirements. The proposed action is an exemption from the regional delivery requirements. For the proposed action alternative, the Council considered a number of options to improve the functioning of the exemption and minimize adverse impacts on small entities. The Council also considered and eliminated from further considerations several alternatives that the Council determined would have limited the effectiveness of the exemption in achieving its intended purpose.

The analysis shows that the proposed action minimizes the adverse impacts on small entities from the status quo. All of the directly regulated entities are expected to benefit from this action relative to the status quo alternative because the proposed rule would allow crab to be landed and processed outside the designated region if a circumstance occurs that the directly regulated entities agreed in advance prevents compliance with regional delivery requirements. Allowing for the exemption would potentially reduce deadloss, promote full utilization of the TAC, and improve safety at sea. It is unlikely that any party to the exemption would benefit more than any other because all applicants would have agreed, before the season, to the terms of mitigation and compensation.

The Council considered a number of options to improve the functioning of the exemption and minimize adverse impacts on small entities. The Council considered options that would allow communities benefiting from a ROFR to select a regional representative to act on their behalf rather than the ECC entity. The Council did not choose that option because of the potential difficulties that communities could encounter in selecting the regional representative and because of the additional administrative costs and burdens associated with this option. In addition to providing an expedited administrative process, the approach selected by the Council maintains the original intent of CR Program community protection measures in that it preserves community interests by providing not only a regional linkage for certain PQS, but also a close linkage between certain PQS and the community of origin for that PQS.

The Council also considered and eliminated from further consideration several alternatives during the development of Amendment 41. These alternatives are described in detail in Section 2.2.1 of the analysis for this action (see **ADDRESSES**). Generally, the Council perceived these alternatives as limiting the effectiveness of the exemption in achieving its intended purpose.

The Council considered and rejected alternatives in which NMFS would fully administer regional exemptions by determining whether specific conditions existed to qualify for an exemption from the regional delivery requirement. The Council did not advance these alternatives because the Council viewed them as overly expensive to administer and likely to prevent the exemption process from fulfilling its purpose as described in the Council's purpose and need statement for this action. The Council and NMFS recognized that the necessary fact finding to make such a determination (e.g., that a specific amount of ice was prohibiting harvesting or delivery of crab in a specific location) would not only delay decision making, but could also be costly. Verification of conditions could be difficult or impracticable due to the remoteness of the location and poor quality of data available.

A factual finding would require NMFS to not only complete an assessment of the event that arguably prevents a delivery, but also of the potential availability of other processing facilities in the region to overcome the barrier to the delivery. These findings would require factual assessments of circumstances in remote areas. Such findings typically require time, which may jeopardize safety in emergencies, and information, which may not be available to NMFS. In addition, the need for administrative review of these findings could result in additional delays. Consequently, the Council elected to pursue alternatives that would not rely on agency administrative discretion. Instead, the affected parties would define the terms under which they would apply for and receive an exemption. This approach also allows the parties flexibility to develop mitigation and compensation requirements that would, in turn, minimize the need for the exemption and, if an exemption is necessary, ensure that the parties potentially harmed by the exemption receive reasonable compensation.

The Council also considered an alternative that would have defined specific exemption criteria in regulation; however, the Council eliminated this alternative because NMFS and the Council recognized that this approach might be overly restrictive and could not be adapted as circumstances might require. The Council also elected not to recommend an alternative that specifically defined compensation because the Council deemed this alternative too prescriptive to effectively balance the competing interests of parties, which are likely to change with the circumstances surrounding the granting of an exemption. Similarly, the Council chose not to advance alternatives that would redesignate IFQ and IPQ to compensate for landings redirected under the exemption because they would be administratively complex given the inability to rollover IFQ from one year to the next.

Duplicate, Overlapping, or Conflicting Federal Rules

NMFS has not identified any duplication, overlap, or conflict between this proposed action and existing Federal rules.

Recordkeeping and Reporting Requirements

The reporting, recordkeeping, and other compliance requirements would be increased under the proposed rule if parties enter into the agreements and contracts required as part of a completed Application for Exemption from CR Crab Regional Delivery Requirements. This proposed rule adds recordkeeping and reporting requirements necessary to implement Amendment 41, namely submission, prior to the start of the fishing season, of an application and affidavit affirming that IFQ holders, IPQ holders, and community representatives have entered into a framework agreement. A second notice and affidavit affirming that those parties have entered into an exemption contract is required if the parties subject to the framework agreement wish to seek an exemption during the fishing season.

Participation in an Application for Exemption CR Crab Regional Delivery Requirements is voluntary, but would be necessary to deliver crab outside of a designated region when circumstances necessitate an exemption from the regional delivery requirements.

The professional skills necessary to comply with reporting and recordkeeping requirements for small entities impacted by this proposed rule include the ability to read, write, and understand English; the ability to use a personal computer and the Internet; and the authority to take actions on behalf of the designated signatory. Each of the small entities must be capable of complying with the requirements of this proposed rule. Each small entity should have financial resources to obtain additional legal or technical expertise that they might require to advise them concerning the framework agreement or the exemption contract.

IFQ holders that sign a preseason application must also prepare and submit an annual Regional Delivery Exemption Report to the NMFS by June 30. At least 2 weeks prior to submission of the Regional Delivery Exemption Report to NMFS, the IFQ holders must submit a copy of the report to the community representatives and IPQ holders that also signed the preseason application. In response to the Regional Delivery Exemption Report, community representatives may voluntarily submit a Community Impact Report and IPQ holders may voluntarily submit an IPQ Holder Report.

Collection-of-Information Requirements

This proposed rule contains a collection-of-information requirement subject to review and approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act (PRA). This requirement has been submitted to OMB for approval under OMB Control No. 0648–0514.

Public reporting burden per response is estimated to average 20 hours for the proposed Application for Exemption from CR Crab Regional Delivery Requirements; 5 hours for CDQ Notification of Representative; 20 hours to prepare the Regional Delivery Exemption Report; and 2 hours to complete the Community Impact Report or IPQ Holder Report.

Public comment is sought regarding: Whether this proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the burden estimate; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the collection of information, including through the use of automated collection techniques or other forms of information technology. Send comments on these, or any other aspects of the collection of information, to NMFS (see **ADDRESSES**) and by email to *OIRA_Submission@omb.eop.gov* or fax to 202–395–7285.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB control number.

List of Subjects in 50 CFR Part 680

Alaska, Fisheries, Reporting and recordkeeping requirements.

Dated: January 25, 2013.

Alan D. Risenhoover,

Director, Office of Sustainable Fisheries, performing the functions and duties of the Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, NMFS proposes to amend 50 CFR part 680 as follows:

PART 680—SHELLFISH FISHERIES OF THE EXCLUSIVE ECONOMIC ZONE OFF ALASKA

■ 1. The authority citation for 50 CFR part 680 continues to read as follows:

Authority: 16 U.S.C. 1862; Pub. L. 109–241; Pub. L. 109–479.

■ 2. In § 680.4, add paragraph (p) to read as follows:

§ 680.4 Permits.

* * * * *

(p) *Exemption from regional delivery requirements for the Bristol Bay red king crab, Bering Sea snow crab, Saint Matthew Island blue king crab, Eastern Aleutian Islands golden king crab, Western Aleutian Islands red king crab, and Pribilof Islands red and blue king crab fisheries*—

(1) *Apply for an exemption.* Eligible applicants may submit an application to exempt North Region IFQ and IPQ or South Region IFQ and IPQ from the prohibitions at §§ 680.7(a)(2) and (a)(4).

(2) *Identification of eligible applicants.* Eligible applicants are:

(i) *IFQ holders.* Any person holding regionally designated IFQ for Bristol Bay red king crab, Bering Sea snow crab, Saint Matthew Island blue king crab, Eastern Aleutian Islands golden king crab, Western Aleutian Islands red king crab, or Pribilof Islands red and blue king crab, or their authorized representative.

(ii) *IPQ holders.* Any person holding regionally designated IPQ for Bristol Bay red king crab, Bering Sea snow crab, Saint Matthew Island blue king crab, Eastern Aleutian Islands golden king crab, Western Aleutian Islands red king crab, or Pribilof Islands red and blue king crab, or their authorized representative.

(iii) *Community representatives.*

(A) For communities that hold or formerly held the ROFR pursuant to § 679.41(l) of this chapter, the community representative that signs the preseason application, the framework agreement, the inseason notice, and the exemption contract is the ECC entity, as defined at § 680.2.

(B) For North Region Saint Matthew blue king crab PQS and North Region Bering Sea snow crab PQS that was issued without a ROFR, the community representative that signs the preseason application, the framework agreement, the inseason notice, and the exemption contract for Saint Paul and Saint George shall be either:

(*1*) Both Aleutian Pribilof Islands Community Development Association (APICDA) and the Central Bering Sea Fishermen's Association (CBSFA), or

(*2*) The community representative that APICDA and CBSFA designate in writing to NMFS by [*INSERT DATE 180 DAYS AFTER THE EFFECTIVE DATE OF THE FINAL RULE*].

(*i*) Either APICDA or CBSFA may revoke the designated community representative by providing written notice to the other entity and to NMFS.

(*ii*) If either APICDA or CBSFA revokes its designation of a community representative after October 15 of a crab fishing year, the revocation will not affect the validity of any action taken by the designated community representative pursuant to this paragraph (p) for that crab fishing year, including signing the preseason application, the framework agreement, the inseason notice, and the exemption contract.

(3) *Required applicants.* Multiple parties may apply for an exemption; however, a complete preseason application and a complete inseason notice must be submitted by a minimum of one Class A IFQ holder, one IPQ holder, and one community representative.

(4) *Application for an exemption from the CR Program regional delivery requirements*—(i) *Application form.* The application form consists of two parts: A preseason application for exemption and an inseason notice of exemption. The application form is available on the NMFS Alaska Region Web site (*http://alaskafisheries.noaa.gov*) or from NMFS at the address below. NMFS must receive both parts of the application form by one of the following methods:

(A) *Mail:* NMFS Regional Administrator, c/o Restricted Access Management Program, P.O. Box 21668, Juneau, AK 99802–1668; or

(B) *Fax:* 907–586–7354; or

(C) *Hand delivery or carrier:* NMFS, Room 713, 709 West 9th Street, Juneau, AK 99801.

(ii) *Part I: Preseason application*—

(A) A complete preseason application must be signed by the required applicants specified in paragraph (p)(3) of this section, contain the information specified on the form, have all applicable fields accurately completed, and have all required documentation attached.

(B) Each applicant must certify, through an affidavit, that the applicant has entered into a framework agreement that—

(*1*) Specifies the CR crab fisheries that are the subject of the framework agreement;

(*2*) Specifies the actions that the parties will take to reduce the need for, and amount of, an exemption;

(*3*) Specifies the circumstances that could be an obstacle to delivery or processing under which the parties would execute an exemption contract and receive an exemption;

(*4*) Specifies the actions that the parties would take to mitigate the effects of an exemption;

(*5*) Specifies the compensation, if any, that any party would provide to any other party; and

(*6*) Is signed by the holders of the IFQ and IPQ that are the subject of the framework agreement and by the community representative that is authorized to sign the framework agreement.

(C) Each applicant must sign and date the affidavit and affirm that, under penalty of perjury, the information and the claims provided on the application are true, correct, and complete.

(D) NMFS must receive the preseason application on or before October 15 of the crab fishing year for which the applicants are applying for an exemption.

(*1*) If a preseason application is submitted by mail, the date of receipt of the preseason application by NMFS will be the postmark date of the application;

(*2*) If an applicant disputes whether NMFS received a preseason application on or before October 15, the applicant must provide written documentation that was contemporaneous with NMFS's receipt of the application that NMFS received the application by October 15.

(E) If NMFS does not receive a timely and complete preseason application on or before October 15 of a crab fishing year, NMFS will deny the preseason application; those applicants will not be able to receive an exemption for that crab fishing year.

(F) If a preseason application is timely and complete, NMFS will approve the application. If NMFS approves a preseason application for an exemption, the applicants will be able to receive an exemption during the crab fishing year if the applicants comply with the requirements for an inseason notice of exemption specified below at paragraph (p)(4)(iii) of this section.

(G) If NMFS denies a preseason application for any reason, the applicants may appeal the denial pursuant to § 679.43 of this chapter.

(H) NMFS will notify all of the applicants whether NMFS has approved or denied the preseason application.

(iii) *Part II: Inseason notice of exemption*—

(A) A complete inseason notice must:

(*1*) Identify the IFQ amount and IPQ amount, by CR crab fishery, subject to the exemption;

(*2*) Contain the information specified on the form, have all applicable fields accurately completed, and have all required documentation attached; and

(*3*) Be signed by the required applicants specified in paragraph (p)(3) that also signed the preseason application.

(B) Each applicant must certify, through an affidavit, that the applicants have entered into an exemption contract that—

(*1*) Identifies the IFQ amount and IPQ amount, by CR crab fishery, is subject to the exemption contract;

(*2*) Describes the circumstances under which the exemption is being exercised;

(*3*) Specifies the action that the parties must take to mitigate the effects of the exemption;

(*4*) Specifies the compensation, if any, that any party must make to any other party; and

(*5*) Is signed by the holders of the IFQ and IPQ that are the subject of the exemption contract and by the community representative that is authorized to sign the exemption contract.

(C) Each applicant must sign and date the affidavit and affirm that, under penalty of perjury, the information and the claims provided on the notice are true, correct, and complete.

(D) NMFS must receive the inseason notice at least one day prior to the day on which the applicants want the exemption to take effect. If an inseason notice is submitted by mail, the date that NMFS receives the inseason notice is not the postmark date of the notice.

(E) The effective date of the exemption is the day after NMFS receives a complete inseason notice. Any delivery of North Region IFQ or South Region IFQ outside the designated region prior to the effective date of the exemption is prohibited under § 680.7(a)(2) and (a)(4). Any processing of North Region IPQ or South Region IPQ outside the designated region prior to the effective date of the exemption is prohibited under § 680.7(a)(2) and (a)(4).

(F) An exemption is effective for the remainder of the crab fishing year.

(5) *Regional delivery exemption report*—(i) Each IFQ holder that signs a preseason application, described in paragraph (p)(4)(ii) of this section, must submit a Regional Delivery Exemption Report to NMFS that includes an explanation of—

(A) The amount of IFQ, if any, set aside to reduce the need for, and the amount of, an exemption;

(B) The mitigation measures employed before submitting an inseason notice;

(C) The number of times an exemption was requested and used;

(D) Whether the exemption was necessary; and

(E) Any impacts resulting from the exemption on the fishery participants and communities that signed the preseason application.

(ii) On or before June 15, IFQ holders must submit a copy of the Regional Delivery Exemption Report to the IPQ holders and community representatives that also signed the preseason application.

(iii) On or before June 30, IFQ holders must submit the Regional Delivery Exemption Report to NMFS at the address in paragraph (p)(4)(i) of this section.

(6) *Public notice of the exemption.* NMFS will post the effective date of an exemption and the Regional Delivery Exemption Reports on the NMFS Alaska Region Web site (*http://alaskafisheries.noaa.gov*).

■ 3. In § 680.7, revise paragraphs (a)(2), (a)(4), (a)(7), (a)(8), and (a)(9) to read as follows:

§ 680.7 Prohibitions.

* * * * *

(a) * * *

(2) Receive CR crab harvested under an IFQ permit in any region other than the region for which the IFQ permit is designated, unless:

(i) Western Aleutian Islands golden king crab are received following the effective date of a NMFS-approved exemption pursuant to § 680.4(o), or

(ii) The IFQ permit and IFQ amount are subject to an exemption pursuant to § 680.4(p).

* * * * *

(4) Use IPQ in any region other than the region for which the IPQ permit is designated, unless:

(i) Western Aleutian Islands golden king crab IPQ is used following the effective date of a NMFS-approved exemption pursuant to § 680.4(o), or

(ii) The IPQ permit and IPQ amount are subject to an exemption pursuant to § 680.4(p).

* * * * *

(7) For an IPQ holder to use more IPQ than the maximum amount of IPQ that may be held by that person. Use of IPQ includes all IPQ held by that person, and all IPQ crab that are received by any RCR at any shoreside crab processor or stationary floating crab processor in which that IPQ holder has a 10 percent or greater direct or indirect ownership interest, unless that IPQ crab meets the requirements in § 680.42(b)(7) or § 680.42(b)(8).

(8) For a shoreside crab processor or stationary floating crab processor, that

does not have at least one owner with a 10 percent or greater direct or indirect ownership interest who also holds IPQ in that crab QS fishery, to receive in excess of 30 percent of the IPQ issued for that crab fishery, unless that IPQ meets the requirements described in § 680.42(b)(7) or § 680.42(b)(8).

(9) For any shoreside crab processor or stationary floating crab processor east of 174 degrees west longitude to use more than 60 percent of the IPQ issued in the EAG or WAI crab QS fisheries, unless that IPQ meets the requirements described in § 680.42(b)(8).

* * * * *

■ 4. In § 680.42,

■ a. Revise paragraph (b)(1)(ii); and,

■ b. Add paragraph (b)(8) to read as follows:

§ 680.42 Limitations on use of QS, PQS, IFQ, and IPQ.

* * * * *

(b) * * *

(1) * * *

(ii) Use IPQ in excess of the amount of IPQ that results from the PQS caps in paragraph (b)(1)(i) of this section, unless that IPQ is:

(A) Derived from PQS that was received by that person in the initial allocation of PQS for that crab QS fishery, or

(B) Subject to an exemption for that IPQ pursuant to § 680.4(p).

* * * * *

(8) Any IPQ crab that is received by an RCR will not be considered use of IPQ by an IPQ holder for the purposes of paragraphs (b)(1) and (b)(2) of this section, if the IPQ is subject to an exemption pursuant to § 680.4(p).

* * * * *

[FR Doc. 2013–02007 Filed 1–29–13; 8:45 am]

BILLING CODE P

Notices

Federal Register

Vol. 78, No. 20

Wednesday, January 30, 2013

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Forest Service

Wallowa-Whitman National Forest; Oregon; Notice of Intent To Prepare a Supplement to the 2010 Final Environmental Impact Statement for Wallowa-Whitman National Forest Invasive Plants Treatment

AGENCY: Forest Service, USDA.

ACTION: Notice of intent to prepare a supplemental environmental impact statement.

SUMMARY: The USDA Forest Service will prepare a Supplement to the Wallowa-Whitman National Forest Invasive Plants Treatment Final Environmental Impact Statement (EIS) to address deficiencies identified by Judge Simon, United States District Court, District of Oregon, in *League of Wilderness Defenders/Blue Mountains Biodiversity Project* v. *United States Forest Service & Connaughton* (Case 3:10–cv–01397–SI). Specifically, the court found the March 2010 Final EIS to be deficient regarding analysis of cumulative impacts of the proposed action.

FOR FURTHER INFORMATION CONTACT: Dea Nelson, Environmental Coordinator, Wallowa-Whitman National Forest, P.O. Box 907, Baker City, OR 97814; or, 541–523–1316; or, *dnelson09@fs.fed.us.*

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday.

SUPPLEMENTARY INFORMATION:

In March 2010, the Final EIS for the Wallowa-Whitman National Forest Invasive Plants Treatment was completed. A Record of Decision was signed on April 2, 2010. These documents, which include descriptions of the purpose and need for the project and the proposed action, can be found at *http://www.fs.usda.gov/detail/wallowa-whitman/landmanagement/planning/?cid=stelprdb5192845.* The supplemental EIS will provide additional information and analysis regarding cumulative impacts. A draft supplemental EIS is estimated to be available in August 2013, and the final in January 2014.

Responsible Official

Wallowa-Whitman Forest Supervisor.

Nature of Decision To Be Made

The Responsible Official will decide whether or not to incorporate the supplemental analysis into the FEIS. The Responsible Official will also document the decision and reasons for the decision in a new record of decision consistent with the scope of the supplement. This decision will be subject to Forest Service appeal regulations (36 CFR part 215).

Scoping Process

Scoping is not required for supplements to environmental impact statements (40 CFR 1502.9(c)(4)). Scoping was conducted for the original EIS. The supplement will be subject to notice and comment. A draft supplemental EIS will be published and made available for review and comment for 45 days, following direction at 36 CFR part 215.

Dated: January 23, 2013.

John Laurence,

Forest Supervisor.

[FR Doc. 2013–01955 Filed 1–29–13; 8:45 am]

BILLING CODE 3410–11–P

COMMISSION ON CIVIL RIGHTS

Sunshine Act Notice

AGENCY: United States Commission on Civil Rights.

ACTION: Notice of briefing and business meeting.

DATE AND TIME: Friday, February 8, 2013; 9:30 a.m. EST.

PLACE: 1331 Pennsylvania Ave. NW., Suite 1150, Washington, DC 20425.

Briefing Agenda—9:30 a.m.–11:30 a.m.

This briefing is open to the public.

Topic: *Regulatory and Other Barriers to Entrepreneurship that Impede Business Start-Ups.*

I. Introductory Remarks by Chairman

II. Panel Discussion—Government, Scholars & Advocacy Groups Panel

Speakers' Remarks and Questions from Commissioners

III. Adjourn Briefing

Meeting Agenda—11:30 a.m.

I. Approval of Agenda

II. Introductions—Inspector General's Office

III. Program Planning

- Update on the Sex Trafficking: A Gender-Based Violation of Civil Rights briefing
- Update on the Federal Civil Rights Engagement with Arab & Muslim Communities Post 9/11 briefing
- Update on the Assessing the Impact of Criminal Background Checks and the Equal Employment Opportunity Commission's Conviction Records Policy on the Employment of Black and Hispanic Workers briefing

IV. Management and Operations

- Chief of Regional Programs' report
- OGC Update on Transaction Reporting rules

V. Approval of State Advisory Committee Slates

- Colorado
- Louisiana
- Ohio
- South Carolina
- South Dakota

VI. Adjourn Meeting

CONTACT PERSON FOR FURTHER INFORMATION: Lenore Ostrowsky, Acting Chief, Public Affairs Unit (202) 376–8591.

Hearing-impaired persons who will attend the meeting and require the services of a sign language interpreter should contact Pamela Dunston at (202) 376–8105 or at *signlanguage@usccr.gov* at least seven business days before the scheduled date of the meeting.

Dated: January 28, 2013.

David Mussatt,

Acting Chief, Regional Programs Coordination Office.

[FR Doc. 2013–02107 Filed 1–28–13; 4:15 pm]

BILLING CODE 6335–01–P

DEPARTMENT OF COMMERCE

Office of the Secretary

Estimates of the Voting Age Population for 2012

AGENCY: Office of the Secretary, Commerce.

ACTION: General notice announcing population estimates.

SUMMARY: This notice announces the voting age population estimates as of July 1, 2012, for each state and the District of Columbia. We are providing this notice in accordance with the 1976 amendment to the Federal Election Campaign Act, Title 2, United States Code, Section 441a(e).

FOR FURTHER INFORMATION CONTACT: Enrique Lamas, Acting Chief, Population Division, U.S. Census Bureau, Room HQ–5H174, Washington, DC 20233, at 301–763–2071.

SUPPLEMENTARY INFORMATION: Under the requirements of the 1976 amendment to the Federal Election Campaign Act, Title 2, United States Code, Section 441a(e), I hereby give notice that the estimates of the voting age population for July 1, 2012, for each state and the District of Columbia are as shown in the following table.

ESTIMATES OF THE POPULATION OF VOTING AGE FOR EACH STATE AND THE DISTRICT OF COLUMBIA: JULY 1, 2012

Area	Population 18 and over
United States	240,185,952
Alabama	3,697,617
Alaska	544,349
Arizona	4,932,361
Arkansas	2,238,250
California	28,801,211
Colorado	3,956,224
Connecticut	2,796,789
Delaware	712,042
District of Columbia	522,843
Florida	15,315,088
Georgia	7,429,820
Hawaii	1,089,302
Idaho	1,169,075
Illinois	9,811,190
Indiana	4,945,857
Iowa	2,351,233
Kansas	2,161,601
Kentucky	3,362,177
Louisiana	3,484,090
Maine	1,063,274
Maryland	4,540,763
Massachusetts	5,244,729
Michigan	7,616,490
Minnesota	4,102,991
Mississippi	2,239,593
Missouri	4,618,513
Montana	783,161
Nebraska	1,392,120
Nevada	2,095,348
New Hampshire	1,045,878
New Jersey	6,838,206
New Mexico	1,571,096
New York	15,307,107
North Carolina	7,465,545
North Dakota	545,020
Ohio	8,880,551
Oklahoma	2,877,457
Oregon	3,038,729
Pennsylvania	10,024,150
Rhode Island	833,818
South Carolina	3,643,633
South Dakota	629,185
Tennessee	4,962,227
Texas	19,073,564
Utah	1,967,315
Vermont	502,060
Virginia	6,329,130
Washington	5,312,045
West Virginia	1,471,372
Wisconsin	4,408,841
Wyoming	440,922

Source: U.S. Census Bureau, Population Division.

I have certified these counts to the Federal Election Commission.

Dated: January 18, 2013.

Rebecca M. Blank,

Acting Secretary, U.S. Department of Commerce.

[FR Doc. 2013–02004 Filed 1–29–13; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

International Trade Administration

Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (''the Department'') has received requests to conduct administrative reviews of various antidumping and countervailing duty orders and findings with December anniversary dates. In accordance with the Department's regulations, we are initiating those administrative reviews.

DATES: *Effective Date:* January 30, 2013.

FOR FURTHER INFORMATION CONTACT: Brenda E. Waters, Office of AD/CVD Operations, Customs Unit, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230, telephone: (202) 482–4735.

SUPPLEMENTARY INFORMATION:

Background

The Department has received timely requests, in accordance with 19 CFR 351.213(b), for administrative reviews of various antidumping and countervailing duty orders and findings with December anniversary dates.

All deadlines for the submission of various types of information, certifications, or comments or actions by the Department discussed below refer to the number of calendar day from the applicable starting time.

Notice of No Sales

If a producer or exporter named in this notice of initiation had no exports, sales, or entries during the period of review (''POR''), it must notify the Department within 60 days of publication of this notice in the **Federal Register**. All submissions must be filed electronically at *http://iaaccess.trade.gov* in accordance with 19 CFR 351.303. *See Antidumping and Countervailing Duty Proceedings: Electronic Filing Procedures; Administrative Protective Order Procedures,* 76 FR 39263 (July 6, 2011). Such submissions are subject to verification in accordance with section 782(i) of the Tariff Act of 1930, as amended (''Act''). Further, in accordance with 19 CFR 351.303(f)(3)(ii), a copy of each request must be served on the petitioner and each exporter or producer specified in the request.

Respondent Selection

In the event the Department limits the number of respondents for individual examination for administrative reviews, the Department intends to select respondents based on U.S. Customs and Border Protection (''CBP'') data for U.S. imports during the POR. We intend to release the CBP data under Administrative Protective Order (''APO'') to all parties having an APO within seven days of publication of this initiation notice and to make our decision regarding respondent selection within 21 days of publication of this **Federal Register** notice. The Department invites comments regarding the CBP data and respondent selection within five days of placement of the CBP data on the record of the applicable review.

In the event the Department decides it is necessary to limit individual examination of respondents and conduct respondent selection under section 777A(c)(2) of the Act:

In general, the Department has found that determinations concerning whether particular companies should be ''collapsed'' (*i.e.,* treated as a single entity for purposes of calculating antidumping duty rates) require a substantial amount of detailed information and analysis, which often require follow-up questions and analysis. Accordingly, the Department will not conduct collapsing analyses at the respondent selection phase of this review and will not collapse companies at the respondent selection phase unless there has been a determination to collapse certain companies in a previous segment of this antidumping proceeding (*i.e.,* investigation, administrative review, new shipper review or changed circumstances review). For any company subject to this review, if the Department determined, or continued to treat, that company as collapsed with others, the Department will assume that such companies continue to operate in the same manner and will collapse them for respondent selection purposes. Otherwise, the Department will not collapse companies for purposes of respondent selection. Parties are requested to (a) identify which companies subject to review previously were collapsed, and (b) provide a citation to the proceeding in which they were collapsed. Further, if companies are requested to complete the Quantity and Value Questionnaire for purposes of respondent selection, in general each company must report volume and value data separately for itself. Parties should not include data for any other party, even if they believe they should be treated as a single entity with that other party. If a company was collapsed with another company or companies in the most recently completed segment of this proceeding where the Department considered collapsing that entity, complete quantity and value data for that collapsed entity must be submitted.

Deadline for Withdrawal of Request for Administrative Review

Pursuant to 19 CFR 351.213(d)(1), a party that has requested a review may withdraw that request within 90 days of the date of publication of the notice of initiation of the requested review. The regulation provides that the Department may extend this time if it is reasonable to do so. In order to provide parties additional certainty with respect to when the Department will exercise its discretion to extend this 90-day deadline, interested parties are advised that the Department does not intend to extend the 90-day deadline unless the requestor demonstrates that an extraordinary circumstance has prevented it from submitting a timely withdrawal request. Determinations by the Department to extend the 90-day deadline will be made on a case-by-case basis.

Separate Rates

In proceedings involving non-market economy (''NME'') countries, the Department begins with a rebuttable presumption that all companies within the country are subject to government control and, thus, should be assigned a single antidumping duty deposit rate. It is the Department's policy to assign all exporters of merchandise subject to an administrative review in an NME country this single rate unless an exporter can demonstrate that it is sufficiently independent so as to be entitled to a separate rate.

To establish whether a firm is sufficiently independent from government control of its export activities to be entitled to a separate rate, the Department analyzes each entity exporting the subject merchandise under a test arising from the *Final Determination of Sales at Less Than Fair Value: Sparklers from the People's Republic of China,* 56 FR 20588 (May 6, 1991), as amplified by *Final Determination of Sales at Less Than Fair Value: Silicon Carbide from the People's Republic of China,* 59 FR 22585 (May 2, 1994). In accordance with the separate rates criteria, the Department assigns separate rates to companies in NME cases only if respondents can demonstrate the absence of both *de jure* and *de facto* government control over export activities.

All firms listed below that wish to qualify for separate rate status in the administrative reviews involving NME countries must complete, as appropriate, either a separate rate application or certification, as described below. For these administrative reviews, in order to demonstrate separate rate eligibility, the Department requires entities for whom a review was requested, that were assigned a separate rate in the most recent segment of this proceeding in which they participated, to certify that they continue to meet the criteria for obtaining a separate rate. The Separate Rate Certification form will be available on the Department's Web site at *http://www.trade.gov/ia* on the date of publication of this **Federal Register** notice. In responding to the certification, please follow the ''Instructions for Filing the Certification'' in the Separate Rate Certification. Separate Rate Certifications are due to the Department no later than 60 calendar days after publication of this **Federal Register** notice. The deadline and requirement for submitting a Certification applies equally to NME-owned firms, wholly foreign-owned firms, and foreign sellers who purchase and export subject merchandise to the United States.

Entities that currently do not have a separate rate from a completed segment of the proceeding [1] should timely file a Separate Rate Application to demonstrate eligibility for a separate rate in this proceeding. In addition, companies that received a separate rate in a completed segment of the proceeding that have subsequently made changes, including, but not limited to, changes to corporate structure, acquisitions of new companies or facilities, or changes to their official company name,[2] should timely file a Separate Rate Application to demonstrate eligibility for a separate rate in this proceeding. The Separate Rate Status Application will be available on the Department's Web site at *http://www.trade.gov/ia* on the date of publication of this **Federal Register** notice. In responding to the Separate Rate Status Application, refer to the instructions contained in the application. Separate Rate Status Applications are due to the Department no later than 60 calendar days of publication of this **Federal Register** notice. The deadline and requirement for submitting a Separate Rate Status Application applies equally to NME-owned firms, wholly foreign-owned firms, and foreign sellers that purchase and export subject merchandise to the United States.

For exporters and producers who submit a separate-rate status application or certification and subsequently are selected as mandatory respondents, these exporters and producers will no longer be eligible for separate rate status unless they respond to all parts of the questionnaire as mandatory respondents.

Initiation of Reviews

In accordance with 19 CFR 351.221(c)(1)(i), we are initiating administrative reviews of the following antidumping and countervailing duty orders and findings. We intend to issue the final results of these reviews not later than December 31, 2013.

	Period to be reviewed
Antidumping Duty Proceedings	
India: Certain Hot-Rolled Carbon Steel Flat Products, A–533–820	12/1/11–11/30/12
Essar Steel Limited	
JSW Ispat Steel Limited (formerly Ispat Industries Limited)	
JSW Steel Limted	
National Steel and Agro Industries Limited	
Steel Authority of India Limited	
Tata Steel Limited	
Welspun Corp Ltd (also referred to as Welspun Steel Ltd.)	
Uttam Galva Steels Limited	
The People's Republic of China: Certain Cased Pencils [3] A–570–849	12/1/11–11/30/12
Beijing Fila Dixon Stationery Company, Ltd. a/k/a Beijing Dixon Ticonderoga Stationery Company, Ltd. a/k/a Beijing Dixon Stationery Company, Ltd. and Dixon Ticonderoga Company (collectively,''Dixon'')	
Orient International Holding Shanghai Foreign Trade Co., Ltd. (''SFTC'')	
The People's Republic of China: Hand Trucks and Parts Thereof [4] A–570–891	12/1/11–11/30/12
New-Tec Integration (Xiamen) Co., Ltd.	
Yangjiang Shunhe Industrial Co.	
The People's Republic of China: Honey [5] A–570–863	12/1/11–11/30/12
Ahcof Industrial Development Corp., Ltd.	
Alfred L. Wolff (Beijing) Co., Ltd.	
Anhui Changhao Import & Export Trading	
Anhui Honghui Foodstuff (Group) Co., Ltd.	
Anhui Honghui Import & Export Trade Co., Ltd.	
Anhui Cereals Oils and Foodstuffs I/E (Group) Corporation	
Anhui Hundred Health Foods Co., Ltd.	
Anhui Native Produce Imp & Exp Corp.	
Anhui Time Tech Co., Ltd.	
APM Global Logistics (Shanghai) Co.	
Baiste Trading Co., Ltd.	
Cheng Du Wai Yuan Bee Products Co., Ltd.	
Chengdu Stone Dynasty Art Stone	
Damco China Limited Qingdao Branch	
Dongtai Peak Honey Industry Co., Ltd.	

[1] Such entities include entities that have not participated in the proceeding, entities that were preliminarily granted a separate rate in any currently incomplete segment of the proceeding (*e.g.,* an ongoing administrative review, new shipper review, *etc.*) and entities that lost their separate rate in the most recently complete segment of the proceeding in which they participated.

[2] Only changes to the official company name, rather than trade names, need to be addressed via a Separate Rate Application. Information regarding new trade names may be submitted via a Separate Rate Certification.

	Period to be reviewed
Eurasia Bee's Products Co., Ltd.	
Feidong Foreign Trade Co., Ltd.	
Fresh Honey Co., Ltd. (formerly Mgl. Yun Shen)	
Golden Tadco Int'l	
Hangzhou Golden Harvest Health Industry Co., Ltd.	
Hangzhou Tienchu Miyuan Health Food Co., Ltd.	
Haoliluck Co., Ltd.	
Hengjide Healthy Products Co. Ltd.	
Hubei Yusun Co., Ltd.	
Inner Mongolia Altin Bee-Keeping	
Inner Mongolia Youth Trade Development Co., Ltd.	
Jiangsu Cereals, Oils Foodstuffs Import Export (Group) Corp.	
Jiangsu Kanghong Natural Healthfoods Co., Ltd.	
Jiangsu Light Industry Products Imp & Exp (Group) Corp.	
Jilin Province Juhui Import	
Maersk Logistics (China) Company Ltd.	
Nefelon Limited Company	
Ningbo Shengye Electric Appliance	
Ningbo Shunkang Health Food Co., Ltd.	
Ningxia Yuehai Trading Co., Ltd.	
Product Source Marketing Ltd.	
Qingdao Aolan Trade Co., Ltd.	
QHD Sanhai Honey Co., Ltd.	
Qinhuangdao Municipal Dafeng Industrial Co., Ltd.	
Renaissance India Mannite	
Shaanxi Youthsun Co., Ltd.	
Shanghai Bloom International Trading Co., Ltd.	
Shanghai Foreign Trade Co., Ltd.	
Shanghai Hui Ai Mal Tose Co., Ltd.	
Shanghai Luyuan Import & Export	
Shanghai Taiside Trading Co., Ltd.	
Shine Bal Co., Ltd.	
Sichuan-Dujiangyan Dubao Bee Industrial Co., Ltd.	
Sichuan Hasten Imp Exp. Trading Co., Ltd.	
Silverstream International Co., Ltd.	
Sunnice Honey	
Suzhou Aiyi IE Trading Co., Ltd.	
Suzhou Shanding Honey Product Co. Ltd.	
Tianjin Eulia Honey Co., Ltd.	
Tianjin Weigeda Trading Co., Ltd.	
Wanxi Haohua Food Co., Ltd.	
Wuhan Bee Healthy Co., Ltd.	
Wuhan Shino-Food Trade Co., Ltd.	
Wuhu Anjie Food Co., Ltd.	
Wuhu Deli Foods Co. Ltd.	
Wuhu Fenglian Co., Ltd.	
Wuhu Haoyikuai Food Products Co., Ltd.	
Wuhu Haoyikuai I & E Co.	
Wuhu Haoyikuai Import & Export Co., Ltd.	
Wuhu Qinshi Tangye	
Wuhu Qinshi Tangye Co., Ltd.	
Wuhu Xinrui Bee-Product Co., Ltd.	
Xinjiang Jinhui Food Co., Ltd.	
Youngster International Trading Co., Ltd.	
Zhejiang Willing Foreign Trading Co.	
The People's Republic of China: Multilayered Wood Flooring [6] A–570–970	5/26/11–11/30/12
A&W (Shanghai) Woods Co., Ltd.	
Armstrong Wood Products Kunshan Co. Ltd.	
Anhui Longhua Bamboo Product Co., Ltd.	
Baishan Huafeng Wood Product Co., Ltd.	
Baiying Furniture Manufacturer Co., Ltd.	
Baroque Timber Industries (Zhongshan) Co., Ltd; Riverside Plywood Corporation; Samling Elegant Living Trading (Labuan) Limited; Samling Global USA, Inc.; Samling Riverside Co., Ltd. (collectively the "Samling Group")	
Benxi Wood Company	
Changbai Mountain Development and Protection Zone Hongtu Wood Industry Co., Ltd.	
Changzhou Hawd Flooring Co., Ltd.	
Chinafloors Timber (China) Co., Ltd.	
Dalian Dajen Wood Co., Ltd.	
Dalian Huilong Wooden Products Co., Ltd.	
Dalian Jiuyuan Wood Industry Co., Ltd.	
Dalian Kemian Wood Industry Co., Ltd.	
Dalian Penghong Floor Products Co., Ltd.	
Dasso Industrial Group Co., Ltd.	

	Period to be reviewed
Dazhuang Floor Co. (dba Dasso Industrial Group Co., Ltd.)	
Dontai Fuan Universal Dynamics, LLC	
Dunhua City Hongyuan Wood Industry Co., Ltd.	
Dunhua City Jisen Wood Industry Co., Ltd.	
Dunhua City Wanrong Wood Industry Co., Ltd.	
Dunhua Dexin Wood Industry Co., Ltd.	
Dunhua Jisheng Wood Industry Co., Ltd.	
Dun Hua Sen Tai Wood Co., Ltd	
Fine Furniture (Shanghai) Limited	
Fu Lik Timber (HK) Co., Ltd.	
Fujian Wuyishan Werner Green Industry Co., Ltd.	
Fusong Jinlong Wooden Group Co., Ltd	
Fusong Qianqiu Wooden Group Co., Ltd.	
Fusong Qianqiu Wooden Products Co., Ltd.	
Furnco International (HK) Company Limited	
GTP International	
Guangdong Fu Lin Timber Technology Limited	
Guangdong Yihua Timber Industry Co., Ltd.	
Guangdong Jiasheng Timber Industry Co., Ltd.	
Guangzhou Panyu Kangda Board Co., Ltd.	
Guanghzhou Panyu Shatou Trading Co., Ltd/Puli Trading Co., Ltd./Guangzhou Panyu Southern Star Co., Ltd; and related companies Yixing Lion-King Timber Industry Co., Ltd. and Jiangsu Simba Flooring Co., Ltd	
HaiLin LinJing Wooden Products, Ltd.	
Hangzhou Hanje Tec Co., Ltd	
Hunchun Forest Wolf Wooden Industry Co., Ltd.	
Huzhou Chenghang Wood Co., Ltd	
Huzhou Fuma Wood Bus. Co., Ltd.	
Huzhou Fulinmen Imp & Emp. Co., Ltd.	
Huzhou Jensonwood Co., Ltd.	
Huzhou Sunergy World Trade Co., Ltd.	
Jianfeng Wood (Suzhou) Co., Ltd.	
Jiangsu Senmao Bamboo and Wood Industry Co., Ltd.	
Jiangsu Simba Flooring Co., Ltd.	
Jiashan FengYun Timber Company Ltd.	
Jiashan Hui Jia Le Decoration Material Co., Ltd.	
Jiaxing Brilliant Import & Export Co., Ltd.	
Jiaxing Hengtong Wood Co., Ltd.	
Jiazing Brilliant Import & Export Co., Ltd.	
Jilin Forest Industry Jinqiao Flooring Group Co., Ltd.	
Jilin Xinyuan Wooden Industry Co., Ltd.	
Karly Wood Product Limited	
Kemian Wood Industry (Kunshan) Co., Ltd.	
Kunming Alston (AST) Wood Products Co., Ltd.	
Kushan Yingyi-Nature Wood Industry Co., Ltd.	
Metropolitan Hardwood Floors, Inc.	
MuDanJiang Bosen Wood Industry Co., Ltd.	
Nanjing Minglin Wooden Industry Co., Ltd.	
Pinge Timber Manufacturing (Zhejiang) Co., Ltd	
Polywell Global Limited	
Power Dekor Group Co., Ltd.	
Puli Trading Limited	
Scholar Home (Shanghai) New Material Co.Ltd.	
Sennorwell International Group (Hong Kong) Limited	
Shanghai Demeijia Wooden Co., Ltd.	
Shanghai Eswell Timber Co., Ltd.	
Shanghai Lairunde Wood Co., Ltd.	
Shanghai Lizhong Wood Products Co., Ltd./The Lizhong Wood Industry Limited Company of Shanghai	
Shanghai New Sihi Wood Co., Ltd.	
Shanghai Shenlin Corp.	
Shenyang Haobainian Wood Co.	
Shenyang Sende Wood Co., Ltd.	
Shenyang Senwang Wooden Industry Co., Ltd.	
Shenzhenshi Huanwei Woods Co., Ltd.	
Suzhou Anxin Weiguang Timber Co., Ltd.	
Suzhou Dongda Wood Co., Ltd.	
Vicwood Industry (Suzhou) Co., Ltd.	
Xiamen Yung De Ornament Co., Ltd.	
Xinyuan Wooden Industry Co., Ltd.	
Xuzhou Shenghe Wood Co., Ltd.	
Yekalon Industry, Inc.	
Zhejiang AnJi XinFeng Bamboo & Wood Co., Ltd.	
Zhejiang Biyork Wood Co., Ltd.	
Zhejiang Dadongwu Greenhome Wood Co., Ltd.	

	Period to be reviewed
Zhejiang Desheng Wood Industry Co., Ltd.	
Zhejiang Fudeli Timber Industry Co., Ltd	
Zhejiang Fuma Warm Technology, Co., Ltd.	
Zhejiang Haoyun Wood Co., Ltd.	
Zhejiang Jeson Wood Co., Ltd.	
Zhejiang Jiechen Wood Industry Co., Ltd.	
Zhejiang Layo Wood Industry Co., Ltd.	
Zhejiang Longsen Lumbering Co., Ltd.	
Zhejiang Shiyou Timber Co., Ltd.	
Zhejiang Tianzhen Bamboo & Wood Development Co., Ltd.	
Zhejiang Yongyu Bamboo Joint-Stock Co., Ltd.	
Countervailing Duty Proceedings	
India: Certain Hot-Rolled Carbon Steel Flat Products C–533–821	1/1/12–12/31/12
JSW Ispat Steel Limited (formerly Ispat Industries Limited)	
National Steel and Agro Industries Limited	
Steel Authority of India Limited	
Tata Steel Limited	
Welspun Corp Ltd (also referred to as Welspun Steel Ltd.)	
Uttam Galva Steels Limited	
The People's Republic of China: Multilayered Wood Flooring C–570–971	4/6/11–12/31/11
A&W (Shanghai) Woods Co., Ltd.	
Armstrong Wood Products Kunshan Co., Ltd.	
Armstrong Wood Products (Kunshan) Co., Ltd.	
Baishan Huafeng Wood Product Co., Ltd.	
Baiying Furniture Manufacturer Co., Ltd.	
Baroque Timber Industries (Zhongshan) Co., Ltd; Riverside Plywood Corporation; Sampling Elegant Living Trading (Labuan) Limited; Samling Global USA, Inc.; Samling Riverside Co., Ltd. (collectively the "Sampling Group")	
Changbai Mountain Development and Protection Zone Hongtu Wood Industry Co., Ltd.	
Changzhou Hawd Flooring Co., Ltd.	
Chinafloors Timber (China) Co., Ltd.	
Dalian Dajen Wood Co., Ltd.	
Dalian Huilong Wooden Products Co., Ltd.	
Dalian Jiuyuan Wood Industry Co., Ltd.	
Dalian Kemian Wood Industry Co., Ltd.	
Dalian Penghong Floor Products Co., Ltd.	
Dazhuang Floor Co. (dba Dasso Industrial Group Co., Ltd.)	
Dontai Fuan Universal Dynamics LLC	
Dunhua City Hongyuan Wood Industry Co., Ltd.	
Dunhua City Wanrong Wood Industry Co., Ltd.	
Dunhua Dexin Wood Industry Co., Ltd.	
Dunhua Jisheng Wood Industry Co., Ltd.	
Dun Hua City Jisen Wood Industry Co., Ltd.	
Dun Hua Sen Tai Wood Co., Ltd.,	
Fine Furniture (Shanghai) Limited	
Fu Lik Timber (HK) Co., Ltd.	
Fusong Jinlong Wooden Group Co., Ltd.	
Fusong Qianqiu Wooden Group Co., Ltd.	
Fusong Qianqiu Wooden Product Co., Ltd.	
GTP International	
Guangdong Fu Lin Timber Technology Limited	
Guangdong Yihua Timber Industry Co., Ltd.	
Guangzhou Jiasheng Timber Industry Co., Ltd.	
Guangzhou Panyu Kangda Board Co., Ltd.	
Guanghzhou Panyu Shatou Trading Co. Ltd./Puli Trading Co., Ltd., and Guangzhou Panyu Southern Star Co., Ltd., and the related companies Yixing Lion-King Timber Industry Co., Ltd. and Jiangsu Simba Flooring Co., Ltd	
HaiLin LinJing Wooden Products, Ltd.	
Hunchun Forest Wolf Industry Co., Ltd.	
Huzhou Chenghang Wood Co., Ltd.	
Huzhou Fuma Wood Bus. Co., Ltd.	
Huzhou Fulinmen Imp. & Exp. Co., Ltd.	
Huzhou Jesonwood Co., Ltd.	
Huzhou Sunergy World Trade Co., Ltd.	
Jianfeng Wood (Suzhou) Co., Ltd.	
Jiangsu Senmao Bamboo, Wood Industry Co., Ltd.	
Jiazing Brilliant Import & Export Co., Ltd.	
Jilin Forest Industry Jinqiao Flooring Group Co., Ltd.	
Jilin Xinyuan Wooden Industry Co., Ltd.	
Karly Wood Product Limited	
Kemian Wood Industry (Kunshan) Co., Ltd.	
Kunming Alston (AST) Wood Products Co., Ltd.	
Kushan Yingyi-Nature Wood Industry Co., Ltd.	
Metropolitan Hardwood Floors, Inc.	

	Period to be reviewed
MuDanJiang Bosen Wood Industry Co., Ltd.	
Nakahiro Jyou Sei Furniture (Dalian) Co., Ltd.	
Nanjing Minglin Wooden Industry Co., Ltd.	
Power Dekor Group Co., Ltd.	
Sennorwell International Group (Hong Kong) Limited	
Shanghai Demeijia Wooden Co., Ltd.	
Shanghai Eswell Timber Co., Ltd.	
Shanghai Lairunde Wood Co., Ltd.	
Shanghai Lizhong Wood Products Co., Ltd. (a/k/a The Lizhong Wood Industry Limited Company of Shanghai)	
Shanghai New Sihi Wood Co., Ltd.	
Shanghai Shenlin Corp.	
Shenyang Haobainian Wood Co.	
Shenyang Sende Wood Co., Ltd.	
Shenzhenshi Huanwei Woods Co., Ltd.	
Suzhou Anxin Weiguang Timber Co., Ltd.	
Suzhou Dongda Wood Co., Ltd.	
Suzhou Times Flooring Co., Ltd.	
Vicwood Industry (Suzhou) Co. Ltd.	
Xiamen Yung De Ornament Co., Ltd.	
Xinyuan Wooden Industry Co., Ltd.	
Xuzhou Shenghe Wood Co., Ltd.	
Yekalon Industry, Inc.	
Zhejiang AnJi XinFeng Bamboo & Wood Co., Ltd.	
Zhejiang Biyork Wood Co., Ltd.	
Zhejiang Dadongwu GreenHome Wood Co., Ltd.	
Zhejiang Desheng Wood Industry Co., Ltd.	
Zhejiang Fudeli Timber Indutry Co., Ltd.	
Zhejiang Haoyun Wood Co., Ltd.	
Zhejiang Jeson Wood Co., Ltd.	
Zhejiang Jiechen Wood Industry Co., Ltd.	
Zhejiang Longsen Lumbering Co., Ltd.	
Zhejiang Shiyou Timber Co., Ltd.	
Zhejiang Tianzhen Bamboo & Wood Development Co., Ltd.	
Suspension Agreements	
None.	

During any administrative review covering all or part of a period falling between the first and second or third and fourth anniversary of the publication of an antidumping duty order under 19 CFR 351.211 or a determination under 19 CFR 351.218(f)(4) to continue an order or suspended investigation (after sunset review), the Secretary, if requested by a domestic interested party within 30 days of the date of publication of the notice of initiation of the review, will determine, consistent with *FAG Italia* v. *United States,* 291 F.3d 806 (Fed Cir. 2002), as appropriate, whether antidumping duties have been absorbed by an exporter or producer subject to the review if the subject merchandise is sold in the United States through an importer that is affiliated with such exporter or producer. The request must include the name(s) of the exporter or producer for which the inquiry is requested.

For the first administrative review of any order, there will be no assessment of antidumping or countervailing duties on entries of subject merchandise entered, or withdrawn from warehouse, for consumption during the relevant provisional-measures ''gap'' period, of the order, if such a gap period is applicable to the period of review.

Interested parties must submit applications for disclosure under administrative protective orders in accordance with 19 CFR 351.305. On January 22, 2008, the Department published *Antidumping and Countervailing Duty Proceedings: Documents Submission Procedures; APO Procedures,* 73 FR 3634 (January 22, 2008). Those procedures apply to administrative reviews included in this notice of initiation. Parties wishing to participate in any of these administrative reviews should ensure that they meet the requirements of these procedures (*e.g.,* the filing of separate letters of appearance as discussed at 19 CFR 351.103(d)).

Any party submitting factual information in an antidumping duty or countervailing duty proceeding must certify to the accuracy and completeness of that information. *See* section 782(b) of the Act. Parties are hereby reminded that revised certification requirements are in effect for company/government officials as well as their representatives in all segments of any antidumping duty or countervailing duty proceedings initiated on or after March 14, 2011. *See Certification of Factual Information to Import Administration During Antidumping and Countervailing Duty Proceedings: Interim Final Rule,* 76 FR 7491 (February 10, 2011) (''*Interim Final Rule*''), amending 19 CFR 351.303(g)(1) and (2). The formats for the revised certifications are provided at the end of

[3] If one of the above named companies does not qualify for a separate rate, all other exporters of Certain Cased Pencils from the PRC who have not qualified for a separate rate are deemed to be covered by this review as part of the single PRC entity of which the named exporters are a part.

[4] If one of the above named companies does not qualify for a separate rate, all other exporters of Hand Trucks and Parts Thereof from the PRC who have not qualified for a separate rate are deemed to be covered by this review as part of the single PRC entity of which the named exporters are a part.

[5] If one of the above named companies does not qualify for a separate rate, all other exporters of Honey and Parts Thereof from the PRC who have not qualified for a separate rate are deemed to be covered by this review as part of the single PRC entity of which the named exporters are a part.

[6] If one of the above named companies does not qualify for a separate rate, all other exporters of Multilayered Wood Flooring from the PRC who have not qualified for a separate rate are deemed to be covered by this review as part of the single PRC entity of which the named exporters are a part.

the *Interim Final Rule.* The Department intends to reject factual submissions in any proceeding segments initiated on or after March 14, 2011 if the submitting party does not comply with the revised certification requirements.

These initiations and this notice are in accordance with section 751(a) of the Act (19 U.S.C. 1675(a)) and 19 CFR 351.221(c)(1)(i).

Dated: January 23, 2013.

Christian Marsh,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2013–01999 Filed 1–29–13; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–552–801]

Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Preliminary Results of Antidumping Duty New Shipper Reviews; 2011–2012

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (''the Department'') is conducting four new shipper reviews (''NSRs'') of the antidumping duty order on certain frozen fish fillets from the Socialist Republic of Vietnam (''Vietnam''). The period of review (''POR'') is August 1, 2011, through January 31, 2012. The reviews cover four exporters of subject merchandise: Quang Minh Seafood Co., Ltd. (''Quang Minh''); Dai Thanh Seafoods Company Limited (''Dathaco''); Fatifish Company Limited (''Fatifish''); and Hoang Long Seafood Processing Co., Ltd. (''Hoang Long'') (collectively, the ''New Shipper Respondents''). The Department has preliminarily determined that the New Shipper Respondents did not sell subject merchandise at less than normal value (''NV'').

DATES: *Effective Date:* January 30, 2013.

FOR FURTHER INFORMATION CONTACT: Jerry Huang, Toni Dach, and Seth Isenberg, AD/CVD Operations, Office 9, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–4047, (202) 482–1655 and (202) 482–0588.

SUPPLEMENTARY INFORMATION:

Scope of the Order

The product covered by the order is frozen fish fillets, including regular, shank, and strip fillets and portions thereof, whether or not breaded or marinated, of the species *Pangasius Bocourti, Pangasius Hypophthalmus* (also known as *Pangasius*), and *Pangasius Micronemus.* These products are classifiable under tariff article codes 1604.19.4000, 1604.19.5000, 0305.59.4000, 0304.29.6033 of the Harmonized Tariff Schedule of the United States (''HTSUS''). Although the HTSUS subheading is provided for convenience and customs purposes, our written description of the scope of the order is dispositive.[1]

Methodology

The Department has conducted these reviews in accordance with section 751(a)(2)(B) of the Tariff Act of 1930, as amended (''the Act'') and 19 CFR 351.214. Export prices have been calculated in accordance with section 772 of the Act. Because Vietnam is a nonmarket economy within the meaning of section 771(18) of the Act, normal value has been calculated in accordance with section 773(c) of the Act. Specifically, the New Shipper Respondents' factors of production have been valued primarily in Bangladesh, which is economically comparable to Vietnam and is a significant producer of comparable merchandise, consistent with section 773(c)(2) of the Act. When data were not available from Bangladesh, we used Indian, Indonesian and Philippine sources.

For a full description of the methodology underlying our conclusions, please see the Preliminary Decision Memorandum. The Preliminary Decision Memorandum is a public document and is on file electronically via Import Administration's Antidumping and Countervailing Duty Centralized Electronic Service System (''IA ACCESS''). IA ACCESS is available to registered users at *http://iaaccess.trade.gov* and in the Central Records Unit, room 7046 of the main Department of Commerce building. In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly on the Internet at *http://www.trade.gov/ia/.* The signed Preliminary Decision Memorandum and the electronic versions of the Preliminary Decision Memorandum are identical in content.

Preliminary Results of the Review

The Department preliminarily finds that the following margins exist for the period August 1, 2010, to January 31, 2011.

Exporter	Producer	Weighted-average margin (dollars per kilogram)
Quang Minh Seafood Co., Ltd	Quang Minh Seafood Co., Ltd	0.00
Dai Thanh Seafoods Company Limited	Dai Thanh Seafoods Company Limited	0.00
Fatifish Company Limited	Fatifish Company Limited	0.00
Hoang Long Seafood Processing Co., Ltd	Hoang Long Seafood Processing Co., Ltd	0.00

Disclosure and Public Comments

The Department intends to disclose calculations performed for these preliminary results to the parties within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b). Interested parties are invited to comment on the preliminary results of these reviews. Interested parties may submit case briefs and/or written comments no later than 30 days after the date of publication of the preliminary results of review.[2] Rebuttal briefs and rebuttals to written comments, limited to issues raised in such briefs or comments, may be filed no later than five days after the time limit for filing the case briefs.[3]

Any interested party may request a hearing within 30 days of publication of

[1] *See* ''Decision Memorandum for Preliminary Results of Antidumping Duty New Shipper Reviews: Certain Frozen Fish Fillets from the Socialist's Republic of Vietnam'' from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations to Paul Piquado, Assistant Secretary for Import Administration, dated January 24, 2013 (''Preliminary Decision Memorandum'') and hereby adopted by this notice for a complete description of the Scope of the Order.

[2] *See* 19 CFR 351.309(c)(1)(ii); Parties submitting written comments must submit them pursuant to the Department's e-filing regulations. *See https://iaaccess.trade.gov/help/IA%20ACCESS%20User%20Guide.pdf.*

[3] *See* 19 CFR 351.309(d)(1)–(2).

these preliminary results.[4] Hearing requests should contain the following information: (1) The party's name, address, and telephone number; (2) the number of participants; and (3) a list of the issues to be discussed. Oral presentations will be limited to issues raised in the briefs. If a request for a hearing is made, parties will be notified of the time and date for the hearing to be held at the U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230.[5]

The Department intends to issue the final results of these new shipper reviews, which will include the results of its analysis of issues raised in all comments and at any hearing, within 90 days of publication of these preliminary results, pursuant to section 751(a)(2)(B)(iv) of the Act.

Deadline for Submission of Publicly Available Surrogate Value Information

In accordance with 19 CFR 351.301(c)(3)(ii), the deadline for submission of publicly available information to value factors of production under 19 CFR 351.408(c) is 20 days after the date of publication of the preliminary results. In accordance with 19 CFR 351.301(c)(1), if an interested party submits factual information less than ten days before, on, or after (if the Department has extended the deadline) the applicable deadline for submission of such factual information, an interested party may submit factual information to rebut, clarify, or correct the factual information no later than ten days after such factual information is served on the interested party. However, the Department generally will not accept in the rebuttal submission additional or alternative surrogate value information not previously on the record, if the deadline for submission of surrogate value information has passed.[6] Furthermore, the Department generally will not accept business proprietary information in either the surrogate value submissions or the rebuttals thereto, as the regulation regarding the submission of surrogate values allows only for the submission of publicly available information.[7]

[4] *See* 19 CFR 351.310(c).

[5] *See* 19 CFR 351.310(d).

[6] *See, e.g., Glycine from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Rescission, in Part,* 72 FR 58809 (October 17, 2007), and accompanying Issues and Decision Memorandum at Comment 2.

[7] *See* 19 CFR 351.301(c)(3).

Assessment Rates

Upon completion of the final results, pursuant to 19 CFR 351.212(b), the Department will determine, and U.S. Customs Border and Protection (''CBP'') shall assess, antidumping duties on all appropriate entries on a per-unit basis for the New Shipper Respondents. The Department intends to issue assessment instructions to CBP 15 days after the date of publication of the final results of review. Pursuant to 19 CFR 351.212(b)(1), we will calculate importer-specific (or customer) per-unit duty assessment rates. We will instruct CBP to assess antidumping duties on all appropriate entries covered by this review if any importer-specific assessment rate calculated in the final results of this review is above *de minimis.* The final results of these reviews shall be the basis for the assessment of antidumping duties on entries of merchandise covered by the final results of these reviews and for future deposits of estimated duties, where applicable.

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of these new shipper reviews for all shipments of subject merchandise from the New Shipper Respondents entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided for by section 751(a)(2)(C) of the Act: (1) For subject merchandise produced and exported by the New Shipper Respondents, the cash deposit rate will be the rates established in the final results of these reviews (except, if a rate is zero or *de minimis,* no cash deposit will be required); (2) for subject merchandise exported by the New Shipper Respondents but not manufactured by the New Shipper Respondents, the cash deposit rate will continue to be the Vietnam-wide rate (*i.e.,* $2.11 per kilogram);[8] and (3) for subject merchandise manufactured by the New Shipper Respondents, but exported by any other party, the cash deposit rate will be the rate applicable to the exporter. These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Interested Parties

This notice serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this POR. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

[8] *See Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of the Antidumping Duty Administrative Review and New Shipper Reviews,* 75 FR 12726, 12728 (March 17, 2010).

We are issuing and publishing this determination in accordance with sections 751(a)(2)(B) and 777(i)(1) of the Act.

Dated: January 24, 2013.

Paul Piquado,

Assistant Secretary for Import Administration.

[FR Doc. 2013–02001 Filed 1–29–13; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC424

Endangered and Threatened Species; Take of Anadromous Fish; Correction

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of receipt of a Scientific purposes and Enhancement of survival permit application and Hatchery and Genetic Management Plan (HGMP); notice of availability of draft environmental assessment (EA); correction.

SUMMARY: This action corrects the **DATES** and **ADDRESSES** section to a notice published on January 8, 2013 (RIN 0648–XC424), which did not contain all of the necessary information regarding the correct comment and viewing period for the application and the HGMP or the correct email address where comments can be sent. This correction adds a sentence to further clarify the correct dates when the referenced documents will be available for public review and comment. This correction also provides the correct email address for submitting comments.

DATES: All the documents will be available to the public beginning on January 25, 2013. Written comments on the permit application, draft HGMP, and draft EA must be received at the appropriate address or fax number (see **ADDRESSES**) no later than 5 p.m. Pacific standard time on March 1, 2013.

ADDRESSES: Written comments on the application, draft HGMP or draft EA should be submitted to Jim Simondet, Klamath Branch Supervisor, NMFS Northern California Office, 1655 Heindon Rd, Arcata, CA 95521. Comments may also be submitted via fax (707) 825–4840, or you may transmit your comment as an attachment to the following email address: *NMFS.SWR.NCO.IronGateHGMP@noaa.gov.*

Copies of the draft EA and HGMP are available for public review during regular business hours from 9:00 a.m. to 5 p.m. at the NMFS Arcata office, 1655 Heindon Road, Arcata, CA 95521, (707) 825–5171. The permit application may be viewed online at: *https://apps.nmfs.noaa.gov/preview/preview_open_for_comment.cfm.*

FOR FURTHER INFORMATION CONTACT: Jim Simondet, Klamath Branch Supervisor, NMFS, telephone (707) 825–5171, email: *jim.simondet@noaa.gov.*

SUPPLEMENTARY INFORMATION:

Background

On Jan 8, 2013 NMFS published a Notice (78 FR 1201) that NMFS had received an application for a permit for scientific purposes and to enhance the propagation and survival of a listed species under the Endangered Species Act of 1973. NMFS also announced the availability for public review and comment of a Draft Environmental Assessment (EA) regarding issuance of the permit, which involves take of coho salmon listed as threatened under the ESA. The dates that these documents were to become available to the public were incorrect, and this correction clarifies when the documents will be available for public viewing and comment on the above mentioned Internet address.

In addition, the email address to where comments could be submitted and has been corrected and the correct email address is not provided above in the addresses section.

Dated: January 24, 2013.

Angela Somma,

Chief, Endangered Species Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2013–01940 Filed 1–29–13; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[Docket No. 120418011–2011–01]

RIN 0648–XB141

Endangered and Threatened Wildlife; 90-Day Finding on Two Petitions To List White Marlin as Threatened or Endangered Under the Endangered Species Act

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce.

ACTION: Notice of 90-day petition finding.

SUMMARY: We (NMFS) announce a 90-day finding on two petitions to list white marlin (*Kajikia albidus*) as threatened or endangered under the Endangered Species Act (ESA). We find that the petitions do not present substantial scientific information indicating that the petitioned action may be warranted.

ADDRESSES: Copies of the petitions and related materials are available upon request from the Assistant Regional Administrator, Protected Resources Division, Southeast Regional Office, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701, or online at: *http://sero.nmfs.noaa.gov/pr/ListingPetitions.htm*

FOR FURTHER INFORMATION CONTACT: Dr. Stephania Bolden, NMFS Southeast Region, 727–824–5312, or Margaret Miller, NMFS Office of Protected Resources, 301–427–8403.

SUPPLEMENTARY INFORMATION:

Background

On February 9, 2012, we received a petition from Mr. James Chambers to list white marlin (*Kajikia albidus*) as threatened or endangered under the ESA. We received a separate petition to list white marlin from the Center for Biological Diversity (CBD) on April 3, 2012. Copies of these petitions are available from us (see **ADDRESSES,** above). The joint USFWS/NMFS petition management handbook states that if we receive two petitions for the same species and a 90-day finding has not yet been made on the earlier petition, then the later petition will be combined with the earlier petition and a combined 90-day finding will be prepared. Given that, this 90-day finding addresses petitions from both Mr. Chambers and CBD requesting us to list white marlin under the ESA.

We have previously reviewed the status of the white marlin for ESA listing as a result of a petition and legal action from these petitioners. In 2001, we received our first petition from Mr. Chambers, and the Biodiversity Legal Foundation, requesting us to list the white marlin as a threatened or endangered species. We convened a status review team to assess the species status and the degree of threat and prepared a status review report (Atlantic White Marlin Status Review Document, WMSRT, 2002). We published our determination on September 9, 2002, that white marlin did not warrant ESA listing (67 FR 57204). In 2006, per a settlement agreement between NMFS, CBD, and the Turtle Island Restoration Network, we revisited the status of the white marlin following the 2006 stock assessment by the International Commission for the Conservation of Atlantic Tunas (ICCAT). On December 21, 2006, we announced the initiation of a white marlin status review and solicited information regarding the status of and threats to the species (71 FR 76639) and convened a new biological review team (BRT) to commence a status review. The report (Atlantic White Marlin Status Review, AWMSR, 2007) prepared by the BRT was peer reviewed and the final document incorporated peer review comments. After considering the AWMSR, we determined the white marlin was neither threatened or endangered (73 FR 843; January 4, 2008).

ESA Statutory and Regulatory Provisions and Evaluation Framework

Section 4(b)(3)(A) of the ESA of 1973, as amended (U.S.C. 1531 *et seq.*), requires, to the maximum extent practicable, that within 90 days of receipt of a petition to list a species as threatened or endangered, the Secretary of Commerce make a finding on whether that petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted, and to promptly publish such finding in the **Federal Register** (16 U.S.C. 1533(b)(3)(A)). When we find that substantial scientific or commercial information in a petition indicates the petitioned action may be warranted (a ''positive 90-day finding''), we are required to promptly commence a review of the status of the species concerned during which we will conduct a comprehensive review of the best available scientific and commercial information. In such cases, we are to conclude the review with a finding as to whether, in fact, the petitioned action is warranted within 12 months of receipt of the petition. Because the finding at the 12-month stage is based on a more thorough review of the available information, as compared to the narrow scope of review at the 90-day stage, a ''may be warranted'' finding does not prejudge the outcome of the status review.

Under the ESA, a listing determination may address a ''species,'' which is defined to also include subspecies and, for any vertebrate species, any distinct population segment (DPS) that interbreeds when mature (16 U.S.C. 1532(16)). A joint NOAA–U.S. Fish and Wildlife Service (USFWS) policy clarifies the agencies' interpretation of the phrase ''distinct population segment'' for the purposes of listing, delisting, and reclassifying a species under the ESA (''DPS Policy''; 61 FR 4722; February 7, 1996). A species, subspecies, or DPS is ''endangered'' if it is in danger of extinction throughout all or a significant portion of its range, and ''threatened'' if it is likely to become endangered within the foreseeable future throughout all or a significant portion of its range (ESA sections 3(6) and 3(20), respectively; 16 U.S.C. 1532(6) and (20)). Pursuant to the ESA and our implementing regulations, we determine whether species are threatened or endangered because of any one or a combination of the following five section 4(a)(1) factors: The present or threatened destruction, modification, or curtailment of habitat or range; overutilization for commercial, recreational, scientific, or educational purposes; disease or predation; inadequacy of existing regulatory mechanisms; and any other natural or manmade factors affecting the species' existence (16 U.S.C. 1533(a)(1), 50 CFR 424.11(c)).

ESA-implementing regulations issued jointly by NMFS and USFWS (50 CFR 424.14(b)) define ''substantial information'' in the context of reviewing a petition to list, delist, or reclassify a species as the amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted. In evaluating whether substantial information is contained in a petition, the Secretary must consider whether the petition: (1) Clearly indicates the administrative measure recommended and gives the scientific and any common name of the species involved; (2) contains detailed narrative justification for the recommended measure, describing, based on available information, past and present numbers and distribution of the species involved and any threats faced by the species; (3) provides information regarding the status of the species over all or a significant portion of its range; and (4) is accompanied by the appropriate supporting documentation in the form of bibliographic references, reprints of pertinent publications, copies of reports or letters from authorities, and maps (50 CFR 424.14(b)(2)).

Court decisions clarify the appropriate scope and limitations of the Services' review of petitions at the 90-day finding stage, in making a determination whether a petitioned action ''may be'' warranted. As a general matter, these decisions hold that a petition need not establish a ''strong likelihood'' or a ''high probability'' that a species is either threatened or endangered to support a positive 90-day finding.

We evaluate the petitioner's request based upon the information in the petition including its references, and the information readily available in our files. We do not conduct additional research, and we do not solicit information from parties outside the agency to help us in evaluating the petition. We will accept the petitioner's sources and characterizations of the information presented, if they appear to be based on accepted scientific principles, unless we have specific information in our files that indicates the petition's information is incorrect, unreliable, obsolete, or otherwise irrelevant to the requested action. Information that is susceptible to more than one interpretation or that is contradicted by other available information will not be dismissed at the 90-day finding stage, so long as it is reliable and a reasonable person would conclude it supports the petitioner's assertions. In other words, conclusive information indicating the species may meet the ESA's requirements for listing is not required to make a positive 90-day finding. We will not conclude that a lack of specific information alone negates a positive 90-day finding, if a reasonable person would conclude that the unknown information itself suggests an extinction risk of concern for the species at issue.

To make a 90-day finding on a petition to list a species, we evaluate whether the petition presents substantial scientific or commercial information indicating the subject species may be either threatened or endangered, as defined by the ESA. First, we evaluate whether the information presented in the petition, along with the information readily available in our files, indicates that the petitioned entity constitutes a ''species'' eligible for listing under the ESA. Next, we evaluate whether the information indicates that the species at issue faces extinction risk that is cause for concern; this may be indicated in information expressly discussing the species' status and trends, or in information describing impacts and threats to the species. We evaluate any information on specific demographic factors pertinent to evaluating extinction risk for the species at issue (e.g., population abundance and trends, productivity, spatial structure, age structure, sex ratio, diversity, current and historical range, habitat integrity or fragmentation), and the potential contribution of identified demographic risks to extinction risk for the species. We then evaluate the potential links between these demographic risks and the causative impacts and threats identified in section 4(a)(1).

Information presented on impacts or threats should be specific to the species and should reasonably suggest that one or more of these factors may be operative threats that act or have acted on the species to the point that it may warrant protection under the ESA. Broad statements about generalized threats to the species, or identification of factors that could negatively impact a species, do not constitute substantial information that listing may be warranted. We look for information indicating that not only is the particular species exposed to a factor, but that the species may be responding in a negative fashion; then we assess the potential significance of that negative response.

Many petitions identify risk classifications made by other organizations or agencies, such as the International Union on the Conservation of Nature (IUCN), the American Fisheries Society (AFS), or NatureServe, as evidence of extinction risk for a species. Risk classifications by other organizations or made under other Federal or state statutes may be informative, but the classification alone may not provide the rationale for a positive 90-day finding under the ESA. For example, as explained by NatureServe, their assessments of a species' conservation status do ''not constitute a recommendation by NatureServe for listing under the U.S. Endangered Species Act'' because NatureServe assessments ''have different criteria, evidence requirements, purposes and taxonomic coverage than government lists of endangered and threatened species, and therefore these two types of lists should not be expected to coincide'' (*http://www.natureserve.org/prodServices/statusAssessment.jsp*). Thus, when a petition cites such classifications, we will evaluate the source information that the classification is based upon, in light of the standards on extinction risk and impacts or threats discussed above.

Species Description

The white marlin is a billfish (Family Istiophoridae) that inhabits the tropical and temperate waters of the Atlantic Ocean and adjacent seas. White marlin is considered to be a panmictic species: individuals move about freely within the Atlantic Ocean, over thousands of miles, and breed freely with other members of the population. Molecular markers have demonstrated that white marlin move significantly among regions (Graves and McDowell, 2003; Wells *et al.,* 2010). White marlin exhibit sexually dimorphic growth patterns with females growing faster and achieving larger sizes than males. There is little information regarding the age and growth of white marlin as billfish are extremely difficult to age. Data limited to a single location found that the sex ratio (proportion of females to males) increased steadily with size and nearly all fish larger than 2,000 cm were female (Arocha and Barrios, 2009).

White marlin are primarily general piscivores, but also feed on squid and other prey items (Nakamura, 1985). Spawning activity occurs during the spring (March through June) in northwestern Atlantic tropical and sub-tropical waters marked by relatively high surface temperatures (20°–29°C) and salinities (>35 ppt). The presence of white marlin larvae suggests there are at least five spawning areas in the western north Atlantic Ocean: Northeast of Little Bahama Bank off the Abaco Islands; northwest of Grand Bahama Island; southwest of Bermuda; the Mona Passage, east of the Dominican Republic; and the Gulf of Mexico (AWMSR, 2007).

White marlin, along with other billfish and tunas, are managed internationally by the member nations of the ICCAT. ICCAT, through the Standing Committee for Research and Statistics (SCRS), conducts regular stock assessments for species under its purview: white marlin stock assessments were conducted in 2002, 2006, and 2012. Both white marlin and roundscale spearfish (*Tetrapturus georgii*) are taken as bycatch on longline fishing gear targeting tuna and swordfish (AWMSR, 2007). White marlin are also targeted in recreational fishing tournaments along the U.S. east coast, which also often land roundscale spearfish (AWMSR, 2007).

White marlin and the roundscale spearfish are sympatric and morphologically very similar. Roundscale spearfish were validated as a genetically distinct species in 2006 (Shivji *et al.,* 2006). Species misidentification of the roundscale spearfish and the white marlin has likely occurred given the complexity of accurate identification (AWMSR, 2007). Little is known about the life history of roundscale spearfish. Beerkricher *et al.* (2009) examined the proportion of spearfish in the total catch identified as white marlin and found it ranged between 0 and 100 percent (n=1443, mean = 27 percent) per set observed in the western north Atlantic, with high variability across geographic areas. Roundscale spearfish were found more frequently offshore compared to nearshore. Given the misidentification problems between white marlin and roundscale spearfish, the SCRS working group decided prior to the 2012 stock assessment that white marlin and roundscale spearfish would be combined as a mixed stock until more accurate species identification and differentiation of species catches are available (SCRS, 2011).

Total catch of white marlin peaked in the mid 1960's (AWMSR, 2007). Total catch of white marlin remained relatively stable through the 1980s and into the early 1990s. In the mid 1990s there was a marked decline in white marlin catch. ICCAT responded by adopting numerous resolutions protective of white marlin, including a reduction in landings and a rebuilding program (AWMSR, 2002; WMSRT, 2007). Both the 2002 and the 2007 white marlin status reviews discussed this marked decline in total catch and described protective measures adopted by ICCAT (WMSRT, 2002; AWMSR, 2007). White marlin catch has remained relatively stable in recent years (SCRS, 2011; 2012). Relative fishing mortality has been declining over the past ten years, it is now most likely to be below the fishing mortality rate expected to yield maximum sustainable yield (Fmsy), and it is highly likely to remain below Fmsy (SCRS, 2012). The BRT concluded that the current regulatory mechanisms are sufficient to prevent continued stock decline (AWMSR, 2007).

Analysis of the Petition

We evaluated whether the petitions presented the information indicated in 50 CFR 424.14(b)(2). Both petitions stated the administrative measures recommended for the white marlin. Neither petition included the scientific name of the species. Both petitions included a narrative justification for the recommended measure, including some information on numbers of the species, historical geographic occurrences of the species, and threats faced by the species. Both petitions utilize information from the 2011 ICCAT Blue Marlin Stock Assessment and While Marlin Data Preparatory Meeting (SCRS, 2011). Only the CBD petition included supporting references.

White marlin is recognized as a taxonomically-distinct species and is therefore an eligible entity for listing under the ESA. We previously determined the Atlantic white marlin constitutes a single species throughout the Atlantic Ocean and there are no populations that warrant consideration of ESA listing (73 FR 843; January 4, 2008). The Chambers petition, seeking protection of the ''North Atlantic sub-population of the white marlin,'' included information summarizing spatial and temporal difference in spawning north and south of the equator that in turn indicates ''two entirely distinct sub-populations which do not interbreed'' and a graph showing total catch of white marlin north of the equator by gear with live and dead discards from 1956–2010 (SCRS, 2011). The Chambers petition did not include any information supporting white marlin population structure that was not previously considered by us. Therefore the best available information indicates white marlin are a single species throughout its range without separation into populations.

Information on Impacts and Threats to the Species

We evaluated whether the information in the petitions and information in our files concerning the extent and severity of one or more of the ESA section 4(a)(1) factors suggest these impacts and threats may be posing a risk of extinction for white marlin that is cause for concern. Collectively, the petitions state that three of the five causal factors in section 4(a)(1) of the ESA are adversely affecting the continued existence of white marlin: (A) Present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial and recreational purposes; and (D) inadequacy of existing regulatory mechanisms. In the following sections, we use the information presented in the petition and in our files to determine whether the petitioned action may be warranted.

Present and Threatened Destruction, Modification, or Curtailment of Habitat or Range

The CBD petition stated the range of the white marlin has been reduced between the 1960s and the 1990s per Worm and Tittensor (2011). Other information provided by CBD contradicts this range reduction and shows Worm and Tittensor's (2011) finding to be obsolete: Lynch *et al.* (2011) includes a figure summarizing distribution of white marlin in the Atlantic Ocean from 2000 to 2006 that indicates white marlin occur in all the areas identified as absent by Worm and Tittensor (2011). Information in our files (SCRS, 2011; 2012) also indicates the range has not contracted. Therefore we conclude the petition does not provide substantial information indicating the range of the white marlin has been constricted and further note that a slight variation in range of a species that occurs across the Atlantic Ocean and 70 degrees latitude would not alone constitute an extinction risk.

The CBD petition states ''studies have found that billfish, such as white marlin, are sensitive to water quality conditions, which are rapidly changing as a result of climate change and ocean acidification'' and refers to Lynch *et al.* (2011). We reviewed Lynch *et al.* (2011) and did not find statements supporting CBDs' assertions. Further, neither CBD nor Lynch *et al.* (2011) provide any explanation or connection of how water quality condition, climate change, or ocean acidification are operative threats to the continued existence of the white marlin. We did not find information in our files indicating how presumed changes in water quality from climate change and ocean acidification would be an extinction risk of concern to white marlin.

In summary, information presented in the two petitions and in our files does not constitute substantial information indicating that the present and threatened destruction, modification, or curtailment of habitat or range may be causing extinction risk of concern for white marlin.

Overutilization for Commercial and Recreational Purposes

The CBD petition quotes from Beerkircher *et al.* (2009) that white marlin are among ''the most overexploited pelagic fishes.'' The CBD petition also attributes other statements to ICCAT (SCRS, 2011) including ''white marlin populations have failed to rebuild, and they have also continued to decline and landings indicate this continued decline and the catch-per-unit-effort shows instability in the population.'' We reviewed SCRS (2011) and could not substantiate or find support for the statements. In addition, the CBD petition did not provide any explanation on how these statements correspond to extinction risk.

The Chambers petition says the status of the white marlin population ''is well below the level at which there is a danger of recruitment failure which is considered to begin at 50 percent of MSY,'' and, ''Passing such a threshold means there are becoming too few breeders to replace the population which can then spiral ever faster towards extinction.'' The Chambers petition did not provide any supporting information for these claims. It included no information or explanation on how this threshold corresponds to extinction risk. The petition did not provide information on recruitment failure or the number of current breeders. We are unaware of data, and did not find information in our files, to support this claim.

The CBD petition did provide some information on white marlin population size, somewhat relevant to Mr. Chambers' claims. It cites the decline in B/Bmsy from 1.02 in 1970 to 0.44 in 2010 (Collette *et al.,* 2011) as evidence of overutilization of white marlin. B/Bmsy is a relative abundance metric in fishery management that expresses a stock's biomass as a proportion of the biomass that would support the continuous, maximum harvest of that stock. Although it provides B/Bmsy figures for white marlin, the CBD does not provide any rationale why a B/Bmsy of 0.44 causes an extinction risk of concern. We do not believe 0.44 B/Bmsy alone is a cause for concern, as it represents fishing potential rather than absolute abundance, and does not necessarily have any relationship to a species' extinction risk. In addition, we interpret the B/Bmsy trend presented in Collette *et al.* (2011) as declining between 1970 and 1990, followed by a stable or increasing, but not decreasing, stock size from 1990 through 2010.

The Chambers petition states white marlin abundance has ''fallen to about 2 percent of an unfished level of abundance by the end of 2007.'' While population decline can result in extinction risk that is cause for concern in certain circumstances, the decline described in the Chambers petition appears to have been derived from reported landings. Although a decline in reported landings can oftentimes indicate a decrease in total abundance, in this case it is likely this decline in landings is a result of the regulations ICCAT has instituted since 1995 to reduce white marlin landings. Therefore, we conclude landings data do not indicate a decline in white marlin abundance and do not indicate that white marlin is being negatively impacted by overutilization. We are unaware of any data suggesting that white marlin have declined to the level Mr. Chambers claims, which would correspond to a B/Bmsy value of 0.04 or one eleventh the value presented in the CBD petition.

The CBD petition cites the ''vulnerable'' status classification made by IUCN to support listing white marlin as threatened or endangered under the ESA, and includes Collette *et al.* (2011) as a reference. As discussed above, risk classifications by other organizations or agencies (e.g., IUCN) do not alone provide rationale for a positive 90-day finding under the ESA. However we have evaluated the IUCN source information for white marlin relative to the ESA standards of extinction risk and we find the IUCN classification does not present information that was not already considered in the 2007 status review (e.g., the 2006 ICCAT stock assessment) or that was not included by CBD in their petition and discussed herein (e.g., range constriction as described by Worm and Tittensor, 2011 and catch composition per Beerkircher *et al.,* 2009).

The CBD petition discusses how roundscale spearfish reported in the white marlin catch can affect ICCAT stock assessments and requests a new assessment. Citing Beerkircher *et al.* (2009), the CBD petition suggests we adopt a proportion of roundscale spearfish to white marlin in the total catch between 21 and 42 percent and re-evaluate our prior finding. As previously discussed, the proportion of spearfish in the total catch identified as white marlin was highly variable and spatially limited (Beerkircher *et al.,* 2009). In evaluating the findings from Beerkircher *et al.* (2009), ICCAT subsequently concluded reliable estimates on the proportion of roundscale spearfish reported as white marlin in the catch rates were not available, and elected to perform a mixed stock assessment until more accurate species identification and differentiation of species catch were available (SCRS, 2011). Specifically, ICCAT determined a comprehensive Atlantic-wide sampling program, as well as a large-scale retrospective analysis, would be required for a reliable population-level estimate of roundscale spearfish reported as white marlin (SCRS, 2011). All white marlin biological material sampled prior to 2006 is currently presumed to contain unknown proportions of roundscale spearfish (SCRS, 2012). We acknowledge it is important to consider the ratio of roundscale spearfish reported in the white marlin catch, however we concur with ICCAT that it is not possible at this time.

The CBD petition referenced the simulations performed by Beerkircher *et al.* (2009) and stated they were an indication of population decline. The CBD petition does not include any additional information indicating how these simulations indicate extinction risk. We carefully reviewed the simulations; we noted they include the period 1955 through 1999 when the marked decline in white marlin catch occurred, and do not project through subsequent years when bycatch was stabilized and reduced. Therefore we do not find this simulated decline in roundscale spearfish concurrent with white marlin surprising, as the simulations are partitioning the noted decline in one species' (white marlin) catch rates that occurred through the 1990s across two species (white marlin and roundscale spearfish). We conclude the simulations do not provide relevant information regarding the extinction risk of white marlin or information on the current status of the white marlin.

In summary, the petitions do not present information regarding the decline of white marlin catches in the 1990s that we have not already considered in prior determinations as discussed (see ''Species Description''). There is no information in our files to suggest our prior conclusions regarding the 1990s decline in white marlin catch were incorrect or insufficient. We conclude the characterization of continuing population decline in the petitions is unsubstantiated. The petitions did not provide substantial information that white marlin populations are unstable or that species misclassification poses an extinction risk. Therefore we conclude the petitions do not present substantial scientific information indicating that listing may be warranted due to overutilization for commercial and recreational purposes.

Inadequacy of Existing Regulatory Mechanisms

The CBD petition states Lynch *et al.* (2011) ''demonstrates that existing regulatory mechanisms are inadequate to prevent the decline of white marlin.'' We carefully reviewed Lynch *et al.* (2011) and could not find statements supporting CBDs' assertions. In fact, Lynch *et al.* (2011) states measures already implemented are likely beneficial to some degree; in combination, reductions in landing and live release ''should slow and possibly reverse downward population trends * * * some evidence of population response to these management strategies may already be observable.'' The Chambers petition states that ICCAT is not managing the white marlin to produce the maximum sustainable yield, but does not explain how this leads to extinction risk of concern. Fishery management targets, such as maximum sustainable yield, and statuses, are based on different criteria than that required by the ESA and, thus, do not necessarily have any relationship to a species' extinction risk. There is no information in our files that indicates the current regulatory mechanisms are insufficient to prevent endangerment of the white marlin. The petitions did not present other information to indicate how the inadequacy of existing regulatory mechanisms is an extinction risk to the white marlin.

While the petitions state additional regulations are required to ensure rebuilding of the marlin populations, they do not provide any explanation on how the existing regulatory mechanisms are inadequate to prevent endangerment of the white marlin. In summary we find the petitions, and information readily available in our files, do not present substantial information to suggest the existing regulatory mechanisms are inadequate and may be causing an extinction risk for white marlin.

After reviewing the information contained in the petitions, as well as information readily available in our files, we conclude these petitions do not present substantial scientific or commercial information indicating the petitioned action may be warranted.

References Cited

A complete list of all references is available upon request from the Protected Resources Division of the NMFS Southeast Regional Office (see **ADDRESSES**).

Authority: The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: January 25, 2013.

Alan D. Risenhoover,

Director, Office of Sustainable Fisheries, performing the functions and duties of the Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

[FR Doc. 2013–02008 Filed 1–29–13; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC300

Notice of Intent To Prepare a Supplemental Draft Environmental Impact Statement on the Effects of Oil and Gas Activities in the Arctic Ocean

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of Intent to prepare a Supplemental Draft Environmental Impact Statement.

SUMMARY: The National Marine Fisheries Service (NMFS) announces its intent to prepare a Supplemental Draft Environmental Impact Statement (DEIS) that would include an analysis of the environmental impacts of issuing Marine Mammal Protection Act (MMPA) Incidental Take Authorizations (ITAs) to the oil and gas industry for the taking of marine mammals incidental to offshore exploration activities (e.g., seismic surveys and exploratory drilling) in Federal and state waters of the U.S. Chukchi and Beaufort Seas off Alaska. The Department of the Interior's Bureau of Ocean Energy Management (BOEM) and the North Slope Borough are cooperating agencies on this EIS. The Environmental Protection Agency is serving as a consulting agency, and NMFS is coordinating with the Alaska Eskimo Whaling Commission pursuant to our co-management agreement under the MMPA.

DATES: Effective January 30, 2013.

ADDRESSES: Information on this project can be found on the Office of Protected Resources Web page at: *http://www.nmfs.noaa.gov/pr/permits/eis/arctic.htm.*

FOR FURTHER INFORMATION CONTACT: Michael Payne, Jolie Harrison, or Candace Nachman, Office of Protected Resources, NMFS, (301) 427–8401.

SUPPLEMENTARY INFORMATION:

Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce to allow, upon request, the incidental, but not intentional taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of proposed authorization is provided to the public for review. The term ''take'' under the MMPA means ''to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal.'' Except with respect to certain activities not pertinent here, the MMPA defines ''harassment'' as ''any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].''

Authorization for incidental take shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring, and reporting of such takings are set forth. NMFS has defined ''negligible impact'' in 50 CFR 216.103 as '' * * * an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.''

Summary of 2011 Draft Environmental Impact Statement

On February 8, 2010, NMFS, as lead agency, announced its intent to prepare an EIS analyzing the impacts to the human environment from the issuance of MMPA ITAs for the take of marine mammals incidental to oil and gas industry exploration activities in the U.S. Arctic Ocean and BOEM's proposed action of issuing geological & geophysical (G&G) permits and authorization of ancillary activities in the U.S. Arctic Ocean under the Outer Continental Shelf Lands Act (OCSLA) (75 FR 6175). The 60-day public scoping period ended on April 9, 2010.

On December 30, 2011, NMFS published a Notice of Availability of the Draft EIS in the **Federal Register** (76 FR 82275). The Draft EIS includes an analysis of the proposed actions identified in the 2010 NOI (i.e., NMFS' issuance of MMPA ITAs for take of marine mammals incidental to G&G surveys, ancillary activities, and exploratory drilling in the Chukchi and Beaufort Seas and BOEM's issuance of G&G permits and authorizations of ancillary activities in the Chukchi and Beaufort Seas), the anticipated environmental impacts, and other measures to minimize the impacts associated with these activities. The 60-day public comment period closed on February 28, 2012.

In light of comments received on the Draft EIS, NMFS and BOEM determined that the Final EIS would benefit from the inclusion of additional alternatives for analysis that cover a broader range of potential levels of exploratory drilling scenarios in the Beaufort and Chukchi Seas. The alternatives are based upon the agencies' analysis of additional information, including the comments and information submitted by stakeholders during the Draft EIS public comment period. Incorporating these alternatives is intended to facilitate consideration of a broader range of possible future offshore activity, thus addressing comments on the Draft EIS and extending the applicability of the document. Revisions to the document will also incorporate information in response to comments received from the public regarding other issues, such as analysis of potential mitigation measures.

Alternatives

The alternatives analyzed in the 2011 Draft EIS are summarized in the Draft EIS Notice of Availability (76 FR 82275, December 30, 2011). However, as noted previously NMFS and BOEM have concluded that additional activity level scenarios should be considered in a Supplemental Draft EIS. Consistent with the 2011 Draft EIS, the alternatives will assess a reasonable range of G&G, ancillary, and exploratory drilling activities expected to occur, as well as a reasonable range of mitigation measures, in order to accurately assess the potential consequences of issuing ITAs under the MMPA and permits under the OCSLA. Each alternative includes an analysis of a suite of standard and additional mitigation measures that have been identified to help reduce impacts to marine mammals and to ensure no unmitigable adverse impact on the availability of marine mammals for subsistence uses.

The primary difference between the upcoming Supplemental Draft EIS and the 2011 Draft EIS will be in the treatment of alternatives. In particular, NMFS and BOEM will analyze an additional alternative that considers up to four exploratory drilling programs in the Beaufort Sea and up to four exploratory drilling programs in the Chukchi Sea per year. In the 2011 Draft EIS, the maximum level of exploratory drilling considered in the alternatives was two exploratory drilling programs in the Beaufort Sea and two exploratory drilling programs in the Chukchi Sea per year. Table 1 outlines the activity levels to be considered in each action alternative. Activity levels noted are a maximum for each alternative.

TABLE 1—LEVELS OF G&G, ANCILLARY, AND EXPLORATORY DRILLING ACTIVITIES PROPOSED FOR CONSIDERATION IN THE ALTERNATIVES IN THE SUPPLEMENTAL DRAFT EIS ON THE EFFECTS OF OIL AND GAS ACTIVITIES IN THE ARCTIC OCEAN. ACTIVITY LEVELS NOTED ARE A MAXIMUM, AND ANY COMBINATION UP TO THAT AMOUNT COULD BE ALLOWED UNDER EACH ALTERNATIVE

	2D/3D Seismic surveys	Site clearance and shallow hazards surveys	On-ice seismic surveys	Exploratory drilling
Alternative 1 (No Action)	0	0	0	0
Alternative 2 (Level 1)	4 in Beaufort 3 in Chukchi	3 in Beaufort 3 in Chukchi	1 in Beaufort 0 in Chukchi	1 in Beaufort 1 in Chukchi.
Alternative 3 (Level 2)	6 in Beaufort 5 in Chukchi	5 in Beaufort 5 in Chukchi	1 in Beaufort 0 in Chukchi	2 in Beaufort 2 in Chukchi.
Alternative 4 (Level 3)	6 in Beaufort 5 in Chukchi	5 in Beaufort 5 in Chukchi	1 in Beaufort 0 in Chukchi	4 in Beaufort 4 in Chukchi.
Alternative 5 (Level 3 with required time/area closures).	6 in Beaufort 5 in Chukchi	5 in Beaufort 5 in Chukchi	1 in Beaufort 0 in Chukchi	4 in Beaufort 4 in Chukchi.

TABLE 1—LEVELS OF G&G, ANCILLARY, AND EXPLORATORY DRILLING ACTIVITIES PROPOSED FOR CONSIDERATION IN THE ALTERNATIVES IN THE SUPPLEMENTAL DRAFT EIS ON THE EFFECTS OF OIL AND GAS ACTIVITIES IN THE ARCTIC OCEAN. ACTIVITY LEVELS NOTED ARE A MAXIMUM, AND ANY COMBINATION UP TO THAT AMOUNT COULD BE ALLOWED UNDER EACH ALTERNATIVE—Continued

	2D/3D Seismic surveys	Site clearance and shallow hazards surveys	On-ice seismic surveys	Exploratory drilling
Alternative 6 (any level with required use of alternative technologies).	6 in Beaufort .... 5 in Chukchi	5 in Beaufort .... 5 in Chukchi	1 in Beaufort .... 0 in Chukchi	Any level up to the maximum, as the technology only relates to seismic surveys.

Alternatives 5 and 6 differ from Alternatives 2, 3, and 4 in the fact that each one considers required mitigation measures not contemplated in the other action alternatives. Certain time/area closures considered for mitigation on a case-by-case basis under the other action alternatives would be required under Alternative 5. The time/area closures would be for specific areas important to biological productivity, life history functions for specific species of concern, and subsistence activities. Activities would not be permitted to occur in any of the time/area closures during the specific identified periods. Additionally, buffer zones around these time/area closures could potentially be included.

In addition to contemplating the same suite of standard and additional mitigation measures analyzed in the other action alternatives, Alternative 6 also includes specific additional mitigation measures that focus on the use of alternative technologies that have the potential to augment or replace traditional airgun-based seismic exploration activities in the future.

Although NMFS is not soliciting comments and information from the public at this time, the agencies will use the information submitted by the public on the Draft EIS to inform the content and analysis in the Supplemental Draft EIS. The public will then have the opportunity to comment on the Supplemental Draft EIS upon its publication. Additionally, the public will have the opportunity to comment on any applications received under the MMPA as part of this action.

Dated: January 24, 2013.

Helen M. Golde,

Acting Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2013–02000 Filed 1–25–13; 4:15 pm]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC471

New England Fishery Management Council; Public Meeting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; public meeting.

SUMMARY: The New England Fishery Management Council's (Council) Recreational Advisory Panel will meet to consider actions affecting New England fisheries in the exclusive economic zone (EEZ).

DATES: The meeting will be held on Friday, February 15, 2013 at 9:30 a.m.

ADDRESSES: The meeting will be held at the DoubleTree by Hilton Boston North Shore, 50 Ferncroft Road, Danvers, MA 01923.

Council address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Paul J. Howard, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

SUPPLEMENTARY INFORMATION: The items of discussion in the committee's agenda are as follows:

The Recreational Advisory Panel (RAP) will meet to discuss recreational management measures for Gulf of Maine cod and Gulf of Maine haddock for fishing year 2013. Measures may need to be modified because of reduced quotas for these two stocks. The RAP will consider alternative management measures and may make recommendations for changes to account for these reductions. The RAP's advice will be provided to the New England Fishery Management Council and its Groundfish Oversight Committee. These two bodies may develop recommendations based on this advice which will be forwarded to the National Marine Fisheries Service (NMFS) for consideration. Framework Adjustment 48, currently under review, may revise measures to allow changes to recreational management measures in advance of the fishing year in order to reduce the possibility of overages, or facilitate harvesting the recreational allocations. Subject to the final decision on this management measure that was proposed in Framework Adjustment 48, NFMS may adjust measures for fishing year 2013. Any changes would be announced as soon as possible. Other business may be discussed.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Paul J. Howard (see **ADDRESSES**) at least 5 days prior to the meeting date.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: January 25, 2013.

Tracey L. Thompson,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2013–01943 Filed 1–29–13; 8:45 am]

BILLING CODE 3510–22–P

COMMODITY FUTURES TRADING COMMISSION

Sunshine Act Meeting—Closed Meeting

The following notice of a closed meeting is published pursuant to the provisions of the Government in the Sunshine Act, Public Law 94–409, 5 U.S.C. 552b.

AGENCY HOLDING THE MEETING: Commodity Futures Trading Commission.

TIME AND DATE: February 4, 2013 at 12:00 p.m.

PLACE: Three Lafayette Center, 1155 21st St., NW., Washington, DC, 9th Floor Commission Conference Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Litigation Matters. In the event that the time or date of this meeting changes, an announcement of the change, along with the new time and place of the meeting will be posted on the Commission's Web site at *www.cftc.gov.*

CONTACT PERSON FOR MORE INFORMATION: Natise Stowe, Executive Assistant, 202–418–5516.

Natise Stowe,

Executive Assistant.

[FR Doc. 2013–02096 Filed 1–28–13; 4:15 pm]

BILLING CODE 6351–01–P

DEPARTMENT OF EDUCATION

Applications for New Awards; Educational Technology, Media, and Materials for Individuals With Disabilities Program—Stepping-Up Technology Implementation

AGENCY: Office of Special Education and Rehabilitative Services, Department of Education.

ACTION: Notice.

Overview Information

Educational Technology, Media, and Materials for Individuals With Disabilities Program—Stepping-Up Technology Implementation.

Notice inviting applications for new awards for fiscal year (FY) 2013.

Catalog of Federal Domestic Assistance (CFDA) Number: 84.327S.

Dates:

Applications Available: January 30, 2013.

Deadline for Transmittal of Applications: March 18, 2013.

Deadline for Intergovernmental Review: May 15, 2013.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The purposes of the Educational Technology, Media, and Materials for Individuals With Disabilities Program [1] are to: (1) Improve results for students with disabilities by promoting the development, demonstration, and use of technology; (2) support educational activities designed to be of educational value in the classroom for students with disabilities; (3) provide support for captioning and video description that is appropriate for use in the classroom; and (4) provide accessible educational materials to students with disabilities in a timely manner.

Priority: In accordance with 34 CFR 75.105(b)(2)(v), this priority is from allowable activities specified in the statute (see sections 674 and 681(d) of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. 1400 et seq.)).

Absolute Priority: For FY 2013, this priority is an absolute priority. Under 34 CFR 75.105(c)(3), we consider only applications that meet this priority.

This priority is:

Educational Technology, Media, and Materials for Individuals With Disabilities—Stepping-Up Technology Implementation

Background

The purpose of this priority is to fund cooperative agreements to: (a) Identify resources [2] needed to effectively implement evidence-based [3] technology tools [4] that benefit students with

[1] This program was formerly called ''Technology and Media Services for Individuals With Disabilities.'' The Department has changed the name to Educational Technology, Media, and Materials for Individuals With Disabilities and updated the purposes of the program to more clearly convey that the program includes accessible educational materials. The program's activities and statutory authorization (20 U.S.C. 1474) remain unchanged.

[2] For the purposes of this priority, ''resources'' include, but are not limited to, school leadership support, professional development support to school staff, and a plan for integrating technology into the classroom curriculum.

[3] For the purposes of this priority, ''evidence-based'' is defined by the definitions published in the Notice of Proposed Priorities for the FY 2013 Supporting Effective Educator Development (SEED) Grant Program (77 FR 53819):

Large sample means a sample of 350 or more students (or other single analysis units) who were randomly assigned to a treatment or control group, or 50 or more groups (such as classrooms or schools) that contain 10 or more students (or other single analysis units) and that were randomly assigned to a treatment or control group.

Moderate evidence of effectiveness means one of the following conditions is met:

(a) There is at least one study of the effectiveness of the process, product, strategy, or practice being proposed that meets the What Works Clearinghouse Evidence Standards without reservations; found a statistically significant favorable impact on a relevant outcome (as defined in this notice) (with no statistically significant unfavorable impacts on that outcome for relevant populations in the study or in other studies of the intervention reviewed by and reported on by the What Works Clearinghouse); and includes a sample that overlaps with the populations or settings proposed to receive the process, product, strategy, or practice.

(b) There is at least one study of the effectiveness of the process, product, strategy, or practice being proposed that meets the What Works Clearinghouse Evidence Standards with reservations, found a statistically significant favorable impact on a relevant outcome (as defined in this notice) (with no statistically significant unfavorable impacts on that outcome for relevant populations in the study or in other studies of the intervention reviewed by and reported on by the What Works Clearinghouse), includes a sample that overlaps with the populations or settings proposed to receive the process, product, strategy, or practice, and includes a large sample (as defined in this notice) and a multi-site sample (as defined in this notice) (Note: multiple studies can cumulatively meet the large and multi-site sample requirements as long as each study meets the other requirements in this paragraph).

Multi-site sample means more than one site, where site can be defined as an LEA, locality, or State.

Relevant outcome means the student outcome or outcomes (or the ultimate outcome if not related to students) that the proposed project is designed to improve, consistent with the specific goals of a program.

Strong evidence of effectiveness means that one of the following conditions is met:

(a) There is at least one study of the effectiveness of the process, product, strategy, or practice being proposed that meets the What Works Clearinghouse Evidence Standards without reservations; found a statistically significant favorable impact on a relevant outcome (as defined in this notice) (with no statistically significant unfavorable impacts on that outcome for relevant populations in the study or in other studies of the intervention reviewed by and reported on by the What Works Clearinghouse); includes a sample that overlaps with the populations and settings proposed to receive the process, product, strategy, or practice; and includes a large sample (as defined in this notice) and a multi-site sample (as defined in this notice) (**Note:** multiple studies can cumulatively meet the large and multi-site sample requirements as long as each study meets the other requirements in this paragraph).

(b) There are at least two studies of the effectiveness of the process, product, strategy, or practice being proposed, each of which meets the What Works Clearinghouse Evidence Standards with reservations, found a statistically significant favorable impact on a relevant outcome (as defined in this notice) (with no statistically significant unfavorable impacts on that outcome for relevant populations in the studies or in other studies of the intervention reviewed by and reported on by the What Works Clearinghouse), includes a sample that overlaps with the populations and settings proposed to receive the process, product, strategy, or practice, and includes a large sample (as defined in this notice) and a multi-site sample (as defined in this notice).

[4] For the purposes of this priority, ''technology tools'' may include, but are not limited to, digital math text readers for students with visual impairment, reading software to improve literacy and communication development, and text-to-speech software to improve reading performance. These tools must assist or otherwise benefit students with disabilities.

disabilities, and (b) develop and disseminate products[5] that will help a broad range of schools to effectively implement these technology tools.

As Congress recognized in IDEA, ''almost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by * * * supporting the development and use of technology, including assistive technology devices and assistive technology services, to maximize accessibility for children with disabilities'' (section 601(c)(5)(H) of IDEA). The use of technology, including assistive technology devices and assistive technology services, enhances instruction and access to the general education curriculum. Since 1998, the Office of Special Education Programs (OSEP) has supported technology and media service projects through the Steppingstones of Technology Innovation for Children with Disabilities (Steppingstones) program. The projects funded under the Steppingstones program developed and evaluated numerous innovative technology tools designed to improve results for children with disabilities. Examples of such tools include: Web-based learning and assessment materials, instructional software, assistive technology devices, methods for using off-the-shelf hardware and software to improve learning, and methods for integrating technology into instruction. In addition, the Department's Institute of Education Sciences (IES) now supports projects to develop and evaluate innovative technology tools. The Stepping-up Technology Implementation program will build on these technology development efforts by identifying, developing, and disseminating products and resources that promote the effective implementation[6] of evidence-based instructional and assistive technology tools in early childhood or kindergarten through grade 12 (K–12) settings.[7]

[5] For the purposes of this priority, ''products'' may include, but are not limited to, instruction manuals, lesson plans, demonstration videos, ancillary instructional materials, and professional development modules such as collaborative groups, coaching, mentoring, or online supports.

[6] In this context, ''effective implementation'' means ''making better use of research findings in typical service settings through the use of processes and activities (such as accountable implementation teams) that are purposeful and described in sufficient detail such that independent observers can detect the presence and strength of these processes and activities'' (Fixsen, Naoom, Blase, Friedman, & Wallace, 2005).

[7] For the purposes of this priority, ''settings'' include general education classrooms, special education classrooms or any place where school-based instruction occurs.

The employment of products and resources designed to assist with the implementation of evidence-based technology tools is critical to ensuring that these tools will be effectively used to improve early childhood outcomes, academic achievement, and college and career readiness of children with disabilities. Data from a survey of more than 1,000 K–12 teachers, principals, and assistant principals indicated that simply providing teachers with technology does not ensure that it will be used. The survey also indicated that while newer teachers may use technology in their personal lives more often than veteran teachers, they do not use it more frequently in their classrooms than veteran teachers do. In addition, the survey indicated that the more often teachers use technology to improve students' daily classroom engagement, the more likely teachers are to recognize the benefits to understanding different student learning styles (Grunwald, 2010). Additionally, Perlman and Redding (2011) found that in order to be used most effectively, technology must be implemented in ways that align with curricular and teacher goals and must offer students opportunities to use these tools in their learning. These findings demonstrate a need for products and resources that can ensure technology tools for students with disabilities are implemented effectively.

Priority:

The purpose of this priority is to fund cooperative agreements to: (a) Identify resources needed to effectively implement evidence-based technology tools that benefit students with disabilities; and (b) develop and disseminate products (e.g., instruction manuals, lesson plans, demonstration videos, ancillary instructional materials) that will help early childhood or K–12 settings to effectively implement these technology tools.

To be considered for funding under this absolute priority, applicants must meet the application requirements. Any project funded under this absolute priority must also meet the programmatic and administrative requirements specified in the priority.

Application Requirements: An applicant must include in its application—

(a) A logic model or conceptual framework that depicts at a minimum, the goals, activities, outputs, and outcomes of the proposed project. A logic model communicates how a project will achieve its outcomes and provides a framework for both formative and summative evaluations of the project;

Note: The following Web sites provide more information on logic models: *www.researchutilization.org/matrix/logicmodel_resource3c.html* and *www.tadnet.org/model_and_performance.*

(b) A plan to implement the activities described in the *Project Activities* section of this priority;

(c) A plan, linked to the proposed project's logic model, for a formative evaluation of the proposed project's activities. The plan must describe how the formative evaluation will use clear performance objectives to ensure continuous improvement in the operation of the proposed project, including objective measures of progress in implementing the project and ensuring the quality of products and services;

(d) A plan for recruiting and selecting the following:

(1) Three development schools. Development schools are the sites in which iterative development[8] of the implementation of technology tools and products will occur. The project must start implementing the technology tool with one development school in year one of the project period and two additional development schools in year two.

(2) Four pilot schools. Pilot schools are the sites in which try-out, formative evaluation, and refinement of technology tools and products will occur. The project must work with the four pilot schools during years three and four of the project period.

(3) Ten dissemination schools. Dissemination schools will be selected if the project is extended for a fifth year. Dissemination schools will be used to conduct the final test of the effectiveness of the products and the final opportunity for the project to refine the products for use by teachers, but will receive less technical assistance (TA) from the project than the development or pilot schools. Also, at this stage, dissemination schools will extend the benefits of the technology tool to additional students. To be selected as a dissemination school, eligible schools and local educational agencies (LEAs) must commit to working with the project to implement the evidence-based technology tool. A school may not serve in more than one category (i.e., development, pilot, dissemination).

[8] For the purposes of this priority, ''iterative development'' refers to a process of testing, systematically securing feedback, and then revising the educational intervention that leads to revisions in the intervention to increase the likelihood that it will be implemented with fidelity (Diamond & Powell, 2011).

(e) Information (e.g., early childhood setting; elementary, middle, or high school; persistently lowest-achieving school;[9] priority school[10]) about the development, pilot, and dissemination schools; their demographics (e.g., student race or ethnicity, percentage of students eligible for free or reduced-price lunch); and other pertinent data.

(f) Documentation that the technology tool is evidence-based (as defined in this notice) and that it can be implemented to improve early childhood outcomes, academic achievement, and college and career readiness.

(g) A budget for attendance at the following:

(1) A one and one-half day kick-off meeting to be held in Washington, DC, after receipt of the award, and an annual planning meeting held in Washington, DC, with the OSEP Project Officer and other relevant staff during each subsequent year of the project period.

Note: Within 30 days of receipt of the award, a post-award teleconference must be held between the OSEP Project Officer and the grantee's project director or other authorized representative.

(2) A three-day Project Directors' Conference in Washington, DC, during each year of the project period.

(3) Two two-day trips annually to attend Department briefings, Department-sponsored conferences, and other meetings, as requested by OSEP.

Project Activities. To meet the requirements of this priority, the project, at a minimum, must conduct the following activities:

(a) Recruit a minimum of three development schools in one LEA and four pilot schools across at least two LEAs in accordance with the plan proposed under paragraph (d) of the *Application Requirements* section of this notice.

Note: Final site selection will be determined in consultation with the OSEP Project Officer following the kick-off meeting.

(b) Identify resources and develop products to support sustained implemention of the selected technology tool. Development of the products must be an interactive process beginning in a single development school and continuing through iterative cycles of development and refinement in the other development schools, followed by a formative evaluation and refinement in the pilot schools. The products must include, at a minimum, the following components to support implementation of the technology tool:

(1) An instrument or method for assessing (i) the need for the technology tool, and (ii) readiness to implement it. Instruments and methods may include resource inventory checklists, school self-study guides, surveys of teacher interest, detailed descriptions of the technology tool for review by school staff, and similar approaches used singly or in combination.

(2) Methods and manuals to support the implementation of the technology tool.

(3) Professional development activities necessary for teachers to implement the technology tool with fidelity and integrate it into the curriculum.

(c) Collect and analyze data on the effect of the technology tool on academic achievement and college and career readiness.

(d) Collect formative and summative evaluation data from the development schools and pilot schools to refine and evaluate the products.

(e) If the project is extended to a fifth year, provide the products and the technology tool to no fewer than 10 dissemination schools that are not the same schools used as development and pilot schools.

(f) Collect summative data about the success of the products in supporting implementation of the technology tool in the dissemination schools; and

(g) By the end of the project period, projects must provide information on:

(1) The products and resources that will enable other schools to implement and sustain implementation of the technology tool.

(2) How the technology tool has improved early childhood outcomes, academic achievement, or college and career readiness for children with disabilities.

(3) A strategy for disseminating the technology tool and accompanying products beyond the schools directly involved in the project.

Collaboration With the Model Demonstration Coordination Center (MDCC).

Although these projects are not model demonstration projects, the MDCC, an OSEP-funded project, will provide coordination support among the projects. Each project funded under this priority must—

(a) Coordinate with the MDCC and the other projects to determine times for cross-project collaboration conference calls. Individual project timelines may need to be adjusted once the cross-project collaboration calls are established;

(b) Provide MDCC with a description of the schools as described in paragraph (e) of the *Application Requirements* section of this notice; and

(c) Participate in conference call discussions, organized and facilitated by the MDCC, and, to the extent appropriate, establish consistent project design elements such as site selection, evaluation design issues, implementation strategies, sustainability, documentation, and dissemination.

Note: The following Web site provides more information on the MDCC: *http://mdcc.sri.com.*

Fifth Year of the Project: The Secretary may extend a project one year beyond 48 months to work with dissemination schools if the grantee is achieving the intended outcomes and making a positive contribution to the implementation of an evidence-based technology tool in the development and pilot schools. Each applicant must include in its application a plan for the full 60-month award. In deciding whether to continue funding the project for the fifth year, the Secretary will consider the requirements of 34 CFR 75.253(a), and in addition—

(a) The recommendation of a review team consisting of the OSEP Project Officer and other experts selected by the

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[9] The term ''persistently lowest-achieving schools'' means, as determined by the State—

(a)(1) Any Title I school in improvement, corrective action, or restructuring that—

(i) Is among the lowest-achieving five percent of Title I schools in improvement, corrective action, or restructuring or the lowest-achieving five Title I schools in improvement, corrective action, or restructuring in the State, whichever number of schools is greater; or

(ii) Is a high school that has had a graduation rate as defined in 34 CFR 200.19(b) that is less than 60 percent over a number of years; and

(2) Any secondary school that is eligible for, but does not receive, Title I funds that—

(i) Is among the lowest-achieving five percent of secondary schools or the lowest-achieving five secondary schools in the State that are eligible for, but do not receive, Title I funds, whichever number of schools is greater; or

(ii) Is a high school that has had a graduation rate as defined in 34 CFR 200.19(b) that is less than 60 percent over a number of years.

(b) To identify the persistently lowest-achieving schools, a State must take into account both—

(i) The academic achievement of the ''all students'' group in a school in terms of proficiency on the State's assessments under section 1111(b)(3) of the Elementary and Secondary Education Act of 1965, as amended (ESEA) in reading/language arts and mathematics combined; and

(ii) The school's lack of progress on those assessments over a number of years in the ''all students'' group.

For the purposes of this priority, the Department considers schools that are identified as Tier I or Tier II schools under the School Improvement Grants Program (see 75 FR 66363) as part of a State's approved FY 2009, FY 2010, or FY 2011 application to be persistently lowest-achieving schools. A list of these Tier I and Tier II schools can be found on the Department's Web site at *http://www2.ed.gov/programs/sif/index.html.*

[10] The term ''priority school'' means a school that has been identified by the State as a priority school pursuant to the State's approved request for ESEA flexibility.

Secretary. This review will be held during the last half of the third year of the project period;

(b) The timeliness and effectiveness with which all requirements of the negotiated cooperative agreement have been or are being met by the project; and

(c) Evidence of the degree to which the project's activities have contributed to changed practices and improved early childhood outcomes, academic achievement, or college and career readiness for students with disabilities.

References

Diamond, K.E. & Powell, D.R. (2011). An iterative approach to the development of a professional development intervention for head start teachers. *Journal of Early Intervention*, *33*(1), 75–93.

Fixsen, D.L., Naoom, S.F., Blase, K.A., Friedman, R.M., & Wallace, F. (2005). Implementation Research: A Synthesis of the Literature. Tampa, FL: University of South Florida, Louis de la Parte Florida Mental Health Institute, The National Implementation Research Network.

Grunwald and Associates. (2010). Educators, Technology and 21st Century Skills: Dispelling Five Myths. Minneapolis, MN: Walden University, Richard W. Riley College of Education. Retrieved from *www.WaldenU.edu/fivemyths.*

Perlman, C.L. & Redding, S. (Eds). (2011). Choosing and Implementing Technology Wisely. Handbook on Effective Implementation of School Improvement Grants. Lincoln, IL: Academic Development Institute. Retrieved from *www.centerii.org/handbook.*

Waiver of Proposed Rulemaking: Under the Administrative Procedure Act (APA) (5 U.S.C. 553) the Department generally offers interested parties the opportunity to comment on proposed priorities and requirements. Section 681(d) of IDEA, however, makes the public comment requirements of the APA inapplicable to the priority in this notice.

Program Authority: 20 U.S.C. 1474 and 1481.

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 79, 80, 81, 82, 84, 86, 97, 98, and 99. (b) The Education Department debarment and suspension regulations in 2 CFR part 3485.

Note: The regulations in 34 CFR part 79 apply to all applicants except federally recognized Indian tribes.

Note: The regulations in 34 CFR part 86 apply to institutions of higher education (IHEs) only.

II. Award Information

Type of Award: Cooperative agreements.

Estimated Available Funds: The Administration has requested $29,588,000 for the Educational Technology, Media, and Materials for Individuals with Disabilities Program for FY 2013, of which we intend to use an estimated $3,000,000 for this competition. The actual level of funding, if any, depends on final congressional action. However, we are inviting applications to allow enough time to complete the grant process if Congress appropriates funds for this program.

Contingent upon the availability of funds and the quality of applications, we may make additional awards in FY 2014 from the list of unfunded applicants from this competition.

Estimated Range of Awards: $475,000 to $500,000.

Estimated Average Size of Award: $500,000.

Maximum Award: We will reject any application that proposes a budget exceeding $500,000 for a single budget period of 12 months. The Assistant Secretary for Special Education and Rehabilitative Services may change the maximum amount through a notice published in the **Federal Register**.

Estimated Number of Awards: 6.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 48 months with an optional additional 12 months based on performance. Applications must include plans for both the 48 month award and the 12 month extension.

III. Eligibility Information

Eligible Applicants: State educational agencies (SEAs); LEAs, including public charter schools that are considered LEAs under State law; IHEs; other public agencies; private nonprofit organizations; outlying areas; freely associated States; Indian tribes or tribal organizations; and for-profit organizations.

2. *Cost Sharing or Matching:* This competition does not require cost sharing or matching.

3. *Other: General Requirements:*

(a) The projects funded under this competition must make positive efforts to employ, and advance in employment, qualified individuals with disabilities (see section 606 of IDEA).

(b) The applicant and grant recipient funded under this competition must involve individuals with disabilities or parents of individuals with disabilities ages birth through 26 in planning, implementing, and evaluating the project (see section 682(a)(1)(A) of IDEA).

IV. Application and Submission Information

1. *Address to Request Application Package:* Education Publications Center (ED Pubs), U.S. Department of Education, P.O. Box 22207, Alexandria, VA 22304. Telephone, toll free: 1–877–433–7827. FAX: (703) 605–6794. If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call, toll free: 1–877–576–7734.

You can contact ED Pubs at its Web site, also: *www.EDPubs.gov* or at its email address: *edpubs@inet.ed.gov*.

If you request an application package from ED Pubs, be sure to identify this competition as follows: CFDA number 84.327S.

Individuals with disabilities can obtain a copy of the application package in an accessible format (e.g., braille, large print, audiotape, or compact disc) by contacting the person or team listed under *Accessible Format* in section VIII of this notice.

2. *Content and Form of Application Submission:* Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this competition.

Page Limit: The application narrative (Part III of the application) is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. You must limit Part III to the equivalent of no more than 50 pages, using the following standards:

- A ''page'' is 8.5″ x 11″, on one side only, with 1″ margins at the top, bottom, and both sides.
- Double space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, references, and captions, as well as all text in charts, tables, figures, and graphs.
- Use a font that is either 12 point or larger or no smaller than 10 pitch (characters per inch).
- Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial. An application submitted in any other font (including Times Roman or Arial Narrow) will not be accepted.

The page limit does not apply to Part I, the cover sheet; Part II, the budget section, including the narrative budget justification; Part IV, the assurances and certifications; or the one-page abstract, the resumes, the bibliography, or the letters of support. However, the page limit does apply to all of the application narrative section (Part III).

We will reject your application if you exceed the page limit; or if you apply other standards and exceed the equivalent of the page limit.

3. *Submission Dates and Times: Applications Available:* January 30, 2013.

Deadline for Transmittal of Applications: March 18, 2013.

Applications for grants under this competition must be submitted electronically using the Grants.gov Apply site (Grants.gov). For information (including dates and times) about how to submit your application electronically, or in paper format by mail or hand delivery if you qualify for an exception to the electronic submission requirement, please refer to section IV. 7. *Other Submission Requirements* of this notice.

We do not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice. If the Department provides an accommodation or auxiliary aid to an individual with a disability in connection with the application process, the individual's application remains subject to all other requirements and limitations in this notice.

Deadline for Intergovernmental Review: May 15, 2013.

4. *Intergovernmental Review:* This competition is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this competition.

5. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

6. *Data Universal Numbering System Number, Taxpayer Identification Number, Central Contractor Registry, and System for Award Management:* To do business with the Department of Education, you must—

a. Have a Data Universal Numbering System (DUNS) number and a Taxpayer Identification Number (TIN);

b. Register both your DUNS number and TIN with the Central Contractor Registry (CCR)—and, after July 24, 2012, with the System for Award Management (SAM), the Government's primary registrant database;

c. Provide your DUNS number and TIN on your application; and

d. Maintain an active CCR or SAM registration with current information while your application is under review by the Department and, if you are awarded a grant, during the project period.

You can obtain a DUNS number from Dun and Bradstreet. A DUNS number can be created within one business day.

If you are a corporate entity, agency, institution, or organization, you can obtain a TIN from the Internal Revenue Service. If you are an individual, you can obtain a TIN from the Internal Revenue Service or the Social Security Administration. If you need a new TIN, please allow 2–5 weeks for your TIN to become active.

The CCR or SAM registration process may take five or more business days to complete. If you are currently registered with the CCR, you may not need to make any changes. However, please make certain that the TIN associated with your DUNS number is correct. Also note that you will need to update your registration annually. This may take three or more business days to complete. Information about SAM is available at SAM.gov.

In addition, if you are submitting your application via Grants.gov, you must (1) be designated by your organization as an Authorized Organization Representative (AOR); and (2) register yourself with Grants.gov as an AOR. Details on these steps are outlined at the following Grants.gov Web page: *www.grants.gov/applicants/get_registered.jsp.*

7. *Other Submission Requirements:* Applications for grants under this competition must be submitted electronically unless you qualify for an exception to this requirement in accordance with the instructions in this section.

a. *Electronic Submission of Applications.*

Applications for grants under the Stepping-up Technology Implementation competition, CFDA number 84.327S, must be submitted electronically using the Governmentwide Grants.gov Apply site at *www.Grants.gov.* Through this site, you will be able to download a copy of the application package, complete it offline, and then upload and submit your application. You may not email an electronic copy of a grant application to us.

We will reject your application if you submit it in paper format unless, as described elsewhere in this section, you qualify for one of the exceptions to the electronic submission requirement and submit, no later than two weeks before the application deadline date, a written statement to the Department that you qualify for one of these exceptions. Further information regarding calculation of the date that is two weeks before the application deadline date is provided later in this section under *Exception to Electronic Submission Requirement.*

You may access the electronic grant application for Stepping-up Technology Implementation at *www.Grants.gov.* You must search for the downloadable application package for this competition by the CFDA number. Do not include the CFDA number's alpha suffix in your search (e.g., search for 84.327, not 84.327S).

Please note the following:

- When you enter the Grants.gov site, you will find information about submitting an application electronically through the site, as well as the hours of operation.
- Applications received by Grants.gov are date and time stamped. Your application must be fully uploaded and submitted and must be date and time stamped by the Grants.gov system no later than 4:30:00 p.m., Washington, DC time, on the application deadline date. Except as otherwise noted in this section, we will not accept your application if it is received—that is, date and time stamped by the Grants.gov system—after 4:30:00 p.m., Washington, DC time, on the application deadline date. We do not consider an application that does not comply with the deadline requirements. When we retrieve your application from Grants.gov, we will notify you if we are rejecting your application because it was date and time stamped by the Grants.gov system after 4:30:00 p.m., Washington, DC time, on the application deadline date.
- The amount of time it can take to upload an application will vary depending on a variety of factors, including the size of the application and the speed of your Internet connection. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the submission process through Grants.gov.
- You should review and follow the Education Submission Procedures for submitting an application through Grants.gov that are included in the application package for this competition to ensure that you submit your application in a timely manner to the Grants.gov system. You can also find the Education Submission Procedures pertaining to Grants.gov under News and Events on the Department's G5 system home page at *www.G5.gov.*

• You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you qualify for an exception to the electronic submission requirement, as described elsewhere in this section, and submit your application in paper format.

• You must submit all documents electronically, including all information you typically provide on the following forms: the Application for Federal Assistance (SF 424), the Department of Education Supplemental Information for SF 424, Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications.

• You must upload any narrative sections and all other attachments to your application as files in a PDF (Portable Document) read-only, non-modifiable format. Do not upload an interactive or fillable PDF file. If you upload a file type other than a read-only, non-modifiable PDF or submit a password-protected file, we will not review that material. Additional, detailed information on how to attach files is in the application instructions.

• Your electronic application must comply with any page-limit requirements described in this notice.

• After you electronically submit your application, you will receive from Grants.gov an automatic notification of receipt that contains a Grants.gov tracking number. (This notification indicates receipt by Grants.gov only, not receipt by the Department.) The Department then will retrieve your application from Grants.gov and send a second notification to you by email. This second notification indicates that the Department has received your application and has assigned your application a PR/Award number (an ED-specified identifying number unique to your application).

• We may request that you provide us original signatures on forms at a later date.

Application Deadline Date Extension in Case of Technical Issues with the Grants.gov System: If you are experiencing problems submitting your application through Grants.gov, please contact the Grants.gov Support Desk, toll free, at 1–800–518–4726. You must obtain a Grants.gov Support Desk Case Number and must keep a record of it.

If you are prevented from electronically submitting your application on the application deadline date because of technical problems with the Grants.gov system, we will grant you an extension until 4:30:00 p.m., Washington, DC time, the following business day to enable you to transmit your application electronically or by hand delivery. You also may mail your application by following the mailing instructions described elsewhere in this notice.

If you submit an application after 4:30:00 p.m., Washington, DC time, on the application deadline date, please contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice and provide an explanation of the technical problem you experienced with Grants.gov, along with the Grants.gov Support Desk Case Number. We will accept your application if we can confirm that a technical problem occurred with the Grants.gov system and that that problem affected your ability to submit your application by 4:30:00 p.m., Washington, DC time, on the application deadline date. The Department will contact you after a determination is made on whether your application will be accepted.

Note: The extensions to which we refer in this section apply only to the unavailability of, or technical problems with, the Grants.gov system. We will not grant you an extension if you failed to fully register to submit your application to Grants.gov before the application deadline date and time or if the technical problem you experienced is unrelated to the Grants.gov system.

Exception to Electronic Submission Requirement: You qualify for an exception to the electronic submission requirement, and may submit your application in paper format, if you are unable to submit an application through the Grants.gov system because—

• You do not have access to the Internet; or

• You do not have the capacity to upload large documents to the Grants.gov system; and

• No later than two weeks before the application deadline date (14 calendar days or, if the fourteenth calendar day before the application deadline date falls on a Federal holiday, the next business day following the Federal holiday), you mail or fax a written statement to the Department, explaining which of the two grounds for an exception prevent you from using the Internet to submit your application.

If you mail your written statement to the Department, it must be postmarked no later than two weeks before the application deadline date. If you fax your written statement to the Department, we must receive the faxed statement no later than two weeks before the application deadline date.

Address and mail or fax your statement to: Terry Jackson, U.S. Department of Education, 400 Maryland Avenue SW., room 4081, Potomac Center Plaza (PCP), Washington, DC 20202–2600. FAX: (202) 245–7617.

Your paper application must be submitted in accordance with the mail or hand delivery instructions described in this notice.

b. *Submission of Paper Applications by Mail.*

If you qualify for an exception to the electronic submission requirement, you may mail (through the U.S. Postal Service or a commercial carrier) your application to the Department. You must mail the original and two copies of your application, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.327S), LBJ Basement Level 1, 400 Maryland Avenue SW., Washington, DC 20202–4260.

You must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

If your application is postmarked after the application deadline date, we will not consider your application.

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

c. *Submission of Paper Applications by Hand Delivery.*

If you qualify for an exception to the electronic submission requirement, you (or a courier service) may deliver your paper application to the Department by hand. You must deliver the original and two copies of your application by hand, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.327S), 550 12th Street SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8:00 a.m. and 4:30:00 p.m., Washington, DC time, except Saturdays, Sundays, and Federal holidays.

Note for Mail or Hand Delivery of Paper Applications: If you mail or hand deliver your application to the Department—

(1) You must indicate on the envelope and—if not provided by the Department—in Item 11 of the SF 424 the CFDA number, including suffix letter, if any, of the competition under which you are submitting your application; and

(2) The Application Control Center will mail to you a notification of receipt of your grant application. If you do not receive this notification within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this program are from 34 CFR 75.210 and are listed in the application package.

2. *Review and Selection Process:* We remind potential applicants that in reviewing applications in any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary also requires various assurances including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department of Education (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

3. *Additional Review and Selection Process Factors:* In the past, the Department has had difficulty finding peer reviewers for certain competitions because so many individuals who are eligible to serve as peer reviewers have conflicts of interest. The Standing Panel requirements under section 682(b) of IDEA also have placed additional constraints on the availability of reviewers. Therefore, the Department has determined that, for some discretionary grant competitions, applications may be separated into two or more groups and ranked and selected for funding within specific groups. This procedure will make it easier for the Department to find peer reviewers, by ensuring that greater numbers of individuals who are eligible to serve as reviewers for any particular group of applicants will not have conflicts of interest. It also will increase the quality, independence, and fairness of the review process, while permitting panel members to review applications under discretionary grant competitions for which they also have submitted applications. However, if the Department decides to select an equal number of applications in each group for funding, this may result in different cut-off points for fundable applications in each group.

4. *Special Conditions:* Under 34 CFR 74.14 and 80.12, the Secretary may impose special conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 34 CFR parts 74 or 80, as applicable; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN; or we may send you an email containing a link to access an electronic version of your GAN. We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 should you receive funding under the competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multi-year award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *www.ed.gov/fund/grant/apply/appforms/appforms.html.*

4. *Performance Measures:* Under the Government Performance and Results Act of 1993 (GPRA), the Department has established a set of performance measures, including long-term measures, that are designed to yield information on various aspects of the effectiveness and quality of the Educational Technology, Media, and Materials for Individuals with Disabilities Program. These measures are included in the application package and focus on the extent to which projects are of high quality, are relevant to improving outcomes of children with disabilities, contribute to improving outcomes for children with disabilities, and generate evidence of validity and availability to appropriate populations. Projects funded under this competition are required to submit data on these measures as directed by OSEP. Grantees also will be required to report information on their projects' performance in annual and final performance reports to the Department (34 CFR 75.590).

5. *Continuation Awards:* In making a continuation award, the Secretary may consider, under 34 CFR 75.253, the extent to which a grantee has made ''substantial progress toward meeting the objectives in its approved application.'' This consideration includes the review of a grantee's progress in meeting the targets and projected outcomes in its approved application, and whether the grantee has expended funds in a manner that is consistent with its approved application and budget. In making a continuation grant, the Secretary also considers whether the grantee is operating in compliance with the assurances in its approved application, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

VII. Agency Contact

FOR FURTHER INFORMATION CONTACT: Terry Jackson, U.S. Department of Education, 400 Maryland Avenue SW., room 4081, PCP, Washington, DC 20202–2600. Telephone: (202) 245–6039.

If you use a TDD or a TTY, call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

VIII. Other Information

Accessible Format: Individuals with disabilities can obtain this document and a copy of the application package in an accessible format (e.g., braille, large print, audiotape, or compact disc) by contacting the Grants and Contracts Services Team, U.S. Department of Education, 400 Maryland Avenue SW., room 5075, PCP, Washington, DC 20202–2550. Telephone: (202) 245–7363. If you use a TDD or a TTY, call the FRS, toll free, at 1–800–877–8339.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: *www.gpo.gov/fdsys.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Dated: January 24, 2013.

Michael Yudin,

Acting Assistant Secretary for Special Education and Rehabilitative Services.

[FR Doc. 2013–01998 Filed 1–29–13; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP13–38–000]

Tennessee Gas Pipeline Company, L.L.C.; Notice of Application

Take notice that on January 14, 2013, Tennessee Gas Pipeline Company, L.L.C. (Tennessee), 1001 Louisiana Street, Houston, Texas 77002, filed an application in Docket No. CP13–38–000 pursuant to section 7(b) of the Natural Gas Act (NGA) and Part 157 of the Commission's regulations, requesting authorization to abandon in place the northern portion of Line No. 523M–2300 (Triple T Line) consisting of approximately 15.76 miles of 30-inch diameter pipeline extending from Eugene Island Block 299 to the Ship Shoal Block 198 Central Gathering Platform, located in Federal offshore waters of the Outer Continental Shelf, Louisiana. Tennessee states that the facilities have been out of service since January 27, 2011, all as more fully set forth in the application which is on file with the Commission and open to public inspection.

Any questions concerning this application may be directed to Thomas G. Joyce, Manager, Certificates, Tennessee Gas Pipeline Company, L.L.C. 1001 Louisiana Street, Houston, Texas 77002, by telephone at (713) 420–3299, by facsimile at (713) 420–1605, or by email at *tom_joyce@kindermorgan.com;* Susan T. Halbach, Senior Counsel, Tennessee Gas Pipeline Company, L.L.C. 1001 Louisiana Street, Houston, Texas 77002, by telephone at (713) 420–5751, or by email at *susan_halbach@kindermorgan.com;* or Debbie Kalisek, Regulatory Analyst, Tennessee Gas Pipeline Company, L.L.C. 1001 Louisiana Street, Houston, Texas 77002, by telephone at (713) 420–3292, by facsimile at (713) 420–1605, or by email at *debbie_kalisek@kindermorgan.com.*

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below, file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit an original and 7 copies of filings made with the Commission and must mail a copy to the applicant and to every other party in the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 7 copies of the protest or intervention to the Federal Energy regulatory Commission, 888 First Street NE., Washington, DC 20426. This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: February 13, 2013.

Dated: January 23, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–01925 Filed 1–29–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 96–042]

Pacific Gas and Electric Company; Notice of Application Accepted for Filing, Soliciting Comments, Motions To Intervene, and Protests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Types of Application:* Amendment of License.

b. *Project No.:* 96–042.

c. *Date Filed:* November 27, 2012.

d. *Applicant:* Pacific Gas and Electric Company.

e. *Name of Project:* Kerckhoff Hydroelectric Project.

f. *Location:* on the San Joaquin River in Fresno and Madera Counties, California, and affects lands of the United States.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a–825r.

h. *Applicant Contact:* Alvin Thoma, Director Hydro Licensing, Pacific Gas and Electric Company, P.O. Box 770000, San Francisco, CA 94177–0001, Telephone No. (415) 973–4466, Email: *ALT@pge.com;* or Annette Faraglia, Esq., Law Department, Pacific Gas and Electric Company, P.O. Box 7442, San Francisco, CA, Telephone No. (415) 973–7145, Email: *ARF3@pge.com.*

i. *FERC Contact:* Mrs. Anumzziatta Purchiaroni, (202) 502–6191, *Anumzziatta.Purchiaroni@ferc.gov.*

j. *Deadline for filing comments, motions to intervene, and protests:* February 19, 2013.

All documents may be filed electronically via the Internet. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site at *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426. Please include the project number (P–96–042) on any comments or motions filed.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person whose name appears on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. *Description of proposed amendment:* The licensee is requesting approval to delete from the license and permanently retire from service one of the three units (Unit 2) at the Kerckhoff 1 Powerhouse. The unit is inoperable and unfeasible to repair given the cost of the repairs and the number of years remaining in the license term (ten years). The proposed modification would decrease the installed capacity of Kerckhoff 1 Powerhouse from 34,080 to 22,720 kW and the total hydraulic capacity from 1,775 to 1,200 cfs. The licensee is not proposing any changes to Kerckhoff 2 Powerhouse or existing project operation.

l. *Locations of the Application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street NE., Room 2A, Washington, DC 20426, or by calling (202) 502–8371. This filing may also be viewed on the Commission's Web site at *http://www.ferc.gov using the "eLibrary" link.* Enter the docket number excluding the last three digits in the docket number field (P–96) to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, call 1–866–208–3676 or email *FERCOnlineSupport@ferc.gov,* for TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, 214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. *Filing and Service of Responsive Documents:* Any filing must (1) Bear in all capital letters the title "COMMENTS", "PROTEST", or "MOTION TO INTERVENE" as applicable; (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, motions to intervene, or protests must set forth their evidentiary basis. Any filing made by an intervenor must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b) and 385.2010.

Dated: January 17, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–01915 Filed 1–29–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 6597–013]

Monadnock Paper Mills, Inc.; Notice of Application Accepted for Filing, Soliciting Motions To Intervene and Protests, Ready for Environmental Analysis, and Soliciting Comments, Recommendations, Preliminary Terms and Conditions, and Preliminary Fishway Prescriptions

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* New Major License.

b. *Project No.:* 6597–013.

c. *Date filed:* July 31, 2012.

d. *Applicant:* Monadnock Paper Mills, Inc.

e. *Name of Project:* Monadnock Hydroelectric Project.

f. *Location:* The existing project is located on the Contoocook River in the towns of Peterborough, Greenfield, Hancock, and Bennington in Hillsborough County, New Hampshire. The project does not affect federal lands.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Michelle Hamm, Manager, Environmental Services, Monadnock Paper Mills, Inc.; Antrim Road, P.O. Box 339, Bennington, NH 03442; (603) 588–3311 or *mhamm@mpm.com.*

i. *FERC Contact:* Samantha Davidson, (202) 502–6839 or *samantha.davidson@ferc.gov.*

j. *Deadline for filing motions to intervene and protests, comments, recommendations, preliminary terms and conditions, and preliminary prescriptions:* 60 days from the issuance date of this notice; reply comments are due 105 days from the issuance date of this notice.

Motions to intervene, protests, comments, recommendations, preliminary terms and conditions, and preliminary fishway prescriptions may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp*. You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The Commission's Rules of Practice require all intervenors filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. This application has been accepted for filing and is now ready for environmental analysis.

l. *The Project Description:*

The existing Monadnock Hydroelectric Project consists of four developments, three of which have generating facilities, with a combined installed capacity of 1,889 kilowatts (kW). The average annual generation of the project is 6,100 megawatt-hours. All power generated by the Monadnock Project is used by Monadnock Paper Mill, Inc.'s (MPM) paper production facility. The four developments, from upstream to downstream, are described below.

Powder Mill Development

The existing Powder Mill Development is located at river mile 46.08 of the Contoocook River and consists of: (1) A 366-foot-long, 18.6-foot-high dam consisting of a 228-foot-long gated, concrete gravity spillway with a crest elevation of 675.44 feet National Geodetic Vertical Datum of 1929 (NGVD) and 2-foot-high seasonal flashboards, a 91-foot-long earth embankment with a concrete core wall, and a 47-foot-long earth embankment with a concrete core wall; (2) a 4-foot-wide sluiceway; (3) a 35-foot-long, 15-foot-wide regulating gatehouse structure with a 4-foot-diameter outlet pipe; (4) a 435-acre impoundment with a storage capacity of 1,940 acre-feet and a normal maximum elevation of 677.44 feet NGVD; and (5) appurtenant facilities.

Monadnock Development

The existing Monadnock Development is located 4,200 feet downstream of Powder Mill Development dam and consists of: (1) A 515-foot-long, 22-foot-high dam consisting of a 165-foot-long concrete spillway with a crest elevation of 663.8 feet NGVD and 2-foot-high seasonal flashboards, a 75-foot-long earth embankment with a concrete core wall, a 50-foot-long concrete non-overflow section, a 25-foot-long earth embankment with a concrete core wall, and a 200-foot-long earthen embankment; (2) a 5-acre impoundment with a storage capacity of 240 acre-feet and a normal maximum elevation of 665.8 feet NGVD; (3) a 75-foot-long, 20-foot-wide powerhouse containing one 125-kW turbine-generating unit and one 298-kW turbine-generating unit for a total installed capacity of 423 kW; (4) two 20 to 25-foot-long, 2.3-kV generator leads; (5) a 100-foot-long tailrace; and (6) appurtenant facilities.

Pierce Development

The existing Pierce Development is located 900 feet downstream of the Monadnock Development dam and consists of: (1) A 420-foot-long, 28-foot-high dam that includes a 290-foot-long concrete spillway with a crest elevation of 651.4 feet NGVD and 2-foot-high seasonal flashboards; (2) a 7-acre impoundment with a storage capacity of 51-acre-feet and a normal maximum elevation of 653.4 feet NGVD; (3) a 25 foot long, 35-foot-wide powerhouse containing one 500-kW turbine-generating unit and one 220-kW turbine-generating unit for a total installed capacity of 720 kW; (4) two 15 to 25-foot-long, 2.3-kV generator leads; (5) a 600-foot-long tailrace; and (6) appurtenant facilities.

Paper Mill Development

The existing Paper Mill Development is located 1,140 feet downstream of the Pierce Development dam and consists of: (1) A 280-foot-long, 19-foot-high dam that includes a 142-foot-long concrete gravity spillway with a crest elevation of 625.6 feet NGVD and 2-foot-high seasonal flashboards; (2) a 5-acre impoundment with a storage capacity of 25-acre-feet and a normal maximum elevation of 627.6 feet NGVD; (3) a 300-foot-long power canal and headgate structure leading to a forebay; (4) an intake structure and a 10-foot-diameter, 200-foot-long steel penstock; (5) a generating room located on the lower level of MPM's paper mill facility containing a 746-kW turbine generating unit; (6) a 150-foot-long, 2.3-kV generator lead; (7) a 800-foot-long tailrace; and (8) appurtenant facilities.

The project also includes a 2,190-foot-long, 2.3-kV overhead transmission line interconnecting the generator leads to a 200-foot-long, 23-kV supply bus at MPM's paper mill facility.

The Powder Mill Development operates in a seasonal store and release mode to meet instream flow requirements and downstream demand for hydroelectric generation at MPM's paper mill facility. The Monadnock, Pierce, and Paper Mill developments operate in a run-of-river mode. The existing license requires an instantaneous minimum flow of 13 cubic feet per second (cfs) (or inflow, whichever is less), in the Powder Mill, Monadnock, and Pierce tailraces; and an instantaneous minimum flow of 70 cfs (or the inflow, whichever is less), in the Paper Mill tailrace. MPM proposes to continue operating the project according to the existing minimum flow requirements and maintain the Powder Mill impoundment between elevations 677.44 and 674.44 feet NGVD.

m. A copy of the application is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at 1–866–208–3676, or for TTY, (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above.

Register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

n. Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, and .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

All filings must (1) Bear in all capital letters the title ''PROTEST'', ''MOTION TO INTERVENE'', ''COMMENTS,'' ''REPLY COMMENTS,''

''RECOMMENDATIONS,'' ''PRELIMINARY TERMS AND CONDITIONS,'' or ''PRELIMINARY FISHWAY PRESCRIPTIONS;'' (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, recommendations, terms and conditions or prescriptions must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). Agencies may obtain copies of the application directly from the applicant. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application. A copy of all other filings in reference to this application must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b) and 385.2010.

o. *Procedural Schedule:*

The application will be processed according to the following revised Hydro Licensing Schedule. Revisions to the schedule may be made as appropriate.

Milestone	Target date
Filing of recommendations, preliminary terms and conditions, and preliminary fishway prescriptions	March 2013.
Commission issues EA	July 2013.
Comments on EA	August 2013.
Modified terms and conditions	October 2013.

p. Final amendments to the application must be filed with the Commission no later than 30 days from the issuance date of this notice.

q. A license applicant must file no later than 60 days following the date of issuance of the notice of acceptance and ready for environmental analysis provided for in § 5.22: (1) A copy of the water quality certification; (2) a copy of the request for certification, including proof of the date on which the certifying agency received the request; or (3) evidence of waiver of water quality certification.

Dated: January 17, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–01913 Filed 1–29–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PR13–23–000]

Enterprise Texas Pipeline LLC; Notice of Compliance Filing

Take notice that on January 17, 2013, Enterprise Texas Pipeline LLC filed a revised Statement of Operating Conditions to comply with a Commission order issued in Docket Nos. PR07–12–005 and PR08–30–001 on December 18, 2012, (141 FERC ¶ 61,213) as more fully detailed in the filing.

Any person desiring to participate in this rate proceeding must file a motion to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the date as indicated below. Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 7 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5:00 p.m. Eastern Time on Wednesday, January 30, 2013.

Dated: January 17, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–01911 Filed 1–29–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EG13–1–000, et al.]

Big Blue Wind Farm, LLC, et al.; Notice of Effectiveness of Exempt Wholesale Generator Status

	Docket Nos.
Big Blue Wind Farm, LLC	EG13–1–000
Calpine Bosque Energy Center, LLC	EG13–2–000
Homer City Generation, L.P.	EG13–3–000
Texas Dispatchable Wind 1, LLC	EG13–4–000
Blue Creek Wind Farm LLC	EG13–5–000

Take notice that during the month of December 2012, the status of the above-captioned entities as Exempt Wholesale Generators Companies became effective by operation of the Commission's regulations. 18 CFR 366.7(a).

Dated: January 17, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–01920 Filed 1–29–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. AC13–22–000]

Empire Pipeline, Inc. (Empire); Notice of Filing

Take notice that on November 29, 2012 Empire Pipeline Company (Empire) submitted a request for a waiver of the reporting requirement to file the FERC Form 2 CPA Certification for 2012.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 or 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: February 19, 2013.

Dated: January 17, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–01918 Filed 1–29–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 637–090]

Public Utility District No. 1 Chelan County; Notice of Application for Amendment of License and Soliciting Comments, Motions To Intervene, and Protests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Non-Project Use of Project Lands and Waters.

b. *Project No.:* 637–090.

c. *Date Filed:* July 25, 2012.

d. *Applicant:* Public Utility District No. 1 Chelan County.

e. *Name of Project:* Lake Chelan Hydroelectric Project.

f. *Location:* The project is located on the Chelan River in Chelan County near the City of Chelan, Washington.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Michelle Smith, Licensing and Compliance Manager, Public Utility District No. 1 of Chelan County, 327 North Wenatchee Ave., Wenatchee, Washington 98801. Phone: 888–663–8121, ext 4180. Email: *michelle@chelanpud.org.*

i. *FERC Contact:* Lorance Yates at 678–245–3084; email: *lorance.yates@ferc.gov.*

j. *Deadline for filing comments, motions to intervene, and protests:* is February 22, 2013.

All documents may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site at *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at 866–208–3676, or for TTY, 202–502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426. Please include the project number (P–637–090) on any comments, motions, or recommendations filed.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person whose name appears on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. *Description of Request:* The applicant has filed a request for Commission approval to authorize the City of Chelan to expand an existing 66-slip marina (a.k.a. Lakeshore Marina) of the Don Morse Memorial Park to include a 9,652-square-foot expansion for an additional 63 new slips. The slip width will be 20-feet wide and will be added to the marina by extending three existing docks and installing two new docks. A total of approximately 115 steel piles will be installed for the new docks. Concrete panel walls associated with a new fixed breakwater system will be driven into the substrate. Approximately nine habitat logs would be situated waterward of the ordinary high watermark beneath the breakwater to enhance near-shore habitat. A swim float would be installed and anchored northwest of the marina complex at an existing swim area. All proposed work will be done in accordance with the various federal and state permits and approvals previously acquired for the proposal.

l. *Locations of the Application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street NE., Room 2A, Washington, DC 20426, or by calling 202–502–8371. This filing may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, call 866–208–3676 or email *FERCOnlineSupport@ferc.gov,* for TTY, call 202–502–8659. A copy is also available for inspection and reproduction at the address in item (h) above. Agencies may obtain copies of the application directly from the applicant.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214, respectively. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. *Filing and Service of Documents:* Any filing must (1) Bear in all capital letters the title ''COMMENTS'', ''PROTEST'', or ''MOTION TO INTERVENE'' as applicable; (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person commenting, protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, motions to intervene, or protests must set forth their evidentiary basis. Any filing made by an intervenor must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 385.2010.

Dated: January 23, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–01922 Filed 1–29–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project Nos. 2593–030 and 2823–019]

Algonquin Power Company; Notice of Intent To File License Application, Filing of Pre-Application Document, and Approving Use of the Traditional Licensing Process

a. *Type of Filing:* Notice of Intent to File License Application and Request to Use the Traditional Licensing Process.

b. *Project No.:* 2593–030 and 2823–019.

c. *Date Filed:* November 29, 2012.

d. *Submitted By:* Algonquin Power Company.

e. *Name of Project:* Upper Beaver Falls Hydroelectric Project (P–2593–030) and Lower Beaver Falls Hydroelectric Project (P–2823–019).

f. *Location:* The Upper and Lower Beaver Falls Hydroelectric Projects are located on the Beaver River in the Towns of Croghan and New Bremen in Lewis County, New York. The projects do not affect federal lands.

g. *Filed Pursuant to:* 18 CFR 5.3 of the Commission's regulations

h. *Potential Applicant Contact:* Mr. Armando Sanchez, Algonquin Power Company, 2845 Bristol Circle, Oakville, Ontario, Canada, L6H 7H7; (905) 465–4555; or email at *armando.sanchez@algonquinpower.com.*

i. *FERC Contact:* Andy Bernick at (202) 502–8660 or email at *andrew.bernick@ferc.gov.*

j. Algonquin Power Company filed a request to use the Traditional Licensing Process for both projects on November 29, 2012. Algonquin Power Company provided public notice of the request on December 19, 2012. In a letter dated January 23, 2013, the Director of the Division of Hydropower Licensing approved the request to use the Traditional Licensing Process.

k. With this notice, we are initiating informal consultation with: (a) The U.S. Fish and Wildlife Service and/or NOAA Fisheries under section 7 of the Endangered Species Act and the joint agency regulations thereunder at 50 CFR Part 402; and (b) the New York State Historic Preservation Officer, as required by section 106, National Historical Preservation Act, and the implementing regulations of the Advisory Council on Historic Preservation at 36 CFR 800.2.

l. With this notice, we are designating Algonquin Power Company as the Commission's non-federal representative for carrying out informal consultation, pursuant to section 7 of the Endangered Species Act, and section 106 of the National Historic Preservation Act.

m. Algonquin Power Company filed a combined Pre-Application Document (PAD) for both projects with the Commission, including a proposed process plan and schedule, pursuant to 18 CFR 5.6 of the Commission's regulations.

n. A copy of the PAD is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site (*http://www.ferc.gov*), using the ''eLibrary'' link. Enter the docket number (P–2593–030 or P–2823–019), excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, (202) 502–8659. A copy is also available for inspection and reproduction at the address in paragraph h.

o. The licensee states its unequivocal intent to submit an application for a new license for Project Nos. 2593–030 and 2823–019. Pursuant to 18 CFR 16.8, 16.9, and 16.10 each application for a new license and any competing license applications must be filed with the Commission at least 24 months prior to the expiration of the existing license. All applications for license for these projects must be filed by December 31, 2015.

p. Register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filing and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

Dated: January 23, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–01923 Filed 1–29–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PR13–22–000]

SourceGas Distribution LLC; Notice of Petition for Rate Approval

Take notice that on January 15, 2013, SourceGas Distribution LLC (SourceGas) filed a rate election pursuant to section 284.123(b)(1) of the Commissions regulations. SourceGas states the rate election for transportation service is based on rates for comparable service on file with the Public Service Commission of Wyoming, as more fully detailed in the petition.

Any person desiring to participate in this rate filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the date as indicated below. Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 7 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5:00 p.m. Eastern Time on Wednesday, January 30, 2013.

Dated: January 17, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–01912 Filed 1–29–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. AD13–4–000]

Notice of Availability of the Report: Recommended Parameters for Solid Flame Models for Land Based Liquefied Natural Gas Spills

The staff of the Federal Energy Regulatory Commission (FERC or Commission) has prepared a report, in the above-referenced docket, examining potential changes to LNGFIRE3, the solid flame model required by the U.S. Department of Transportation's regulations at Title 49, Code of Federal Regulations (CFR), Part 193 for predicting radiant heat from liquefied natural gas (LNG) pool fires on land.

The report investigates the effects of matching both individual modeling parameters/correlations to measured experimental data and overall radiant heat predictions to measured results from field experiments. The review specifically addresses experimental data from the Phoenix large scale LNG fire tests on water conducted by Sandia National Laboratories between 2008 and 2011 and from the Montoir large scale LNG fire test over land conducted by Gaz de France in 1989. FERC staff concludes that LNGFIRE3, as currently prescribed by 49 CFR part 193, is appropriate for modeling thermal radiation from LNG pool fires on land and is suitable for use in siting on-shore LNG facilities. The report is available for public viewing on the FERC's Web site (*www.ferc.gov*) using the eLibrary link.

Any person wishing to comment on the report may do so. The comment period is 30 days and ends on February 22, 2013. For your convenience, there are three methods you can use to file your comments with the Commission. In all instances, please reference the docket number (AD13–4–000) with your submission. The Commission encourages electronic filing of comments and has expert staff available to assist you at (202) 502–8258 or *efiling@ferc.gov.*

(1) You can file your comments electronically using the eFiling feature on the Commission's Web site (*www.ferc.gov*) under the link to Documents and Filings. With eFiling, you can provide comments in a variety of formats by attaching them as a file with your submission. New eFiling users must first create an account by clicking on ''eRegister.'' You must select the type of filing you are making. If you are filing a comment on a particular project, please select ''Comment on a Filing''; or

(2) You can file a paper copy of your comments by mailing them to the following address: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Room 1A, Washington, DC 20426.

The study, as well as any comments received, will be considered by FERC staff during preparation of the environmental assessments or environmental impact statements produced for LNG project applications filed with the Commission.

Information about this document is available from the Commission's Office of External Affairs, at (866) 208–FERC, or on the FERC Web site (*www.ferc.gov*) using the eLibrary link. Click on the eLibrary link, click on ''General Search,'' and enter the docket number excluding the last three digits in the Docket Number field (i.e., AD13–4). Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at *FercOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659.

In addition, the Commission offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. Go to *www.ferc.gov/esubscribenow.htm.*

Dated: January 23, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–01924 Filed 1–29–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 7019–068]

Eastern Hydroelectric Corporation; Notice Rejecting Request for Rehearing

On December 7, 2012, Commission staff issued an order amending license Article 401 for Eastern Hydroelectric Corporation's (Eastern Hydroelectric) East Juliette Project No. 7019, located on the Ocmulgee River in East Juliette, Jones County, Georgia.[1] On January 11, 2013, Eastern Hydroelectric filed a request for rehearing of Commission staff's order.

Pursuant to section 313(a) of the Federal Power Act (FPA),[2] an aggrieved party must file a request for rehearing within thirty days after the issuance of a Commission decision, in this case no later than January 7, 2013.[3] Because the 30-day rehearing deadline is statutorily based, it cannot be extended, and the request for rehearing filed by petitioner must be rejected as untimely.[4] Furthermore, petitioner's failure to file a timely request for rehearing constitutes acceptance of Commission staff's order.[5]

This notice constitutes final agency action. Requests for rehearing by the Commission of this rejection must be filed within 30 days of the date of issuance of this notice pursuant to section 313(a) of the Federal Power Act, 16 U.S.C. 825*l* (2006), and section 385.713 of the Commission's regulations, 18 CFR 385.713 (2012).

Dated: January 17, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–01914 Filed 1–29–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP13–54–000]

ANR Pipeline Company; Notice of Request Under Blanket Authorization

Take notice that on January 18, 2013, ANR Pipeline Company (ANR), 717 Texas Street, Houston, Texas 77002–2761, filed in Docket No. CP13–54–000, an application pursuant to sections 157.205 and 157.216(b) of the Commission's Regulations under the Natural Gas Act (NGA) as amended, requesting authorization to abandon an 11,000 rated horsepower compressor unit and appurtenances, located on

[1] *Eastern Hydroelectric Corp.,* 141 FERC ¶ 62,176 (2012).

[2] 16 U.S.C. 825*l* (2006).

[3] *See* 18 CFR 385.2007 (2012) (stating that if the last day of any time period is a Sunday, the period does not end until the close of the Commission's business on the next business day).

[4] In addition, the pleading as filed is deficient, and subject to dismissal, because it failed to include a Statement of Issues, as required by section 385.713(c)(2) of the Commission's regulations, 18 CFR 385.713(c)(2) (2012).

[5] *See Eastern Hydroelectric,* 141 FERC ¶ 62,176 (2012) at Ordering Paragraph (I).

ANR's system at its Jena Compressor Station in La Salle Parish, Louisiana, and associated mainline capacity. The authorizations are requested under ANR's blanket certificate issued in Docket No. CP82–480–000,[1] all as more fully set forth in the application which is on file with the Commission and open to public inspection.

ANR proposes to abandon in place Unit 107, with appurtenances, located on ANR's system at ANR's Jena CS in La Salle Parish, Louisiana. This unit was installed under the authority granted in CP70–183.[2] ANR intends to abandon Unit 107 because it is not needed to provide service, is oversized for current flows, and such abandonment will save on maintenance costs. The proposed abandonment activity will not involve ground disturbance or increases to operational air or noise emissions. The unit was not used to provide service to any of ANR's customers for over two years. The estimated cost to replicate the 11,000 rated horsepower compressor unit proposed to be abandoned is $24,684,000.

The filing may also be viewed on the web at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or TTY, contact (202) 502–8659.

Any questions concerning this application should be directed to Rene Staeb, Manager, Project Determinations & Regulatory Administration, ANR Pipeline Company, 717 Texas Street, Houston, Texas, 77002–2761, at (832) 320–5215 or fax (832) 320–6215 or *Rene_Staeb@transcanada.com.*

Any person or the Commission's staff may, within 60 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to Section 157.205 of the regulations under the NGA (18 CFR 157.205), a protest to the request. If no protest is filed within the time allowed therefor, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the allowed time for filing a protest, the instant request shall be treated as an application for authorization pursuant to Section 7 of the NGA.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commenters will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commenters will not be required to serve copies of filed documents on all other parties. However, the non-party commentary will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 7 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

Dated: January 23, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–01926 Filed 1–29–13; 8:45 am]

BILLING CODE 6717–01–P

[1] See Michigan Wisconsin Pipe Line Co., 20 FERC ¶ 62,595 (1982).

[2] See Michigan Wisconsin Pipe Line Co., 43 FPC 761 (1970).

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Staff Attendance at Southwest Power Pool Regional Entity Trustee, Regional State Committee and Board of Directors Meetings

The Federal Energy Regulatory Commission (Commission) hereby gives notice that members of its staff may attend the meetings of the Southwest Power Pool, Inc. (SPP) Regional Entity Trustee (RE), Regional State Committee (RSC) and Board of Directors, as noted below. Their attendance is part of the Commission's ongoing outreach efforts.

All meetings will be held at the SPP Corporate Offices, 201 Worthen Drive, Little Rock, AR 722111. The phone number is (501) 312–9000.

SPP RE
January 28, 2013 (8:00 a.m.–12:00 p.m.)

SPP RSC
January 28, 2013 (1:00 p.m.–5:00 p.m.)

SPP Board of Directors
January 29, 2013 (8:00 a.m.–3:00 p.m.)

The discussions may address matters at issue in the following proceedings:

Docket No. ER06–451, *Southwest Power Pool, Inc.*
Docket No. ER08–1419, *Southwest Power Pool, Inc.*
Docket No. ER09–659, *Southwest Power Pool, Inc.*
Docket No. ER11–4105, *Southwest Power Pool, Inc.*
Docket No. ER12–140, *Southwest Power Pool, Inc.*
Docket No. ER12–550, *Southwest Power Pool, Inc.*
Docket No. ER12–891, *Southwest Power Pool, Inc.*
Docket No. ER12–909, *Southwest Power Pool, Inc.*
Docket No. ER12–959, *Southwest Power Pool, Inc.*
Docket No. ER12–1017, *Southwest Power Pool, Inc.*
Docket No. ER12–1018, *Southwest Power Pool, Inc.*
Docket No. ER12–1179, *Southwest Power Pool, Inc.*
Docket No. ER12–1401, *Southwest Power Pool, Inc.*
Docket No. ER12–1402, *Southwest Power Pool, Inc.*
Docket No. ER12–1586, *Southwest Power Pool, Inc.*
Docket No. ER12–1772, *Southwest Power Pool, Inc.*
Docket No. ER12–1779, *Southwest Power Pool, Inc.*
Docket No. ER12–1849, *Southwest Power Pool, Inc.*
Docket No. ER12–1974, *Southwest Power Pool, Inc.*
Docket No. ER12–2292*, Southwest Power Pool, Inc.*
Docket No. ER12–2366, *Southwest Power Pool, Inc.*
Docket No. ER12–2387, *Southwest Power Pool, Inc.*
Docket No. ER12–2505, *Southwest Power Pool, Inc.*
Docket No. ER12–2507, *Southwest Power Pool, Inc.*
Docket No. ER12–2525, *Southwest Power Pool, Inc.*
Docket No. ER12–2562, *Southwest Power Pool, Inc.*
Docket No. ER12–2648, *Southwest Power Pool, Inc.*
Docket No. EL12–2, *Southwest Power Pool, Inc.*
Docket No. EL12–47, *Southwest Power Pool, Inc.*
Docket No. EL12–51, *Southwest Power Pool, Inc.*
Docket No. EL12–60, *Southwest Power Pool, Inc., et al.*

Docket No. ER12–1813, *The Empire District Electric Co.*
Docket No. ER12–1071, *Entergy Arkansas, Inc.*
Docket No. EL12–59, *Golden Spread Electric Cooperative, Inc.*
Docket No. ER09–548, *ITC Great Plains, LLC*
Docket No. ER12–1826, *Kansas City Power & Light Co.*
Docket No. ER12–1828, *KCP&L Greater Missouri Operations Co.*
Docket No. ER11–3728, *Midwest Independent Transmission System Operator, Inc.*
Docket No. ER12–480, *Midwest Independent Transmission System Operator, Inc.*
Docket No. ER12–1577, *Midwest Independent Transmission System Operator, Inc.*
Docket No. EL11–34, *Midwest Independent Transmission System Operator, Inc.*
Docket No. ER09–36, *Prairie Wind Transmission, LLC*
Docket No. ER12–1537, *Public Service Co. of Oklahoma*
Docket No. ER12–1538, *Southwestern Electric Power Co.*
Docket No. ER12–1970, *Southwestern Electric Power Co.*
Docket No. ER09–35, *Tallgrass Transmission, LLC*
Docket No. EL12–28, *Xcel Energy Services Inc., et al.*
Docket No. EL13–15, *Southwestern Public Service Company*
Docket No. EL13–35, *Southwestern Public Service Company*
Docket No. ER13–301, *Southwest Power Pool, Inc.*
Docket No. ER13–366, *Southwest Power Pool, Inc.*
Docket No. ER13–367, *Southwest Power Pool, Inc.*
Docket No. ER13–459, *Southwest Power Pool, Inc.*
Docket No. ER13–476, *Southwest Power Pool, Inc.*
Docket No. ER13–498, *Southwest Power Pool, Inc.*
Docket No. ER13–528, *Southwest Power Pool, Inc.*
Docket No. ER13–551, *Southwest Power Pool, Inc.*
Docket No. ER13–565, *Southwest Power Pool, Inc.*
Docket No. ER13–566, *Southwest Power Pool, Inc.*
Docket No. ER13–567, *Southwest Power Pool, Inc.*
Docket No. ER13–601, *Southwest Power Pool, Inc.*
Docket No. ER13–664, *Southwest Power Pool, Inc.*
Docket No. ER13–725, *Southwest Power Pool, Inc.*

These meetings are open to the public.

For more information, contact Patrick Clarey, Office of Energy Market Regulation, Federal Energy Regulatory Commission at (317) 249–5937 or *patrick.clarey@ferc.gov.*

Dated: January 17, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–01917 Filed 1–29–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER13–64–000; et al.]

PacifiCorp, et al; Notice of FERC Staff Attendance

PacifiCorp	Docket No. ER13–64–000
Deseret Generation & Transmission Cooperative, Inc.	Docket No. ER13–65–000
Northwestern Corporation (Montana)	Docket No. ER13–67–000
Portland General Electric Company	Docket No. ER13–68–000
Idaho Power Company	Docket No. ER13–127–000
Public Service Company of Colorado	Docket No. ER13–75–000
Terra-Gen Dixie Valley, LLC	Docket No. ER13–76–000
Tucson Electric Power Company	Docket No. ER13–77–000
UNS Electric, Inc.	Docket No. ER13–78–000
Public Service Company of New Mexico	Docket No. ER13–79–000
Arizona Public Service Company	Docket No. ER13–82–000
El Paso Electric Company	Docket No. ER13–91–000
Black Hills Power, Inc., et al.	Docket No. ER13–96–000
Black Hills Colorado Electric Utility Company	Docket No. ER13–97–000
NV Energy, Inc	Docket No. ER13–105–000
Cheyenne Light, Fuel and Power Company	Docket No. ER13–120–000
Avista Corporation	Docket No. ER13–93–000
Avista Corporation	Docket No. ER13–94–000
Puget Sound Energy	Docket No. ER13–98–000
Puget Sound Energy	Docket No. ER13–99–000
Bonneville Power Administration	Docket No. NJ13–1–000
California Independent System Operator Corporation	Docket No. ER13–103–000

The Federal Energy Regulatory Commission (Commission) hereby gives notice that on January 30, 2013, members of its staff will attend a meeting hosted by California Independent System Operator regarding the interregional coordination requirements established by Order No. 1000. The agenda and other documents for the meeting will be available at *https://www.columbiagrid.org/O1000Inter-documents.cfm.*

The meeting is open to all stakeholders and Commission staff's attendance is part of the Commission's ongoing outreach efforts. The meeting may discuss matters at issue in the above captioned dockets.

For Further Information Contact: Susan Beall at *Susan.Beall@ferc.gov.*

Dated: January 23, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–01921 Filed 1–29–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 4254–009]

Stephen Phillips, Brentwood Dam Ventures, LLC; Notice of Transfer of Exemption

1. By letter filed May 31, 2006 and supplemented on January 15, 2013, Stephen Phillips and Brentwood Dam Ventures, LLC informed the Commission that the exemption from

licensing for the Exeter River Hydro #1 Project, FERC No. 4254, originally issued December 1, 1981,[1] has been transferred to Brentwood Dam Ventures, LLC. The project is located on the Exeter River in Rockingham County, New Hampshire. The transfer of an exemption does not require Commission approval.

2. Brentwood Dam Ventures, LLC, located at 25 Limerick Road, Arundel, ME 04046 is now the exemptees of the Exeter River Hydro #1 Project, FERC No. 4254.

Dated: January 17, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–01916 Filed 1–29–13; 8:45 am]

BILLING CODE 6717–01–P

EXPORT-IMPORT BANK

Economic Impact Policy

This notice is to inform the public that the Export-Import Bank United is re-notifying this transaction due to a request for increased financing. The foreign borrower is requesting a $225 million direct loan to support the export of approximately $173 million in U.S. aluminum manufacturing equipment and services to a smelter in the United Arab Emirates. The U.S. exports will enable the foreign buyer to increase its production capacity of aluminum by about 574,000 metric tons of aluminum per year. Available information indicates that the majority of this new foreign production will be sold in the following markets: Netherlands, Japan, United Arab Emirates, United States, South Korea, and Thailand. The balance of the foreign production will be sold to China, Cyprus, Egypt, France, Germany, Greece, Hungary, Indonesia, Italy, Kenya, Malaysia, Philippines, Poland, Romania, Slovakia, South Africa, Spain, Sri Lanka, Taiwan, Turkey, and United Kingdom. Interested parties may submit comments on this transaction by email to *economic.impact@exim.gov* or by mail to 811 Vermont Avenue NW., Room 442, Washington, DC 20571, within 14 days of the date this notice appears in the **Federal Register**.

Angela Mariana Freyre,

Senior Vice President and General Counsel.

[FR Doc. 2013–01956 Filed 1–29–13; 8:45 am]

BILLING CODE 6690–01–P

[1] 17 FERC ¶ 62,321, Order Granting Exemption From Licensing of a Small Hydroelectric Project of 5 Megawatts or Less.

FEDERAL COMMUNICATIONS COMMISSION

Information Collection Being Reviewed by the Federal Communications Commission Under Delegated Authority

AGENCY: Federal Communications Commission.

ACTION: Notice; request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burden and as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), the Federal Communications Commission invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s). Comments are requested concerning: whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information burden for small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid OMB control number.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before April 1, 2013. If you anticipate that you will be submitting PRA comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the FCC contact listed below as soon as possible.

ADDRESSES: Submit your PRA comments to Nicholas A. Fraser, Office of Management and Budget, via fax at 202–395–5167 or via Internet at *Nicholas_A._Fraser@omb.eop.gov* and to Judith B. Herman, Federal Communications Commission, via the Internet at *Judith-b.herman@fcc.gov*. To submit your PRA comments by email send them to: *PRA@fcc.gov*.

FOR FURTHER INFORMATION CONTACT: Judith B. Herman, Office of Managing Director, (202) 418–0214.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0295.

Title: Section 90.607(a)(1) and (b)(1), Supplemental Information to be Furnished by Applicants For Facilities Under Subpart S.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities, not-for-profit institutions and state, local or tribal government.

Number of Respondents: 3,788 respondents; 3,788 responses.

Estimated Time per Response: .25 hours.

Frequency of Response: On occasion reporting requirement.

Obligation To Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. section 308(b).

Total Annual Burden: 947 hours.

Total Annual Cost: N/A.

Privacy Impact Assessment: N/A.

Nature and Extent of Confidentiality: There is no need for confidentiality.

Needs and Uses: The Commission is submitting this expiring information collection to the Office of Management and Budget (OMB) for approval of an extension request (no change in the public reporting requirement).

This rule section requires the affected applicants to submit a list of any radio facilities they hold within 40 miles of the base station transmitter site being applied for.

This information is used to determine if an applicant's proposed system is necessary in light of communications facilities it already owns. Such a determination helps the Commission to equitably distribute limited spectrum and prevents spectrum warehousing.

OMB Control Number: 3060–0308.

Title: Section 90.505, Developmental Operation, Showing Required.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents: 10 respondents; 10 responses.

Estimated Time per Response: 2 hours.

Frequency of Response: Recordkeeping requirement.

Obligation to Respond: Required to obtain or retain benefits. There is no statutory authority for this information collection.

Total Annual Burden: 20 hours.

Total Annual Cost: N/A.

Privacy Impact Assessment: N/A.

Nature and Extent of Confidentiality: There is no need for confidentiality.

Needs and Uses: The Commission is submitting this expiring information collection to the Office of Management and Budget (OMB) for approval of an extension request (no change in the recordkeeping requirement). There is no change in the Commission's previous burden estimates.

Section 90.505 requires applicants proposing developmental operations to submit supplemental information showing why the authorization is necessary and what its use will be.

This requirement will be used by Commission staff in evaluating the applicant's need for such frequencies and the interference potential to other stations operating on the proposed frequencies.

OMB Control Number: 3060–0355.

Title: Rate-of-Return Monitoring Reports.

Form Numbers: FCC Forms 492 and 492–A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents: 80 respondents; 80 responses.

Estimated Time per Response: 8 hours.

Frequency of Response: Annual reporting requirement and recordkeeping requirement.

Obligation to Respond: Mandatory. Statutory authority for this information collection is contained in 47 U.S.C. sections 160, 161, 209(b) and 220 as amended by the Communications Act of 1934, as amended.

Total Annual Burden: 640 hours.

Total Annual Cost: N/A.

Privacy Impact Assessment: N/A.

Nature and Extent of Confidentiality: In most cases, the rate-of-return reports do not require submission of any confidential or commercially-sensitive data. The areas in which detailed information is required are fully subject to regulation. If a respondent finds it necessary to submit confidential or commercially-sensitive data, they may do so under 47 CFR 0.459 of the Commission's rules.

Needs and Uses: The Commission is submitting this expiring information collection to the Office of Management and Budget (OMB) for approval of an extension request (no change in the reporting and/or recordkeeping requirements).

The filing of FCC Forms 492 and 492–A is required by 47 CFR 65.600 of the Commission's rules. FCC Form 492 is filed by each local exchange carrier (LEC) or groups of carriers who file individual access tariffs or who are not subject to sections 61.41 through 61.49 of the Commission's rules. Each LEC, or group of affiliated carriers, subject to the previously stated sections, file FCC Form 492–A. These data provide the necessary detail to enable the Commission to fulfill its regulatory responsibilities.

The Commission has granted AT&T, Verizon, legacy Qwest, and other similarly-situated carriers forbearance from FCC Form 492–A. *See Petition of AT&T Inc. for Forbearance under 47 U.S.C. 160 from Enforcement of Certain of the Commission's Cost Assignment Rules, WC Docket Nos. 07–21, 05–342, Memorandum Opinion and Order, 23 FCC Rcd 7302 (2008)* (AT&T Cost Assignment Forbearance Order), *pet. for recon pending, pet.for review pending, NASUCA* v. *FCC,* Case No. 08–1226 (D.C. Cir. filed June 23, 2008); *Service Quality, Customer Satisfaction, Infrastructure and Operating Data Gathering,* WC Docket Nos. 08–190, 07–139, 07–204, 07–273, 07–21, Memorandum Opinion and Order and Notice of Proposed Rulemaking, *23 FCC Rcd 13747* (2008) (Verizon/Qwest Cost Assignment Forbearance Order), *pet. for recon. pending, pet. for review pending, NASCUA* v. *FCC,* Case No. 08–1353 (D.C. Cir. filed Nov. 4, 2008).

Despite this forbearance, the Commission seeks OMB approval for the extension of this information collection for three years because petitions for reconsideration and review of those forbearance decisions are currently pending before the Commission and the U.S. Court of Appeals for the D.C. Circuit, respectively.

OMB Control Number: 3060–0625.

Title: Section 24.103, Construction Requirements.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Individuals or households, business or other for-profit entities, not-for-profit entities and state, local or tribal government.

Number of Respondents: 5 respondents; 90 responses.

Estimated Time per Response: .5 hours to 3 hours.

Frequency of Response: On occasion, 5 and 10 year reporting requirements and recordkeeping requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. section 303 as amended by the Communications Act of 1934, as amended.

Total Annual Burden: 102 hours.

Total Annual Cost: $41,000.

Privacy Impact Assessment: Yes. The FCC maintains a system of record notice (SORN), FCC/WTB–1, ''Wireless Services Licensing Records,'' that covers the collection, purpose(s), storage, safeguards and disposal of the personally identifiable information (PII) that individual PCS licensees maintain under 47 CFR 24.103 of the Commission's rules.

Nature and Extent of Confidentiality: There is a need for confidentiality. See Privacy Impact Assessment above and in the supporting statement (item 10) when this collection is submitted to OMB for review and approval.

Needs and Uses: The Commission is submitting this expiring information collection to the Office of Management and Budget (OMB) for approval of an extension request (no change in the reporting and/or recordkeeping requirement).

The Commission's narrowband Personal Communications Service (PCS) rules will improve the efficiency of spectrum use, reduce the regulatory burden on spectrum users, encourage competition, and promote service to the largest feasible number of users.

Specifically, this collection requires that nationwide narrowband PCS licensees must, under this rule section, to notify the FCC by filing FCC Form 601, no later than 15 days after the end of the 5 year period following the initial grant of their license, indicating that they plan to satisfy the alternative requirements to provide ''substantial service''. Also under this rule section, upon meeting the 5 and 10 year benchmarks in (a), (b) and (c) of this subsection, licensees shall notify the Commission by filing FCC Form 601 and including a map and other supporting documentation that demonstrate the required geographic area coverage, population coverage, or substantial service to the licensed area within 15 days of the expiration of the relevant period has been met.

OMB Control Number: 3060–1062.

Title: Schools and Libraries Universal Support Mechanism—Notification of Equipment Transfers.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities, not-for-profit institutions and state, local or tribal government.

Number of Respondents: 100 respondents; 100 responses.

Estimated Time per Response: 1 hour.

Frequency of Response: On occasion reporting requirement, recordkeeping requirement and third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. sections 151, 154(i), 154(j), 201–205, 214, 254 and 403.

Total Annual Burden: 100 hours.

Total Annual Cost: N/A.

Privacy Impact Assessment: N/A.

Nature and Extent of Confidentiality: There is no need for confidentiality.

Needs and Uses: The Commission is submitting this expiring information collection to the Office of Management and Budget (OMB) for approval of an extension request (no change in the public reporting, recordkeeping and/or third party disclosure requirements).

The Commission is reporting an 80 hour increase in the total annual burden. This change is due to an increase in the number of respondents filing equipment transfer notifications due to an increase in school closings and consolidations.

In the event that a recipient of equipment purchased with E-rate funds is permanently or temporarily closed and the equipment is transferred, the transferring entity must notify USAC of the transfer, and both the transferring and receiving entities must maintain detailed records documenting the transfer and the reasons for the transfer for a period of five years. The purpose of this notification is to prevent waste, fraud and abuse.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 2013–01889 Filed 1–29–13; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Information Collection Being Submitted for Review and Approval to the Office of Management and Budget

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: The Federal Communications Commission (FCC), as part of its continuing effort to reduce paperwork burdens, invites the general public and other Federal agencies to take this opportunity to comment on the following information collection, as required by the Paperwork Reduction Act (PRA) of 1995. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid control number. Comments are requested concerning whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees. The FCC may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid Office of Management and Budget (OMB) control number.

DATES: Written comments should be submitted on or before March 1, 2013. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contacts below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicholas A. Fraser, OMB, via fax 202–395–5167, or via email *Nicholas_A._Fraser@omb.eop.gov;* and to Cathy Williams, FCC, via email *PRA@fcc.gov* and to *Cathy.Williams@fcc.gov.* Include in the comments the OMB control number as shown in the **SUPPLEMENTARY INFORMATION** section below.

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection, contact Cathy Williams at (202) 418–2918. To view a copy of this information collection request (ICR) submitted to OMB: (1) Go to the Web page *http://www.reginfo.gov/public/do/PRAMain,* (2) look for the section of the Web page called ''Currently Under Review,'' (3) click on the downward-pointing arrow in the ''Select Agency'' box below the ''Currently Under Review'' heading, (4) select ''Federal Communications Commission'' from the list of agencies presented in the ''Select Agency'' box, (5) click the ''Submit'' button to the right of the ''Select Agency'' box, (6) when the list of FCC ICRs currently under review appears, look for the OMB control number of this ICR and then click on the ICR Reference Number. A copy of the FCC submission to OMB will be displayed.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–xxxx.

Title: Establishment of a Public Safety Answering Point Do-Not-Call Registry, CG.

Docket No.: 12–129.

Form Number: N/A.

Type of Review: New collection.

Respondents: Business or other for-profit entities; Federal Government; Not-for-profit institutions; State Local or Tribal Government.

Number of Respondents and Responses: 106,500 respondents; 1,446,333 responses.

Estimated Time per Response: 30 minutes (.50 hours) to 2 hours.

Frequency of Response: Recordkeeping requirement; Annual, monthly, on occasion and one-time reporting requirements.

Obligation To Respond: Required to obtain or retain benefits. The statutory authority for the information collection requirements is found in the Middle Class Tax Relief and Job Creation Act of 2012, Public Law 112–96, February 22, 2012.

Total Annual Burden: 792,667 hours.

Total Annual Cost: None.

Nature and Extent of Confidentiality: An assurance of confidentiality is not offered because this information collection does not require the collection of personally identifiable information from individuals.

Privacy Impact Assessment: No impact(s).

Needs and Uses: The rules adopted herein establish recordkeeping requirements for a large variety of entities, including small business entities. First, each Public Safety Answering Point (PSAP) may designate a representative who shall be required to file a certification with the administrator of the PSAP registry that they are authorized to place numbers *69623 onto that registry. The designated PSAP representative shall provide contact information including the PSAP represented, name, title, address, telephone number and email address. Verified PSAPs shall be permitted to upload to the registry any PSAP telephone associated with the provision of emergency services or communications with other public safety agencies. On an annual basis designated PSAP representatives shall access the registry, review their numbers and remove any ineligible numbers from the registry. Second, an operator of automatic dialing equipment (OADE) is prohibited from contacting any number on the PSAP registry. Each OADE must register for access to the PSAP registry by providing contact information which includes name, business address, contact person, telephone number, email, and all outbound telephone numbers used to place autodialed calls. All such contact information must be updated within 30 days of any change. In addition, the OADE must certify that it is accessing the registry solely to prevent autodialed calls to numbers on the registry. An OADE must access and employ a version of the PSAP registry obtained from the registry administrator no more than 31 days prior to the date any call is made, and maintain record documenting this process. No person or entity may sell, rent, lease, purchase, share, or use the PSAP registry for any purpose expect to comply with our rules prohibiting contact with numbers on the registry.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 2013–01877 Filed 1–29–13; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL MARITIME COMMISSION

Notice of Agreements Filed

The Commission hereby gives notice of the filing of the following agreements under the Shipping Act of 1984. Interested parties may submit comments on the agreements to the Secretary, Federal Maritime Commission, Washington, DC 20573, within ten days of the date this notice appears in the **Federal Register**. Copies of the agreements are available through the Commission's Web site (*www.fmc.gov*) or by contacting the Office of Agreements at (202)–523–5793 or *tradeanalysis@fmc.gov.*

Agreement No.: 011962–009.

Title: Consolidated Chassis Management Pool Agreement.

Parties: The Ocean Carrier Equipment Management Association and its member lines; the Association's subsidiary Consolidated Chassis Management LLC and its affiliates; CCM Holdings LLC; CCM Pools LLC and its subsidiaries; Matson Navigation Co.; and Westwood Shipping Lines.

Filing Party: Jeffrey F. Lawrence, Esq.; Cozen O'Conner; 1627 I Street NW., Suite 1100; Washington, DC 20006–4007.

Synopsis: The amendment would revise the agreement to expand participation on the CCMP Governing Board and pool boards, and clarify that a majority of members on such boards shall be OCEMA members. The amendment would also delete Crowley Maritime Corporation, Crowley Latin America Services, LLC and Crowley Caribbean Services, LLC as parties, and change the name of CCM affiliate CCM Holdings LLC to Consolidated Chassis Enterprises LLC.

Agreement No.: 012193–000.

Title: Siem Car Carrier Pacific AS/Compania Sud Americana de Vapores S.A. Space Charter Agreement.

Parties: Siem Car Carrier Pacific AS and Compania Sud Americana de Vapores S.A.

Filing Party: Ashley W. Craig Esq.; Venable LLP; 575 Seventh Street NW., Washington, DC 20004.

Synopsis: The agreement authorizes the parties engage in a limited range of cooperative activities, including but not limited to, vessel space chartering in the trade between the U.S. West Coast on the one hand, and China, Japan and Korea on the other hand.

By Order of the Federal Maritime Commission.

Dated: January 25, 2013.

Rachel Dickon,

Assistant Secretary.

[FR Doc. 2013–01994 Filed 1–29–13; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License Applicants

The Commission gives notice that the following applicants have filed an application for an Ocean Transportation Intermediary (OTI) license as a Non-Vessel-Operating Common Carrier (NVO) and/or Ocean Freight Forwarder (OFF) pursuant to section 19 of the Shipping Act of 1984 (46 U.S.C. 40101). Notice is also given of the filing of applications to amend an existing OTI license or the Qualifying Individual (QI) for a licensee.

Interested persons may contact the Office of Ocean Transportation Intermediaries, Federal Maritime Commission, Washington, DC 20573, by telephone at (202) 523–5843 or by email at *OTI@fmc.gov.*

Champion International Moving, Ltd. (NVO & OFF) One Champion Way, Canonsburg, PA 15317. Officers: Ronald A. Smith, President (QI), Ronald G. Schmitt, Vice President. Application Type: Add OFF Service.

Easy Shipping Corporation (NVO & OFF), 10940 S. Keating Avenue, Unit 3B, Oak Lawn, IL 60453. Officer: Ahmed Sadek, President (QI). Application Type: New NVO & OFF License.

Miami Freight & Logistics Services, Inc. (NVO & OFF), 3630 NW 76th Street, Miami, FL 33143. Officers: Syed H. Hussaini, Vice President (QI), Mohamed Abouelmaati, President. Application Type: New NVO & OFF License.

Naca Logistics (USA), Inc. dba Brennan International Transport, dba Brennan, dba Conterm Consolidation Services, dba Conterm, dba Direct Container line, dba DCL, dba Ocean World Shipping, dba OWS, dba Ocean Express, dba Oceanexpress Vanguard Logistics Services, dba Vanguard (NVO), 857 East 230th Street, Carson, CA 90745. Officers: Ank de Roos, Director (QI), Hans Mikkelsen, President. Application Type: QI Change.

Nautical Shipping Line (PVT.) Limited dba Nautical Shipping Line (NVO), 3/G, Block-6 P.E.C.H.S., Karachi, Pakistan. Officers: Asif Ali, Vice President (QI), Ayaz Ali, President. Application Type: New NVO License.

S&R Marine Services B.V. Inc. (NVO), Rivierweg 1, 3161 GM Rhoon, Hoogvliet, Rotterdam, Netherlands. Officers: Peter F. Spiering, President (QI), Ronald de Roo, Director. Application Type: New NVO License.

Sprint Global Inc (NVO & OFF), 3731 NW Cary Parkway, Suite 102, Cary, NC 27513. Officers: Jagadeeswari Chandramouleeswaran, President (QI), Saraswathi Lakshmanan, Secretary. Application Type: Add OFF Service.

Hua Yang Transportation Co. (NVO), 1450 Glenn Curtiss Street, Carson, CA 90746. Officers: Merlinda V. Tan, COO (QI), Yanzhong Ding, President. Application Type: Name Change to Firstrans International Co.

Transportes Zuleta, Inc. (NVO), 844 W. Flagler Street, Miami, FL 33130. Officers: Carmen L. Rodriguez, Treasurer (QI), Jacqueline Morales, President. Application Type: QI Change.

Universal Containers, LLC (NVO & OFF), 15760 Ventura Blvd., Suite 840, Encino, CA 91436. Officers: Ajay R. Rathod, Manager (QI), Amir Maghami, President. Application Type: New NVO & OFF License.

By the Commission.

Dated: January 25, 2013.

Rachel E. Dickon,

Assistant Secretary.

[FR Doc. 2013–01992 Filed 1–29–13; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The applications will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than February 25, 2013.

A. Federal Reserve Bank of Kansas City (Dennis Denney, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. Weststar Bancorp, Albuquerque, New Mexico; to become a bank holding company through the acquisition of 100 percent of the voting shares of Sunrise Bank of Albuquerque, Albuquerque, New Mexico.

B. Federal Reserve Bank of Dallas (E. Ann Worthy, Vice President) 2200 North Pearl Street, Dallas, Texas 75201–2272:

1. Strategic Growth Bank Incorporated and Strategic Growth Bancorp Incorporated, both of El Paso, Texas; to acquire 100 percent of the voting shares of New Mexico Banquest Corporation, Santa Fe, New Mexico, through the merger of its wholly owned merger subsidiary, NM Lobo Acquisition Corporation, and thereby acquire First National Bank of Santa Fe, Santa Fe, New Mexico.

In addition, in connection with this application, Applicants have also applied to acquire First Santa Fe Advisors, LLC and thereby engage in advisory and investment activities, and First Santa Fe Insurance Services, Inc., to engage in insurance activities, both of Santa Fe, New Mexico, and thereby engage in investment advisory and insurance activities, pursuant to sections 225.28(b)(11) and (b)(8) of Regulation Y.

Board of Governors of the Federal Reserve System, January 25, 2013.

Margaret McCloskey Shanks,

Deputy Secretary of the Board.

[FR Doc. 2013–01981 Filed 1–29–13; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

[Document Identifier: HHS–OS–18596–60D]

Agency Information Collection Activities; Proposed Collection; Public Comment Request

AGENCY: Office of the Secretary, HHS.

ACTION: Notice.

SUMMARY: In compliance with section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, announces plans to submit an Information Collection Request (ICR), described below, to the Office of Management and Budget (OMB). The ICR is for extending the use of the approved information collection assigned OMB control number 0990–0220, which expires on July 31, 2013. Prior to submitting that ICR to OMB, OS seeks comments from the public regarding the burden estimate, below, or any other aspect of the ICR.

DATES: Comments on the ICR must be received on or before April 1, 2013.

ADDRESSES: Submit your comments to *Information.CollectionClearance@hhs.gov* or by calling (202) 690–6162.

FOR FURTHER INFORMATION CONTACT: Information Collection Clearance staff, *Information.CollectionClearance@hhs.gov* or (202) 690–6162.

SUPPLEMENTARY INFORMATION: When submitting comments or requesting information, please include the document identifier HHS–OS–18596–60D for reference.

Information Collection Request Title: Voluntary Academic and Industry DHHS Partner Surveys.

OMB No.: 0990–0220.

Abstract: To comply with E.O. 12862 and 5 U.S.C. 305, the Department of Health and Human Services plans to continue surveying its grant recipients and contractors over a three year period to compile and evaluate their opinions about the Department's grants and acquisition processes, ultimately to improve our business processes. The survey is voluntary. This is an extension, without change, of a currently approved collection. The respondents are vendors and grant recipients. The purpose of the information collection is for program evaluation and program planning or management. The frequency of collection is every three years (36-month cycle). The questionnaire takes 10 to 15 minutes to complete.

Need and Proposed Use of the Information: The purpose of the information collection is for program evaluation and program planning or management.

Likely Respondents: Vendors, Grant Recipients.

Burden Statement: Burden in this context means the time expended by persons to generate, maintain, retain, disclose or provide the information requested. This includes the time needed to review instructions, to develop, acquire, install and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information, to train personnel and to be able to respond to a collection of information, to search data sources, to complete and review the collection of information, and to transmit or otherwise disclose the information. The total annual burden hours estimated for this ICR are summarized in the table below.

TOTAL ESTIMATED ANNUALIZED BURDEN—HOURS

Type of respondent	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden hours
Vendors	1000	1	12/60	200
Grant Recipients	1667	1	10/60	279
Total				479

OS specifically requests comments on (1) the necessity and utility of the proposed information collection for the proper performance of the agency's functions, (2) the accuracy of the estimated burden, (3) ways to enhance the quality, utility, and clarity of the information to be collected, and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Keith A. Tucker,

Information Collection Clearance Officer.

[FR Doc. 2013–01989 Filed 1–29–13; 8:45 am]

BILLING CODE 4150–24–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–13–0212]

Agency Forms Undergoing Paperwork Reduction Act Review

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these requests, call (404) 639–7570 or send an email to *omb@cdc.gov.* Send written comments to CDC Desk Officer, Office of Management and Budget, Washington, DC or by fax to (202) 395–5806. Written comments should be received within 30 days of this notice.

Proposed Project

The National Hospital Care Survey (NHCS) (OMB No. 0920–0212, expiration date: 04/30/2014)—Revision—National Center for Health Statistics (NCHS), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

Section 306 of the Public Health Service (PHS) Act (42 U.S.C. 242k), as amended, authorizes that the Secretary of Health and Human Services (DHHS), acting through NCHS, shall collect statistics on the extent and nature of illness and disability of the population of the United States. This three-year clearance request for the National Hospital Care Survey includes data collection from hospital inpatient departments; hospital ambulatory departments including emergency departments (ED), outpatient departments (OPD), and ambulatory surgery locations (ASLs); and freestanding ambulatory surgery centers (ASCs).

The National Center for Health Statistics' (NCHS) surveys on hospital care include the National Hospital Discharge Survey (NHDS) (OMB No. 0920–0212) and the National Hospital Ambulatory Medical Care Survey (NHAMCS) (OMB No. 0920–0234). NHDS, between 1965 and 2010, provided critical information on the utilization of the nation's non-Federal short-stay hospitals and on the nature and treatment of illness among the inpatient hospitalized population. NHAMCS has provided data annually since 1992 concerning the nation's use of hospital emergency and outpatient departments. Beginning in 2009 NHAMCS collected data on hospital-based ambulatory surgery locations, and in 2010 began collection of data from free-standing ambulatory surgery centers. NHAMCS data have been extensively used for monitoring changes and analyzing the types of outpatient care provided in the nation's hospitals.

The Drug Abuse Warning Network (DAWN) (OMB No. 0930–0078, expired 12/31/2011) collected specific information on drug-related visits to the ED. DAWN was previously funded by the Center for Behavioral Health Statistics & Quality (CBHSQ) of the Substance Abuse & Mental Health Services Administration (SAMHSA), DHHS.

NCHS is integrating the data collected from NHDS, NHAMCS, and DAWN into one survey called the National Hospital Care Survey (NHCS). This integration will increase the wealth and depth of data on health care utilization and allow for linkages to other data sources such as the National Death Index and data from Centers for Medicare and Medicaid Services (CMS).

The recruitment of a sample of 500 hospitals for NHCS has been ongoing since May 2011. Participating hospitals are submitting inpatient level data in the form of electronic Uniform Bill (UB–04) administrative claims data as well as facility-level data. This activity continues in 2013 in addition to the sampled hospitals being asked to provide data on the utilization of health care provided in their EDs, OPDs and ASLs, thus integrating the NHDS, NHAMCS, and DAWN into NHCS. If funding becomes available, a new sample of freestanding ASCs will be recruited sometime within the 3-year clearance period.

NHCS will replace NHDS, NHAMCS, and DAWN, but continue to provide nationally representative data on utilization of hospital care and general purpose health care statistics on inpatient care as well as care delivered in EDs, OPDs, ASLs, and freestanding ASCs.

Facility-level, patient-level, discharge-level, and visit-level, data items will be collected from the recruited hospitals and freestanding ASCs in NHCS. Facility-level data items will include ownership, number of staffed beds, clinical capabilities, financial information, and electronic health record adoption. Patient-level data items will be collected for both inpatient and ambulatory components and include basic demographic information, personal identifiers, name, address, social security number (if available), and medical record number (if available). For the inpatient component, discharge-level data will be collected through the UB–04 claims and will include: admission and discharge dates, diagnoses, diagnostic services, and surgical and non-surgical procedures. For the ambulatory component, visit-level data will be collected through the UB–04 claims as well as through abstraction of a sample of medical records, which includes reason for visit, diagnosis, procedures, medications, and patient disposition.

We expect that the users of NHCS will be similar to the users of NHDS, NHAMCS, and DAWN data. These users include but are not limited to CDC, Congressional Research Office, Office of the Assistant Secretary for Planning and Evaluation (ASPE), National Institutes of Health, American Health Care Association, Centers for Medicare & Medicaid Services (CMS), Bureau of the Census, Office of National Drug Control Policy, state and local governments, and nonprofit organizations. Other users of these data include universities, research organizations, many in the private sector, foundations, and a variety of users in the print media.

Data collected through NHCS are essential for evaluating health status of the population, for the planning of programs and policy to elevate the health status of the Nation, for studying morbidity trends, and for research activities in the health field. Historically, NHDS and NHAMCS data have been used extensively in the development and monitoring of goals for the Year 2000, 2010, and 2020 Healthy People Objectives.

There is no cost to respondents other than their time to participate. The total burden is 7,224 hours.

ESTIMATED ANNUALIZED BURDEN HOURS

Respondents	Form	Number of respondents	Number of responses per respondent	Avg. burden per response (in hours)
Department of Health Information Management (DHIM) or Health Information Technology (DHIT) staff Hospital CEO/CFO.	Initial Hospital Intake Questionnaire	133	1	1
Hospital CEO/CFO	Recruitment Survey Presentation	133	1	1
Hospital CEO/CFO	Annual Inpatient Hospital Interview	500	1	1
Hospital CEO/CFO	Annual Ambulatory Hospital Interview	500	1	1.5
Hospital Medical and Health Services Manager.	Ambulatory Unit Induction	2,000	1	15/60
Hospital DHIM or DHIT staff	Prepare and transmit UB–04 for inpatient and ambulatory.	500	4	1
Hospital Medical Record Clerk	Pulling and re-filing Patient Records (ED, OPD, and ASL).	1,125	100	1/60
FSASC Chief Executive Officer	Annual FSACS Interview	250	1	30/60
FSASC DHIM or DHIT	Prepare and transmit UB–04	250	4	1
FSASC Medical Record Clerk	Pulling and re-filing Patient Records	125	100	1/60

Kimberly S. Lane,

Deputy Director, Office of Scientific Integrity, Office of the Associate Director for Science, Office of the Director, Centers for Disease Control and Prevention.

[FR Doc. 2013–01945 Filed 1–29–13; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Healthcare Infection Control Practices Advisory Committee: Notice of Charter Renewal

This gives notice under the Federal Advisory Committee Act (Pub. L. 92–463) of October 6, 1972, that the Healthcare Infection Control Practices Advisory Committee, Department of Health and Human Services, has been renewed for a 2-year period through January 19, 2015.

For information, contact Jeffrey Hageman, M.H.S., Executive Secretary, Healthcare Infection Control Practices Advisory Committee, Department of Health and Human Services, 1600 Clifton Road NE., Mailstop A35, Atlanta, Georgia 30333, telephone 404/639–4951 or fax 404/639–2647.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Elaine L. Baker,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 2013–01980 Filed 1–29–13; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Board of Scientific Counselors, National Center for Health Statistics: Notice of Charter Renewal

This gives notice under the Federal Advisory Committee Act (Pub. L. 92–463) of October 6, 1972, that the Board of Scientific Counselors, National Center for Health Statistics, Department of Health and Human Services, has been renewed for a 2-year period through January 19, 2015.

For information, contact Virginia Cain, Ph.D., Designated Federal Officer, Board of Scientific Counselors, National Center for Health Statistics, Department of Health and Human Services, 3311 Toledo Road, Room 7204, Mailstop P08, Hyattsville, Maryland 20782, telephone 301/458–4395 or fax 301/458–4020.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Elaine L. Baker,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 2013–01974 Filed 1–29–13; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP): Initial Review

The meeting announced below concerns Birth Defects Study to Evaluate Pregnancy exposureS (BD–STEPS), FOA DD13–003, initial review.

In accordance with Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC) announces the aforementioned meeting:

Time and Date: 10:00 a.m.–6:00 p.m., March 5, 2013 (Closed).

Place: Teleconference.

Status: The meeting will be closed to the public in accordance with provisions set forth in Section 552b(c)(4) and (6), Title 5 U.S.C., and the Determination of the Director, Management Analysis and Services Office, CDC, pursuant to Public Law 92–463.

Matters To Be Discussed: The meeting will include the initial review, discussion, and evaluation of applications received in response to ''Birth Defects Study to Evaluate Pregnancy exposureS (BD–STEPS), FOA DD13–003, initial review.''

Contact Person for More Information: M. Chris Langub, Ph.D., Scientific Review Officer, CDC, 4770 Buford Highway NE., Mailstop F–46, Atlanta, Georgia 30341, Telephone: (770) 488–3585, *EEO6@cdc.gov.*

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Elaine L. Baker,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 2013–01977 Filed 1–29–13; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Healthcare Infection Control Practices Advisory Committee (HICPAC)

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC) announces the following meeting for the aforementioned committee:

Times and Dates: 9:00 a.m.–5:00 p.m., March 14, 2013; 9:00 a.m.–12:00 p.m., March 15, 2013.

Place: CDC, Global Communications Center, Building 19, Auditorium B3, 1600 Clifton Road NE., Atlanta, Georgia, 30333.

Status: Open to the public, limited only by the space available. Please register for the meeting at *www.cdc.gov/hicpac.*

Purpose: The Committee is charged with providing advice and guidance to the Director, Division of Healthcare Quality Promotion, the Director, National Center for Emerging and Zoonotic Infectious Diseases (NCEZID), the Deputy Director, Office of Infectious Diseases (OID), the Director, CDC, and the Secretary, Health and Human Services regarding: (1) The practice of healthcare infection prevention and control; (2) strategies for surveillance, prevention, and control of infections, antimicrobial resistance, and related events in settings where healthcare is provided; and (3) periodic updating of CDC guidelines and other policy statements regarding prevention of healthcare-associated infections (HAIs) and healthcare-related conditions.

Matters To Be Discussed: The agenda will include updates on CDC's activities for HAIs; an update on draft CDC guidelines including: guideline for prevention of infections among patients in neonatal intensive care units (NICU), guideline for the prevention of surgical site infections, and guideline for infection prevention in healthcare personnel. Also to be discussed are updates on National HealthCare Safety Network (NHSN) surveillance activities including measure development and discussion about surgical site infection definitions from the HICPAC surveillance working group. Agenda items are subject to change as priorities dictate.

Contact Person for More Information: Erin Stone, M.S., HICPAC, Division of Healthcare Quality Promotion, NCEZID, CDC, l600 Clifton Road NE., Mailstop A–07, Atlanta, Georgia 30333, Telephone (404) 639–4045. Email: *hicpac@cdc.gov.*

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and prevention and the Agency for Toxic Substances and Disease Registry.

Elaine L. Baker,

Director, Management Analysis and Services Office Centers for Disease Control and Prevention.

[FR Doc. 2013–01979 Filed 1–29–13; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP): Initial Review

The meeting announced below concerns Cooperative Research Agreements Related to the World Trade Center Health Program (U01) PAR 12–126, initial review.

In accordance with Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC) announces the aforementioned meeting:

Time and Date: 8:00 a.m.–5:00 p.m., March 5, 2013 (Closed).

Place: CDC, Roybal Campus, Building 19 (Global Communications Center), Rooms 245/246, Atlanta, Georgia 30333, Telephone: (404) 639–4800.

Status: The meeting will be closed to the public in accordance with provisions set forth in Section 552b(c)(4) and (6), Title 5 U.S.C., and the Determination of the Director, Management Analysis and Services Office, CDC, pursuant to Public Law 92–463.

Matters To Be Discussed: The meeting will include the initial review, discussion, and evaluation of applications received in response to ''Cooperative Research Agreements Related to the World Trade Center Health Program (U01) PAR 12–126.''

Contact Person for More Information: Nina Turner, Ph.D., Scientific Review Officer, CDC/NIOSH, 1095 Willowdale Road, Mailstop G800, Morgantown, West Virginia 26505, Telephone: (304) 285–5976.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Elaine L. Baker,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 2013–01978 Filed 1–29–13; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP): Initial Review

The meeting announced below concerns Evaluation of Treatments and Services Provided to People with

Duchenne Muscular Dystrophy (DMD), FOA DD13–002, initial review.

In accordance with Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC) announces the aforementioned meeting:

Time and Date: 11:00 a.m.–5:00 p.m., March 28, 2013 (Closed).

Place: Teleconference.

Status: The meeting will be closed to the public in accordance with provisions set forth in Section 552b(c)(4) and (6), Title 5 U.S.C., and the Determination of the Director, Management Analysis and Services Office, CDC, pursuant to Public Law 92–463.

Matters To Be Discussed: The meeting will include the initial review, discussion, and evaluation of applications received in response to ''Evaluation of Treatments and Services Provided to People with Duchenne Muscular Dystrophy (DMD), FOA DD13–002, initial review.''

Contact Person for More Information: M. Chris Langub, Ph.D., Scientific Review Officer, CDC, 4770 Buford Highway NE., Mailstop F–46, Atlanta, Georgia 30341, Telephone: (770) 488–3585, *EEO6@cdc.gov.*

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Elaine L. Baker,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 2013–01976 Filed 1–29–13; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Clinical Laboratory Improvement Advisory Committee (CLIAC)

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC) announces the following meeting of the aforementioned committee:

Times and Dates

8:30 a.m.–5 p.m., March 6, 2013
8:30 a.m.–12 p.m., March 7, 2013

Place: CDC, 1600 Clifton Road, NE., Tom Harkin Global Communications Center, Building 19, Room 232, Auditorium B, Atlanta, Georgia 30333.

Online Registration Required: All CLIAC attendees are required to register for the meeting online at least 5 business days in advance for U.S. citizens and at least 10 business days in advance for international registrants. Register at *http://wwwn.cdc.gov/cliac/default.aspx* by scrolling down and clicking the appropriate link under ''Meeting Registration'' (either U.S. Citizen Registration or Non-U.S. Citizen Registration) and completing all forms according to the instructions given. Please complete all the required fields before submitting your registration and submit no later than February 27, 2013 for U.S. registrants and February 20, 2013 for international registrants.

Status: Open to the public, limited only by the space available. The meeting room accommodates approximately 100 people.

Purpose: This Committee is charged with providing scientific and technical advice and guidance to the Secretary of Health and Human Services; the Assistant Secretary for Health; the Director, Centers for Disease Control and Prevention; the Commissioner, Food and Drug Administration; and the Administrator, Centers for Medicare and Medicaid Services. The advice and guidance pertain to general issues related to improvement in clinical laboratory quality and laboratory medicine practice and specific questions related to possible revision of the CLIA standards. Examples include providing guidance on studies designed to improve safety, effectiveness, efficiency, timeliness, equity, and patient-centeredness of laboratory services; revisions to the standards under which clinical laboratories are regulated; the impact of proposed revisions to the standards on medical and laboratory practice; and the modification of the standards and provision of non-regulatory guidelines to accommodate technological advances, such as new test methods and the electronic transmission of laboratory information.

Matters To Be Discussed: The agenda will include agency updates from CDC, the Centers for Medicare & Medicaid Services (CMS), and the Food and Drug Administration (FDA). Presentations and discussions will include activities related to forthcoming FDA infection prevention guidance for the use of fingerstick and point-of-care blood testing devices, especially glucose meters. Other topics will include the harmonization of clinical laboratory test results; and assuring the quality of new DNA sequencing technologies in the clinical laboratory.

Agenda items are subject to change as priorities dictate.

Providing Oral or Written Comments: It is the policy of CLIAC to accept written public comments and provide a brief period for oral public comments whenever possible. *Oral Comments:* In general, each individual or group requesting to make an oral presentation will be limited to a total time of five minutes (unless otherwise indicated). Speakers must also submit their comments in writing for inclusion in the meeting's Summary Report. To assure adequate time is scheduled for public comments, individuals or groups planning to make an oral presentation should, when possible, notify the contact person below at least one week prior to the meeting date. *Written Comments:* For individuals or groups unable to attend the meeting, CLIAC accepts written comments until the date of the meeting (unless otherwise stated). However, it is requested that comments be submitted at least one week prior to the meeting date so that the comments may be made available to the Committee for their consideration and public distribution. Written comments, one hard copy with original signature, should be provided to the contact person below. Written comments will be included in the meeting's Summary Report.

Availability of Meeting Materials: To support the green initiatives of the federal government, the CLIAC meeting materials will be made available to the Committee and the public in electronic format (PDF) on the Internet instead of by printed copy. Refer to the CLIAC Web site on the day of the meeting for materials. *http://wwwn.cdc.gov/cliac/cliac_meeting_all_documents.aspx.*

Note: If using a mobile device to access the materials, please verify the device's browser is able to download the files from the CDC's Web site before the meeting. Alternatively, the files can be downloaded to a computer and then emailed to the portable device. An Internet connection, power source and limited hard copies may be available at the meeting location, but cannot be guaranteed.

Contact Person for Additional Information: Nancy Anderson, Chief, Laboratory Practice Standards Branch, Division of Laboratory Science and Standards, Laboratory Science, Policy and Practice Program Office, Office of Surveillance, Epidemiology and Laboratory Services, Centers for Disease Control and Prevention, 1600 Clifton Road NE., Mailstop F–11, Atlanta, Georgia 30333; telephone (404) 498–2741; fax (404) 498–2219; or via email at *NAnderson@cdc.gov.*

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** Notices pertaining to announcements of meetings and other committee management activities, for CDC and the

Agency for Toxic Substances and Disease Registry.

Elaine L. Baker,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 2013–01975 Filed 1–29–13; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–10455]

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services, is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the Agency's function; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

1. *Type of Information Collection Request:* New collection; *Title of Information Collection:* Report of a Hospital Death Associated with Restraint or Seclusion; *Use:* Executive Order 13563, Improving Regulation and Regulatory Review, was signed on January 18, 2011. The order recognized the importance of a streamlined, effective, and efficient regulatory framework designed to promote economic growth, innovation, job creation, and competitiveness. Each agency was directed to establish an ongoing plan to reduce or eliminate burdensome, obsolete, or unnecessary regulations to create a more efficient and flexible structure.

The regulation that was published on May, 16, 2012 (77 FR 29034) included a reduction in the reporting requirement related to hospital deaths associated with the use of restraint or seclusion, § 482.13(g). Hospitals are no longer required to report to CMS those deaths where there was no use of seclusion and the only restraint was 2-point soft wrist restraints. It is estimated that this will reduce the volume of reports that must be submitted by 90 percent for hospitals. In addition, the final rule replaced the previous requirement for reporting via telephone to CMS, which proved to be cumbersome for both CMS and hospitals, with a requirement that allows submission of reports via telephone, facsimile or electronically, as determined by CMS. Finally, the amount of information that CMS needs for each death report in order for CMS to determine whether further on-site investigation is needed has been reduced.

The Child Health Act (CHA) of 2000 established in Title V, Part H, Section 591 of the Public Health Service Act (PHSA) minimum requirements concerning the use of restraints and seclusion in facilities that receive support with funds appropriated to any Federal department or agency. In addition, the CHA enacted Section 592 of the PHSA, which establishes minimum mandatory reporting requirements for deaths in such facilities associated with use of restraint or seclusion. Provisions implementing this statutory reporting requirement for hospitals participating in Medicare are found at 42 CFR 482.13(g), as revised in the final rule that published on May 16, 2012 (77 FR 29034).

The 60-day **Federal Register** notice published on November 21, 2012, (77 FR 69848). Subsequently, there was a minor revision to the Health Death Report form. *Form Number:* CMS–10455 (OCN: 0938—New); *Frequency:* Occasionally; *Affected Public:* Private Sector. *Number of Respondents:* 4,900. *Number of Responses:* 24,500. *Total Annual Hours:* 8,085. (For policy questions regarding this collection contact Danielle Miller at 410–786–8818. For all other issues call 410–786–1326.)

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access CMS Web Site address at *http://www.cms.hhs.gov/PaperworkReductionActof1995,* or Email your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov,* or call the Reports Clearance Office on (410) 786–1326.

To be assured consideration, comments and recommendations for the proposed information collections must be received by the OMB desk officer at the address below, no later than 5 p.m. on *March 1, 2013.*

OMB, Office of Information and Regulatory Affairs, Attention: CMS Desk Officer, Fax Number: (202) 395–6974, Email: *OIRA_submission@omb.eop.gov.*

Dated: January 24, 2013.

Martique Jones,

Deputy Director, Regulations Development Group, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2013–01848 Filed 1–29–13; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–276 and CMS–339]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Centers for Medicare & Medicaid Services (CMS) is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

1. *Type of Information Collection Request:* Reinstatement with change of a previously approved collection; *Title:* Prepaid Health Plan Cost Report; *Use:* Health Maintenance Organizations and Competitive Medical Plans (HMO/CMPs) contracting with the Secretary under Section 1876 of the Social Security Act are required to submit a budget and enrollment forecast, semi-annual interim report, interim final cost report, and a final certified cost report in accordance with 42 CFR 417.572–417.576. Health Care Prepayment Plans

(HCPPs) contracting with the Secretary under Section 1833 of the Social Security Act are required to submit a budget and enrollment forecast, semi-annual interim report, and final cost report in accordance with 42 CFR 417.808 and 42 CFR 417.810. CMS is requesting approval for the reinstatement with change of Form CMS–276 (OCN: 0938–0165). This Cost Report outlines the provisions for implementing Section 1876(h) and Section 1833(a)(1)(A) of the Social Security Act. The purposes of the revisions were to implement some changes in response to the Affordable Care Act, clarify certain instructions, and update outdated issues within the Cost Report. *Form Number:* CMS–276 (OMB# 0938–0165); *Frequency:* Annually; *Affected Public:* Private Sector—Business or other for-profits and not-for-profit institutions; *Number of Respondents:* 29; *Total Annual Responses:* 106; *Total Annual Hours:* 1,384. (For policy questions regarding this collection contact Temeshia Johnson at 410–786–8692. For all other issues call 410–786–1326.)

2. *Type of Information Collection Request:* Reinstatement with change of a previously approved collection; *Title of Information Collection:* Medicare Provider Cost Report Reimbursement Questionnaire; *Use:* The purpose of Form CMS–339 is to assist the provider in preparing an acceptable cost report and to minimize subsequent contact between the provider and its Medicare Administrative Contractor (MAC). Form CMS–339 provides the basic data necessary to support the information in the cost report. Exhibit 1of Form CMS–339 contains a series of reimbursement-oriented questions which serve to update information on the operations of the provider. It is arranged topically regarding financial activities such as independent audits, provider organization and operation, etc. The MAC is responsible for the settlement of the Medicare cost report and must determine the reasonableness and the accuracy of the reimbursement claimed. This process includes performing both a desk review of the cost report and an analysis leading to a decision to settle the cost report with or without further audit. Form CMS–339 provides essential information to enable the MAC to make the audit or no audit decision, scope of the audit if one is necessary, and to update the provider documentation (i.e., documentation to support the financial profile of the provider). If the information is not collected, the MAC will have to go onsite to each provider to get this information. Consequently, it is far less burdensome and extremely cost effective to capture this information through the Form CMS–339.

Exhibit 2 of Form CMS–339 is a listing of bad debts pertaining to uncollectible Medicare deductible and coinsurance amounts. Preparation of the listing is a convenient way for providers to supply the MAC with information needed to determine the allow ability of the bad debts for reimbursement. Some items required to determine allow ability that are included on this exhibit are patient's name, dates of service, date first bill sent to beneficiary, and date the collection effort ceased. Supplying the MAC with this information may be all that is required for the MAC to determine whether or not the bad debt is allowable. This too may eliminate a visit to the provider to gather this needed data. *Form Number:* CMS–339 (OCN: 0938–0301); *Frequency:* Yearly; *Affected Public:* Private Sector—Business or other for-profits and not-for-profit institutions; *Number of Respondents:* 17,939; *Total Annual Responses:* 17,939; *Total Annual Hours:* 53,817. (For policy questions regarding this collection contact Christine Dobrzycki at 410–786–3389. For all other issues call 410–786–1326.)

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access CMS' Web site address at *http://www.cms.hhs.gov/PaperworkReductionActof1995*, or Email your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov,* or call the Reports Clearance Office on (410) 786–1326.

In commenting on the proposed information collections please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be submitted in one of the following ways by *April 1, 2013:*

1. *Electronically.* You may submit your comments electronically to *http://www.regulations.gov.* Follow the instructions for ''Comment or Submission'' or ''More Search Options'' to find the information collection document(s) accepting comments.

2. *By regular mail.* You may mail written comments to the following address: CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development, Attention: Document Identifier/OMB Control Number _________, Room C4–26–05, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

Dated: January 24, 2013.

Martique Jones,

Deputy Director, Regulations Development Group, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2013–01849 Filed 1–29–13; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No: FDA–2013–N–0001]

Science Board to the Food and Drug Administration; Notice of Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). The meeting will be open to the public.

Name of Committee: Science Board to the Food and Drug Administration (Science Board).

General Function of the Committee: The Science Board provides advice primarily to the Commissioner of Food and Drugs and other appropriate officials on specific complex scientific and technical issues important to the FDA and its mission, including emerging issues within the scientific community. Additionally, the Science Board provides advice to the Agency on keeping pace with technical and scientific developments including in regulatory science; and input into the Agency's research agenda; and on upgrading its scientific and research facilities and training opportunities. It will also provide, where requested, expert review of Agency-sponsored intramural and extramural scientific research programs.

Date and Time: The meeting will be held on Wednesday, February 27, 2013, from approximately 8:30 a.m. to 5:15 p.m.

Location: FDA White Oak Campus, 10903 New Hampshire Ave., Building 31 Conference Center, the Great Room (rm. 1503), Silver Spring, MD 20993. For those unable to attend in person, the meeting will also be webcast. The link for the webcast is available at *https://collaboration.fda.gov/scienceboard/.* Information regarding special accommodations due to a disability, visitor parking, and transportation may be accessed at: *http://www.fda.gov/AdvisoryCommittees/default.htm;* under the heading ''Resources for You,'' click on ''Public Meetings at the FDA White

Oak Campus.'' Please note that visitors to the White Oak Campus must enter through Building 1.

Contact Person: Martha Monser, Office of the Chief Scientist, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 32, rm. 4286, Silver Spring, MD 20993, 301–796–4627, or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area). A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check the Agency's Web site at *http://www.fda.gov/AdvisoryCommittees/default.htm* and scroll down to the appropriate advisory committee meeting link, or call the advisory committee information line to learn about possible modifications before coming to the meeting.

Agenda: On February 27, 2013, the Science Board will be provided with updates and/or draft reports from the Center for Devices and Radiological Health Research Review subcommittee and the Global Health subcommittee. A progress update will be presented regarding the recently established Center for Biologics Evaluation and Review Post-Marketing Safety Review subcommittee. An update on the plan to establish a new subcommittee to evaluate the Agency's continuing work to address the challenges identified in Science Board's 2007 ''Science and Mission at Risk'' Report will be presented. Plans will also be presented and a proposed charge reviewed for a second subcommittee to assess similar issues with respect to information technology including evaluation of scientific data utilization, data liberation and innovation. Overviews of genomics activities at the Centers for Food Safety and Applied Nutrition and Veterinary Medicine will be presented, along with plans for an Agency-wide working group to address cross-cutting genomics activities. Finally, recipients of the FY2012 Scientific Achievement awards (selected by the Science Board) will provide overviews of the activities for which the awards were given.

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its Web site prior to the meeting, the background material will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on FDA's Web site after the meeting. Background material is available at *http://www.fda.gov/AdvisoryCommittees/Calendar/default.htm.* Scroll down to the appropriate advisory committee link.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person on or before Wednesday, February 20, 2013. Oral presentations from the public will be scheduled between approximately 4:30 p.m. and 5 p.m. Those individuals interested in making formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before Tuesday, February 12, 2013. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by Wednesday, February 13, 2013.

Persons attending FDA's advisory committee meetings are advised that the Agency is not responsible for providing access to electrical outlets.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Martha Monser at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our Web site at *http://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm111462.htm* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: January 24, 2013.

Jill Hartzler Warner,

Acting Associate Commissioner for Special Medical Programs.

[FR Doc. 2013–01944 Filed 1–29–13; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Deafness and Other Communication Disorders; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Deafness and Other Communication Disorders Special Emphasis Panel; VSL Fellowships.

Date: February 21, 2013.

Time: 12:00 p.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6120 Executive Blvd. Rockville, MD 20852 (Telephone Conference Call).

Contact Person: Sheo Singh, Ph.D., Scientific Review Officer, National Institute on Deafness and Other Communication Disorders National Institutes of Health, Rockville, MD 20850, 301–496–8693, *singhs@nidcd.nih.gov*.

Name of Committee: National Institute on Deafness and Other Communication Disorders Special Emphasis Panel; Training in Hearing Research Review Meeting.

Date: February 26, 2013.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road NW., Washington, DC 20015.

Contact Person: Andrea B. Kelly, Ph.D., Scientific Review Officer, National Institute on Deafness and Other Communication Disorders National Institutes of Health, Rockville, MD 20850, 301–496–8683, *kellya2@nidcd.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.173, Biological Research Related to Deafness and Communicative Disorders, National Institutes of Health, HHS)

Dated: January 24, 2013.

Melanie J. Gray,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–01880 Filed 1–29–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel PAR–12–186: Macroeconomic Aspects of Population Aging.

Date: February 25, 2013.

Time: 1:00 p.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Suzanne Ryan, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3139, MSC 7770, Bethesda, MD 20892, (301) 435–1712, *ryansj@csr.nih.gov*.

Name of Committee: Musculoskeletal, Oral and Skin Sciences Integrated Review Group, Musculoskeletal Tissue Engineering Study Section.

Date: February 26–27, 2013.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Doubletree Hotel Bethesda (Formerly Holiday Inn Select), 8120 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Baljit S Moonga, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4214, MSC 7806, Bethesda, MD 20892, 301–435–1777, *moongabs@mail.nih.gov*.

Name of Committee: Brain Disorders and Clinical Neuroscience Integrated Review Group, Clinical Neuroscience and Neurodegeneration Study Section.

Date: February 26, 2013.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hotel Nikko San Francisco, 222 Mason Street, San Francisco, CA 94102.

Contact Person: Samuel C Edwards, Ph.D., Chief, Brain Disorders and Clinical Neuroscience, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5210, MSC 7846, Bethesda, MD 20892, (301) 435–1246, *edwardss@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Lung Fibrosis and Injury.

Date: February 26–27, 2013.

Time: 9:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: George M Barnas, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4220, MSC 7818, Bethesda, MD 20892, 301–435–0696, *barnasg@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Member Conflict: Substance Abuse in Special Populations Special Emphasis Panel.

Date: February 26, 2013.

Time: 1:00 p.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Monica Basco, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3220, MSC 7808, Bethesda, MD 20892, 301–496–7010, *bascoma@mail.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Psychiatric Disorders: Clinical and Basic Aspects.

Date: February 26, 2013.

Time: 2:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Julius Cinque, MS, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5186, MSC 7846, Bethesda, MD 20892, (301) 435–1252, *cinquej@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Member Conflict: Retinopathy and Eye Diseases.

Date: February 26, 2013.

Time: 12:00 p.m. to 2:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: James P Harwood, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5168, MSC 7840, Bethesda, MD 20892, 301–435–1256, *harwoodj@csr.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: January 24, 2013.

Carolyn A. Baum,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–01881 Filed 1–29–13; 8:45 am]

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DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5600–FA–09]

Housing Choice Voucher Program; Office of Public and Indian Housing Announcement of Funding Awards for Fiscal Year 2012

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Announcement of Fiscal Year 2012 Awards.

SUMMARY: In accordance with Section 102(a)(4)(C) of the Department of Housing and Urban Development Reform Act of 1989, this document notifies the public of funding awards for Fiscal Year (FY) 2012 to public housing agencies (PHAs) under the Section 8 Housing Choice Voucher Program (HCVP). The purpose of this notice is to publish the names, addresses, and amount of the awards to PHAs for non-competitive funding awards for housing conversion actions, public housing relocations and replacements, moderate rehabilitation replacements, and HOPE VI voucher awards.

FOR FURTHER INFORMATION CONTACT: Michael S. Dennis, Director, Office of Housing Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street SW., Room 4228, Washington, DC 20410–5000, telephone (202) 402–4059. Hearing- or speech-impaired individuals may call HUD's TTY number at (800) 927–7589. (Only the ''800'' telephone number is toll-free.)

SUPPLEMENTARY INFORMATION: The regulations governing the HCVP are published at 24 CFR part 982. The regulations for allocating housing assistance budget authority under Section 213(d) of the Housing and Community Development Act of 1974 are published at 24 CFR Part 791, Subpart D.

The purpose of this rental assistance program is to assist eligible families to pay their rent for decent, safe, and sanitary housing. The FY 2012 awardees announced in this notice were provided HCVP tenant protection vouchers (TPVs) funds on an as-needed, non-competitive basis, i.e., not consistent with the provisions of a Notice of Funding Availability (NOFAs). TPV awards made to PHAs for program actions that displace families living in public housing were made on a first-come, first-served basis in accordance with PIH Notice 2007–10, Voucher Funding in Connection with the Demolition or Disposition of Occupied Public Housing Units, and PIH Notice 2010–27, Implementation of the Federal Fiscal Year 2012 Funding Provision for the Housing Choice Voucher Program. Announcements of awards provided under the NOFA process for Mainstream, Designated Housing, Family Unification (FUP), and Veterans Assistance Supportive Housing (VASH) programs will be published in a separate **Federal Register** notice.

Awards published under this notice were provided (1) to assist families living in HUD-owned properties that are being sold; (2) to assist families affected by the expiration or termination of their Project-based Section 8 and Moderate Rehabilitation contracts; (3) to assist families in properties where the owner has prepaid the HUD mortgage; (4) to assist families in projects where the Rental Supplement and Rental Assistance Payments contracts are expiring (Rental Assistance Demonstration (RAD—Second Component per PIH Notice 2012–32); (5) to provide relocation housing assistance in connection with the demolition of public housing; (6) to provide replacement housing assistance for single room occupancy (SRO) units that fail housing quality standards (HQS); and (7) to assist families in public housing developments that are scheduled for demolition in connection with a HUD-approved HOPE VI revitalization or demolition grant.

A special administrative fee of $200 per occupied unit was provided to PHAs to compensate for any extraordinary HCVP administrative costs associated with the Multifamily Housing conversion action(s).

The Department awarded total new budget authority of $119,362,818 for 16,436 housing choice vouchers to recipients under all of the above-mentioned categories. This budget authority includes $1,343,896 of unobligated commitments made in FY 2011. These funds were reserved by September 30, 2011, but not contracted until FY 2012, and thus have been included with obligated commitments for FY 2012.

In accordance with Section 102(a)(4)(C) of the Department of Housing and Urban Development Reform Act of 1989 (103 Stat. 1987, 42 U.S.C. 3545), the Department is publishing the names, addresses, and amounts of those awards as shown in Appendix A alphabetically by State then by PHA name.

Dated: January 4, 2013.

Sandra B. Henriquez,

Assistant Secretary for Public and Indian Housing.

SECTION 8 RENTAL ASSISTANCE PROGRAMS ANNOUNCEMENT OF AWARDS FOR FISCAL YEAR 2012

Housing agency	Address	Units	Award
Public Housing Tenant Protection Moderate Rehabilitation Replacements			
CA: OAKLAND HA	1619 HARRISON ST, OAKLAND, CA 94612	9	$97,143
CA: COUNTY OF SACRAMENTO HA	P.O. BOX 1834, SACRAMENTO, CA 95812	1	8,837
CA: SAN JOSE HA	505 WEST JULIAN ST, SAN JOSE, CA 95110	5	72,589
CA: COUNTY OF SANTA CLARA HA	505 WEST JULIAN ST, SAN JOSE, CA 95110	8	116,380
CT: WATERBURY HA	2 LAKEWOOD RD, WATERBURY, CT 06704	3	22,962
FL: HA OF JACKSONVILLE	1300 BROAD ST, JACKSONVILLE, FL 32202	8	57,411
IL: CHICAGO HA	60 EAST VAN BUREN ST, 11TH FL, CHICAGO, IL 60605.	12	118,736
MO: ST. LOUIS COUNTY HA	8865 NATURAL BRIDGE, ST. LOUIS, MO 63121	32	216,407
MT: MT DEPT OF COMMERCE	301 S. PARK, HELENA, MT 59620	15	71,757
NC: HA WINSTON-SALEM	500 WEST FOURTH ST, STE 300, WINSTON-SALEM, NC 27101.	7	42,024
ND: MINOT HA	108 EAST BURDICK EXPWY, MINOT, ND 58701	25	127,536
ND: BARNES COUNTY HA	120 12TH ST, NW., VALLEY CITY, ND 58072	8	27,739
ND: STARK COUNTY HA	1149 WEST VILLARD, DICKINSON, ND 58602	5	17,160
NY: TOWN OF AMHERST	1195 MAIN ST, BUFFALO, NY 14209	1	4,571
NY: CITY OF BUFFALO	470 FRANKLIN ST, BUFFALO, NY 14202	9	42,624
NY: NYS HSG TRUST FUND CORP	38–40 STATE ST, ALBANY, NY 12207	10	90,770
OH: CUYAHOGA MHA	8120 KINSMAN RD, CLEVELAND, OH 44104	3	19,811
OK: TULSA HA	PO BOX 6369, TULSA, OK 74148	7	39,257
OK: HENRYETTA HA	1708 WEST RAGAN, HENRYETTA, OK 74437	20	67,793
PA: HA OF CITY OF PITTSBURGH	200 ROSS ST, PITTSBURGH, PA 15219	7	40,425
TX: MISSION HA	906 E 8TH ST, MISSION, TX 78572	13	45,532
VA: ARLINGTON CO DEPT OF HUM SERV	2100 WASHINGTON BLVD, 3RD FL, ARLINGTON, VA 22204.	35	403,920
Total for Moderate Rehabilitation Replacements.		243	1,751,384
Public Housing Relocation and Replacement			
AL: HA OF SHEFFIELD	PO BOX 429, SHEFFIELD, AL 35660	16	$41,247
AL: HA OF TUSCALOOSA	2117 JACK WARNER PKWY, TUSCALOOSA, AL 35401.	125	532,966
AR: JONESBORO URB REN & HA	330 UNION ST, JONESBORO, AR 72401	8	40,809
CA: CO OF SAN BERNARDINO HA	715 E. BRIER DR, SAN BERNARDINO, CA 92408	105	573,201
CA: ALAMEDA COUNTY HA	22941 ATHERTON ST, HAYWARD, CA 94541	100	700,765
CO: AURORA HA	10745 E. KENTUCKY AVE, AURORA, CO 80012	55	370,187
CT: ANSONIA HA	36 MAIN ST, ANSONIA, CT 06401	57	332,522

SECTION 8 RENTAL ASSISTANCE PROGRAMS ANNOUNCEMENT OF AWARDS FOR FISCAL YEAR 2012—Continued

Housing agency	Address	Units	Award
DC: DISTRICT OF COLUMBIA HA	1133 NORTH CAPITOL ST, NE., WASHINGTON, DC 20002.	50	690,120
FL: HA OF SARASOTA	1300 BOULEVARD OF THE ARTS, SARASOTA, FL 34236.	56	524,556
FL: HA WEST PALM BEACH GEN FUND	1715 DIVISION AVE, WEST PALM BEACH, FL 33407.	52	427,944
FL: MILTON HA	5668 BYROM ST, MILTON, FL 32570	50	272,786
FL: HERNANDO COUNTY HA	20 NORTH MAIN ST, BROOKSVILLE, FL 34601	105	456,827
GA: HA OF MARIETTA	95 COLE ST, MARIETTA, GA 30061	120	768,018
GA: NORTHWEST GEORGIA HA	800 NORTH FIFTH AVE, ROME, GA 30162	82	374,973
IN: MUNCIE HA	402 E. SECOND ST, MUNCIE, IN 47302	7	25,529
MD: MONTGOMERY CO HA	10400 DETRICK AVE, KENSINGTON, MD 20895	200	1,651,125
MD: ANNE ARUNDEL COUNTY HA	7885 GORDON CT, GLEN BURNIE, MD 21060	92	485,429
MD: WASHINGTON COUNTY HA	PO BOX 2944, HAGERSTOWN, MD 21741	80	446,765
MN: BLOOMINGTON HRA	1800 WEST OLD SHAKOPEE RD, BLOOMINGTON, MN 55431.	26	179,597
NC: HA OF THE CITY OF ASHEVILLE	PO BOX 1898, ASHEVILLE, NC 28802	6	21,497
NC: HA OF CITY OF CHARLOTTE	1301 SOUTH BLVD, CHARLOTTE, NC 28236	26	216,708
NJ: LONG BRANCH HA	336 GARFIELD CT, LONG BRANCH, NJ 07740	136	1,573,151
NJ: JERSEY CITY HA	400 US HIGHWAY #1, JERSEY CITY, NJ 07306	15	146,920
NJ: NEW BRUNSWICK HA	7 VAN DYKE AVE, NEW BRUNSWICK, NJ 08901	58	641,197
NY: HA OF HUNTINGTON	1–A LOWNDES AVE, HUNTINGTION STA, NY 11746.	40	633,461
OH: COLUMBUS METRO. HA	880 EAST 11TH AVE, COLUMBUS, OH 43211	494	2,438,093
OH: CUYAHOGA MHA	8120 KINSMAN RD, CLEVELAND, OH 44104	260	1,552,559
OH: LUCAS MHA	435 NEBRASKA AVE, TOLEDO, OH 43697	141	809,318
PA: LACKAWANNA COUNTY HA	2019 WEST PINE ST, DUNMORE, PA 18512	76	318,279
PA: HA OF THE CO OF CHESTER	30 W. BARNARD ST, WEST CHESTER, PA 19382.	24	168,324
PA: INDIANA COUNTY HA	104 PHILADELPHIA ST, INDIANA, PA 15701	24	97,453
RQ: PUERTO RICO DEPT OF HSNG	PO BOX 21365, SAN JUAN, PR 00928	482	1,865,057
SC: HA GREENVILLE	PO BOX 10047, GREENVILLE, SC 29603	172	664,763
TN: KNOXVILLE COMM DEV CORP	PO BOX 3550, KNOXVILLE, TN 37927	182	1,046,769
TN: CHATTANOOGA H/A	PO BOX 1486, CHATTANOOGA, TN 37402	370	2,040,351
TX: AUSTIN HA	PO BOX 6159, AUSTIN, TX 78762	74	610,953
TX: HOUSTON HA	2640 FOUNTAIN VIEW, HOUSTON, TX 77057	74	577,715
TX: HA OF ORANGE	P.O. BOX 3107, ORANGE, TX 77630	33	196,290
VA: RICHMOND REDEV & HA	901 CHAMBERLAYNE PKWY, RICHMOND, VA 23261.	18	141,828
VT: RUTLAND HA	5 TREMONT ST, RUTLAND, VT 05701	11	30,786
WA: KING COUNTY HA	600 ANDOVER PARK WEST, SEATTLE, WA 98188.	508	6,225,906
WA: HA OF THE CITY OF TACOMA	902 SOUTH "L" ST, STE 2C, TACOMA, WA 98405.	103	676,112
WA: HA OF THE CITY OF RENTON	970 HARRINGTON AVE, NE., RENTON, WA 98056.	16	133,582
WI: HA OF CITY OF MILWAUKEE	809 NORTH BROADWAY, MILWAUKEE, WI 53201.	65	411,044
Total for Public Housing Relocation and Replacement.		4,794	32,133,482
SRO—Relocation/Replacement			
IL: CHICAGO HA	60 EAST VAN BUREN ST, 11TH FL, CHICAGO, IL 60605.	50	482,298
VA: ROANOKE REDEV & HA	2624 SALEM TRNPK, NW., ROANOKE, VA 24017	36	207,412
Total for SRO—Relocation/Replacement		86	689,710
Witness Relocation Assistance			
FL: ORLANDO HA	390 NORTH BUMBY AVE, ORLANDO, FL 32803	1	11,856
FL: MIAMI DADE HA	701 NW 1ST COURT, 16TH FL, MIAMI, FL 33136	1	15,552
FL: HA OF OCALA	P.O. BOX 2468, OCALA, FL 34478	1	7,764
MD: MONTGOMERY CO HA	10400 DETRICK AVE, KENSINGTON, MD 20895	2	34,716
MD: HARFORD COUNTY HA	15 SOUTH MAIN ST, STE 106, BEL AIR, MD 21014.	1	13,560
NC: HA OF CITY OF CHARLOTTE	1301 SOUTH BLVD, CHARLOTTE, NC 28236	1	11,952
NJ: BURLINGTON CO BRD OF SOC SERV	795 WOODLANE RD, MOUNT HOLLY, NJ 08060	1	11,424
NV: CITY OF RENO HA	1525 EAST NINTH ST, RENO, NV 89512	1	15,636
PA: ALLENTOWN HA	1339 ALLEN ST, ALLENTOWN, PA 18102	1	10,308

SECTION 8 RENTAL ASSISTANCE PROGRAMS ANNOUNCEMENT OF AWARDS FOR FISCAL YEAR 2012—Continued

Housing agency	Address	Units	Award
RQ: PUERTO RICO DEPT OF HSNG	PO BOX 21365, SAN JUAN, PR 00928	1	7,308
VA: VIRGINIA HSNG DEV AUTH	601 SOUTH BELVIDERE ST, RICHMOND, VA 23220.	1	16,320
Total for Witness Relocation Assistance		12	156,396
Tenant Protection Vouchers for HOPE VI			
CO: HA OF CITY AND CO OF DENVER	777 GRANT ST, DENVER, CO 80203	54	369,647
MA: BOSTON HA	52 CHAUNCY ST, BOSTON, MA 02111	51	655,397
MA: TAUNTON HA	30 OLNEY ST, STE B, TAUNTON, MA 02780	165	1,599,247
Total for TP—HOPE VI		270	2,624,291
Total for Public Housing Tenant Protection		5,405	37,355,263
Housing Conversion Actions RAD Conversion Assistance			
CA: CITY OF SAN LUIS OBISPO HA	487 LEFF ST, SAN LUIS OBISPO, CA 93406	17	67,097
CA: CITY OF SANTA BARBARA HA	808 LAGUNA ST, SANTA BARBARA, CA 93101	106	773,071
PA: LACKAWANNA COUNTY HA	2019 WEST PINE ST, DUNMORE, PA 18512	15	48,550
Total for RAD Conversion Assistance		138	888,718
Housing Conversion Rent Supplement			
CA: CITY OF SAN LUIS OBISPO HA	487 LEFF ST, SAN LUIS OBISPO, CA 93406	7	53,988
CT: TORRINGTON HA	110 PROSPECT ST, TORRINGTON, CT 06790	36	223,245
CT: CONN DEPT OF SOC SERV	25 SIGOURNEY ST, 9TH FL, HARTFORD, CT 06105.	14	106,829
MA: BOSTON HA	52 CHAUNCY ST, BOSTON, MA 02111	33	424,080
NY: HA OF HARRIETSTOWN	14 KIWASSA RD, STE 1, SARANAC LAKE, NY 12983.	8	28,838
SD: CANTON HSNG & REDEV COMM	903 W. FIFTH ST, CANTON, SD 57013	7	30,577
WA: SEATTLE HA	120 SIXTH AVE NORTH, SEATTLE, WA 98109	85	838,184
Total for Housing Conversion Rent Supplement		190	1,705,741
Property Disposition Relocation			
MO: ST. LOUIS HA	3520 PAGE BLVD, ST. LOUIS, MO 63106	34	173,181
MS: MERIDIAN HA	PO BOX 870, MERIDIAN, MS 39302	24	128,117
MS: HA OF SOUTH DELTA	202 WESTON AVE, LELAND, MS 38756	11	52,502
Total for Property Disposition Relocation		69	353,800
Prepayments			
CA: OAKLAND HA	1619 HARRISON ST, OAKLAND, CA 94612	109	1,176,507
CA: CITY OF LOS ANGELES HSG AUTH	2600 WILSHIRE BLVD, 3RD FL, LOS ANGELES, CA 90057.	12	124,360
CA: COUNTY OF MONTEREY HSG AUTH	123 RICO ST, SALINAS, CA 93907	105	881,975
CA: ALAMEDA COUNTY HSG AUTH	22941 ATHERTON ST, HAYWARD, CA 94541	96	1,251,821
CA: COUNTY OF ORANGE HA	1770 NORTH BRDWY, SANTA ANA, CA 92706	19	210,052
CO: HA OF CITY AND CO OF DENVER	777 GRANT ST, DENVER, CO 80203	110	1,003,979
CT: CONN DEPT OF SOC SERV	25 SIGOURNEY ST, 9TH FL, HARTFORD, CT 06105.	148	1,121,706
FL: MIAMI DADE HA	701 NW 1ST COURT, 16TH FL, MIAMI, FL 33136	199	2,099,453
FL: HA HOLLYWOOD	7300 N. DAVIE RD EXT, HOLLYWOOD, FL 33024	100	1,015,176
IL: CHICAGO HA	60 EAST VAN BUREN ST, 11TH FL, CHICAGO, IL 60605.	160	1,611,571
IL: ELGIN HA	120 SOUTH STATE ST, ELGIN, IL 60123	32	211,083
KY: LOUISVILLE HA	420 SOUTH EIGHTH ST, LOUISVILLE, KY 40203	404	2,433,198
KY: MAYFIELD HA	312 BROOKSIDE DR, MAYFIELD, KY 42066	57	108,799
MA: BOSTON HA	52 CHAUNCY ST, BOSTON, MA 02111	28	361,029
MA: CAMBRIDGE HA	675 MASSACHUSETTS AVE, CAMBRIDGE, MA 02139.	32	504,975
MA: SPRINGFIELD HA	25 SAAB COURT, SPRINGFIELD, MA 01101	144	1,059,558
MA: BEVERLY HA	137 REAR BRIDGE ST, BEVERLY, MA 01915	100	962,568
MA: COMM DEV PROG COMM OF MA, EOCD	100 CAMBRIDGE ST, BOSTON, MA 02114	338	3,730,385
MD: HARFORD COUNTY HA	15 SOUTH MAIN ST, STE 106, BEL AIR, MD 21014.	160	727,787

SECTION 8 RENTAL ASSISTANCE PROGRAMS ANNOUNCEMENT OF AWARDS FOR FISCAL YEAR 2012—Continued

Housing agency	Address	Units	Award
MD: BALTIMORE CO. HSNG OFFICE	6401 YORK RD, 1 ST FL, BALTIMORE, MD 21212.	100	454,980
ME: AUGUSTA HA	33 UNION ST, STE 3, AUGUSTA, ME 04330	0	16,337
MI: DETROIT HSNG COMMISSION	1301 EAST JEFFERSON AVE, DETROIT, MI 48207.	35	254,604
MI: MICHIGAN STATE HSG DEV AUTH	P.O. BOX 30044, LANSING, MI 48909	70	357,666
MN: WORTHINGTON HRA	819 TENTH ST, WORTHINGTON, MN 56187	23	85,273
NC: WESTERN PIEDMONT COG	736 4TH ST, SW., HICKORY, NC 28603	9	41,935
NE: BELLEVUE HA	8214 ARMSTRONG CIRCLE, BELLEVUE, NE 68147.	55	312,741
NY: HA OF SYRACUSE	516 BURT ST, SYRACUSE, NY 13202	359	1,922,952
NY: HA OF SCHENECTADY	375 BROADWAY, SCHENECTADY, NY 12305	21	124,768
NY: HA OF ROCHESTER	675 WEST MAIN ST, ROCHESTER, NY 14611	497	2,527,722
NY: THE CITY OF NEW YORK DHPD	100 GOLD ST, RM 501, NEW YORK, NY 10038	962	10,643,555
NY: CITY OF NIAGARA FALLS COM DEV	1022 MAIN ST, NIAGARA FALLS, NY 14302	17	71,888
NY: NYS HSG TRUST FUND CORP	38–40 STATE ST, ALBANY, NY 12207	533	3,435,802
OH: CUYAHOGA MHA	8120 KINSMAN RD, CLEVELAND, OH 44104	9	60,572
OH: CINCINNATI METRO HA	16 WEST CENTRAL PKWY, CINCINNATI, OH 45210.	28	96,970
OH: GREENE METRO HA	538 NORTH DETROIT ST, XENIA, OH 45385	46	245,623
OK: OKLAHOMA HSNG FIN AGENCY	PO BOX 26720, OKLAHOMA CITY, OK 73126	23	65,014
OR: HA OF THE COUNTY OF	PO BOX 1510, OREGON CITY, OR 97045	44	299,666
OR: COMM SERV AGENCY OF LANE CO	177 DAY ISLAND RD, EUGENE, OR 97401	46	242,692
PA: PHILADELPHIA HA	12 SOUTH 23RD ST, PHILADELPHIA, PA 19103	50	509,325
PA: HARRISBURG HA	351 CHESTNUT ST, 12TH FL, HARRISBURG, PA 17101.	108	760,778
PA: BEAVER COUNTY HA	300 STATE ST, BEAVER, PA 15009	70	217,558
PA: WASHINGTON COUNTY HA	100 SOUTH FRANKLIN ST, WASHINGTON, PA 15301.	63	279,017
PA: JOHNSTOWN HA	501 CHESTNUT ST, JOHNSTOWN, PA 15907	134	534,644
PA: ERIE COUNTY HA	120 S. CENTER, CORRY, PA 16407	47	130,821
RI: EAST PROVIDENCE H A	99 GOLDSMITH AVE, EAST PROVIDENCE, RI 02914.	99	725,250
RI: RHODE ISLAND HSG MORT FIN CORP	44 WASHINGTON ST, PROVIDENCE, RI 02903	51	251,541
SC: HA SOUTH CAROLINA REG NO 1	404 CHURCH ST, LAURENS, SC 29360	20	100,022
SC: HA OF GREENWOOD	PO BOX 973, GREENWOOD, SC 29648	89	345,156
TN: METROPOLITAN DEV & HA	701 SOUTH SIXTH ST, NASHVILLE, TN 37202	115	738,203
TX: SAN ANTONIO HA	818 S. FLORES ST, SAN ANTONIO, TX 78295	100	637,272
TX: MC ALLEN HA	2301 JASMINE AVE, MC ALLEN, TX 78501	80	336,384
VA: ALEXANDRIA REDEV & HA	600 N FAIRFAX ST, ALEXANDRIA, VA 22314	20	261,562
VA: CHARLOTTESVILLE REDEV & HA	605 EAST MAIN ST, RM A040, CHARLOTTESVILLE, VA 22902.	162	1,193,810
VA: HAMPTON REDEVELOPEMENT & HSG AUTH.	P.O. BOX 280, HAMPTON, VA 23669	3	23,963
VA: VIRGINIA HSNG DEV AUTH	601 SOUTH BELVIDERE ST, RICHMOND, VA 23220.	160	1,088,876
VT: RUTLAND HA	5 TREMONT ST, RUTLAND, VT 05701	121	338,643
WA: SEATTLE HA	120 SIXTH AVE NORTH, SEATTLE, WA 98109	205	2,142,882
WA: HA OF CITY OF YAKIMA	810 N 6TH AVE, YAKIMA, WA 98902	17	79,997
WI: SHEBOYGAN HA	PO BOX 1052, SHEBOYGAN, WI 53082	8	31,039
WY: ROCK SPRINGS HA	233 C ST, ROCK SPRINGS, WY 82901	5	25,113
Total for Prepayments		6,959	52,608,598
Terminations/Opt-Outs			
AK: AK HSG FINANCE CORP	PO BOX 101020, ANCHORAGE, AK 99510	26	143,432
AR: HA OF CITY OF LITTLE ROCK	100 S. ARCH ST, LITTLE ROCK, AR 72201	40	227,438
AR: HA OF TEXARKANA	911 FERGUSON ST, TEXARKANA, AR 71854	53	252,518
AR: JONESBORO URB REN & HA	330 UNION ST, JONESBORO, AR 72401	22	113,736
CA: CITY OF LOS ANGELES HA	2600 WILSHIRE BLVD, 3RD FL, LOS ANGELES, CA 90057.	147	943,660
CA: COUNTY OF SACRAMENTO HA	P.O. BOX 1834, SACRAMENTO, CA 95812	8	47,128
CA: YOLO COUNTY HA	147 W. MAIN ST, WOODLAND, CA 95776	0	347,760
CA: COUNTY OF SANTA CLARA HA	505 WEST JULIAN ST, SAN JOSE, CA 95110	15	109,106
CA: SANTA CRUZ COUNTY HA	2931 MISSION ST, SANTA CRUZ, CA 95060	26	153,005
CA: COUNTY OF SAN DIEGO	3989 RUFFIN RD, SAN DIEGO, CA 92123	105	1,019,138
CA: CITY OF NATIONAL CITY	140 E. 12TH ST, STE B, NATIONAL CITY, CA 91950.	79	331,885
CO: COLORADO DIVISION OF HSNG	1313 SHERMAN ST, RM 518, DENVER, CO 80203.	39	268,674
CT: WATERBURY HA	2 LAKEWOOD RD, WATERBURY, CT 06704	11	87,187

SECTION 8 RENTAL ASSISTANCE PROGRAMS ANNOUNCEMENT OF AWARDS FOR FISCAL YEAR 2012—Continued

Housing agency	Address	Units	Award
CT: STAMFORD HA	22 CLINTON AVE, STAMFORD, CT 06901	19	242,349
FL: ST. PETERSBURG H/A	P.O. BOX 12849, ST. PETERSBURG, FL 33733	189	1,571,565
FL: HA OF MIAMI BEACH	200 ALTON RD, MIAMI BEACH, FL 33139	112	983,015
GA: HA OF ATLANTA GA	230 JOHN WESLEY DOBBS AVE, NE., ATLANTA, GA 30303.	122	1,216,067
HI: COUNTY OF HAWAII HCD	50 WAILUKU DRIVE, HILO, HI 96720	9	42,473
IA: SOUTHERN IOWA REG HA	219 N PINE, CRESTON, IA 50801	28	108,138
IA: AREA XV MULTI–COUNTY HA	417 NORTH COLLEGE, AGENCY, IA 52530	24	72,204
IA: SOUTHEAST IOWA REG HA	218 N. 3RD ST, STE 309, BURLINGTON, IA 52601.	15	35,841
IN: INDIANA HSNG & COMM DEV	30 S. MERIDIAN ST, STE 1000, INDIANAPOLIS, IN 46204.	68	348,277
KS: TOPEKA HA	2010 SE CALIFORNIA AVE, TOPEKA, KS 66607	47	208,719
KS: SALINA HA	469 S. 5TH STREET, SALINA, KS 67402	6	9,768
KS: HAYS HA	1709 SUNSET TRAIL, HAYS, KS 67601	12	45,778
KY: CAMPBELL COUNTY HA	PO BOX 72424, NEWPORT, KY 41072	38	219,961
KY: KENTUCKY HSNG CORP	1231 LOUISVILLE RD, FRANKFORT, KY 40601	15	57,069
LA: NEW ORLEANS HA	4100 TOURO ST, NEW ORLEANS, LA 70122	95	884,252
MA: BOSTON HA	52 CHAUNCY ST, BOSTON, MA 02111	59	760,095
MD: HA OF CITY OF FREDERICK	209 MADISON ST, FREDERICK, MD 21701	33	351,133
MD: MONTGOMERY CO HA	10400 DETRICK AVE, KENSINGTON, MD 20895	84	1,109,556
MD: HOWARD COUNTY HSNG COMM	6751 COLUMBIA GATEWAY DR, 3RD FL, COLUMBIA, MD 21046.	44	196,450
ME: MAINE STATE HA	353 WATER ST, AUGUSTA, ME 04330	16	99,444
MI: DETROIT HSNG COMM	1301 EAST JEFFERSON AVE, DETROIT, MI 48207.	139	1,043,023
MI: PLYMOUTH HSNG COMM	1160 SHERIDAN, PLYMOUTH, MI 48170	34	136,356
MI: MICHIGAN STATE HSG DEV AUTH	P.O. BOX 30044, LANSING, MI 48909	150	473,382
MO: ST. LOUIS HA	3520 PAGE BLVD, ST. LOUIS, MO 63106	20	101,871
MO: DALLAS COUNTY PHA	215 SOUTH BARNES, SPRINGFIELD, MO 65802	16	31,364
MT: MT DEPT OF COMMERCE	301 S. PARK, HELENA, MT 59620	9	28,703
NC: GREENSBORO HA	PO BOX 21287, GREENSBORO, NC 27420	90	460,469
NE: SOUTH SIOUX CITY HA	118 E. 21ST ST, SOUTH SIOUX CITY, NE 68776	51	124,636
NY: HA OF AMSTERDAM	52 DIVISION ST, AMSTERDAM, NY 12010	45	229,543
NY: VILLAGE OF COBLESKILL	349 MINERAL SPRINGS RD, COBLESKILL, NY 12043.	64	158,243
NY: NYS HSG TRUST FUND CORP	38–40 STATE ST, ALBANY, NY 12207	128	1,161,861
OR: COMM SERV AGENCY OF LANE CO	177 DAY ISLAND RD, EUGENE, OR 97401	21	88,144
OR: HA OF JACKSON COUNTY	2231 TABLE ROCK RD, MEDFORD, OR 97501	51	242,761
PA: PHILADELPHIA HA	12 SOUTH 23RD ST, PHILADELPHIA, PA 19103	49	502,564
PA: ALLEGHENY COUNTY HA	625 STANWIX ST, 12TH FL, PITTSBURGH, PA 15222.	27	82,551
PA: HA OF COUNTY OF BUTLER	114 WOODY DR, BUTLER, PA 16001	3	9,421
PA: JOHNSTOWN HA	501 CHESTNUT ST, JOHNSTOWN, PA 15907	39	81,975
PA: YORK CITY HA	31 S. BROAD ST, YORK, PA 17405	0	117,000
PA: CLARION COUNTY HA	8 WEST MAIN ST, CLARION, PA 16214	0	29,158
PA: ERIE COUNTY HA	120 S. CENTER, CORRY, PA 16407	26	63,323
RQ: MUNICIPALITY OF CAROLINA	PO BOX 8, CAROLINA, PR 00986	64	252,037
SD: CITY OF LENNOX HOUSING & REDEV	217 SOUTH PINE ST, LENNOX, SD 57039	3	14,403
SD: HURON HA	PO BOX 283, HURON, SD 57350	7	19,971
TN: KNOXVILLE COMM DEV CORP	PO BOX 3550, KNOXVILLE, TN 37927	76	437,113
TN: METROPOLITAN DEV & HA	701 SOUTH SIXTH ST, NASHVILLE, TN 37202	376	1,869,581
TN: HA MURFREESBORO	415 NORTH MAPLE ST, MURFREESBORO, TN 37130.	15	86,149
TX: BEEVILLE HA	PO BOX 427, BEEVILLE, TX 78104	24	87,163
UT: HA OF CITY OF OGDEN	1100 GRANT AVE, OGDEN, UT 84404	35	204,137
WA: SEATTLE HA	120 SIXTH AVE NORTH, SEATTLE, WA 98109	46	501,748
WA: KING COUNTY HA	600 ANDOVER PARK WEST, SEATTLE, WA 98188.	93	908,212
WA: HA OF CITY OF BREMERTON	110 RUSSELL RD, BREMERTON, WA 98312	49	339,217
WA: HA CITY OF EVERETT	3107 COLBY AVE, EVERETT, WA 98206	64	551,816
WA: HA OF SNOHOMISH COUNTY	12625 4TH AVE W, STE 200, EVERETT, WA 98204.	42	359,443
WA: SPOKANE HA WEST	55 MISSION ST, STE 104, SPOKANE, WA 99201	16	81,047
WI: BROWN COUNTY HA	100 N JEFFERSON ST, RM 608, GREEN BAY, WI 54301.	146	662,852
WI: MILWAUKEE CO HA 102	102 2711 W WELLS ST, 1ST FL, RM 102, MILWAUKEE,, WI 53208.	29	204,363
WY: ROCK SPRINGS HA	233 C ST, ROCK SPRINGS, WY 82901	22	68,677
Total for Terminations/Opt-outs		3,675	24,421,098

SECTION 8 RENTAL ASSISTANCE PROGRAMS ANNOUNCEMENT OF AWARDS FOR FISCAL YEAR 2012—Continued

Housing agency	Address	Units	Award
Total for Housing Conversion Actions		11,031	79,977,555
Special Fees—Terminations/Opt-Outs			
AK: AK HSG FINANCE CORP	PO BOX 101020, ANCHORAGE, AK 99510	0	5,000
AR: HA OF CITY OF LITTLE ROCK	100 S. ARCH ST, LITTLE ROCK, AR 72201	0	7,600
AR: HA OF TEXARKANA	911 FERGUSON ST, TEXARKANA, AR 71854	0	9,200
AR: JONESBORO URB RENL & HA	330 UNION ST, JONESBORO, AR 72401	0	3,000
CA: CITY OF LOS ANGELES HA	2600 WILSHIRE BLVD, 3RD FL, LOS ANGELES, CA 90057.	0	29,400
CA: COUNTY OF SACRAMENTO HA	P.O. BOX 1834, SACRAMENTO, CA 95812	0	1,600
CA: COUNTY OF SANTA CLARA HA	505 WEST JULIAN ST, SAN JOSE, CA 95110	0	3,000
CA: SANTA CRUZ COUNTY HA	2931 MISSION ST, SANTA CRUZ, CA 95060	0	5,200
CA: COUNTY OF SAN DIEGO	3989 RUFFIN RD, SAN DIEGO, CA 92123	0	20,400
CA: CITY OF NATIONAL CITY	140 E. 12TH ST, STE B, NATIONAL CITY, CA 91950.	0	15,800
CO: COLORADO DIVISION OF HSNG	1313 SHERMAN ST, RM 518, DENVER, CO 80203.	0	3,600
CT: WATERBURY HA	2 LAKEWOOD RD, WATERBURY, CT 06704	0	2,200
CT: STAMFORD HA	22 CLINTON AVE, STAMFORD, CT 06901	0	3,600
FL: ST. PETERSBURG H/A	P.O. BOX 12849, ST. PETERSBURG, FL 33733	0	37,800
FL: HA OF MIAMI BEACH	200 ALTON RD, MIAMI BEACH, FL 33139	0	22,400
GA: HA OF ATLANTA GA	230 JOHN WESLEY DOBBS AVE, NE., ATLANTA, GA 30303.	0	24,400
HI: COUNTY OF HAWAII HCD	50 WAILUKU DR, HILO, HI 96720	0	800
IA: SOUTHERN IOWA REG HA	219 N PINE, CRESTON, IA 50801	0	5,600
IA: AREA XV MULTI–COUNTY HA	417 NORTH COLLEGE, AGENCY, IA 52530	0	4,800
IA: SOUTHEAST IOWA REG HA	218 N. 3RD ST, STE 309, BURLINGTON, IA 52601.	0	3,000
IN: INDIANA HSNG & COMM DEV	30 S. MERIDIAN ST, STE 1000, INDIANAPOLIS, IN 46204.	0	10,800
KS: TOPEKA HA	2010 SE CALIFORNIA AVE, TOPEKA, KS 66607	0	9,400
KS: SALINA HA	469 S. 5TH ST, SALINA, KS 67402	0	1,200
KS: HAYS HA	1709 SUNSET TRAIL, HAYS, KS 67601	0	2,400
KY: CAMPBELL COUNTY HA	PO BOX 72424, NEWPORT, KY 41072	0	5,200
KY: KENTUCKY HSNG CORP	1231 LOUISVILLE RD, FRANKFORT, KY 40601	0	2,800
LA: NEW ORLEANS HA	4100 TOURO ST, NEW ORLEANS, LA 70122	0	9,400
MA: BOSTON HA	52 CHAUNCY ST, BOSTON, MA 02111	0	11,200
MD: HA OF CITY OF FREDERICK	209 MADISON ST, FREDERICK, MD 21701	0	5,400
MD: MONTGOMERY CO HA	10400 DETRICK AVE, KENSINGTON, MD 20895	0	15,600
MD: HOWARD COUNTY HSNG COMM	6751 COLUMBIA GATEWAY DR, 3RD FL, COLUMBIA, MD 21046.	0	8,800
ME: MAINE STATE HA	353 WATER ST, AUGUSTA, ME 04330	0	3,000
MI: DETROIT HSNG COMM	1301 EAST JEFFERSON AVE, DETROIT, MI 48207.	0	20,000
MI: PLYMOUTH HSNG COMM	1160 SHERIDAN, PLYMOUTH, MI 48170	0	4,400
MI: MICHIGAN STATE HSG DEV AUTH	P.O. BOX 30044, LANSING, MI 48909	0	14,400
MO: ST. LOUIS HA	3520 PAGE BLVD, ST. LOUIS, MO 63106	0	3,400
MO: DALLAS COUNTY PHA	215 SOUTH BARNES, SPRINGFIELD, MO 65802	0	3,200
MT: MT DEPT OF COMMERCE	301 S. PARK, HELENA, MT 59620	0	1,600
NC: GREENSBORO HA	PO BOX 21287, GREENSBORO, NC 27420	0	15,400
NE: SOUTH SIOUX CITY HA	118 E. 21ST ST, SOUTH SIOUX CITY, NE 68776	0	10,200
NY: HA OF AMSTERDAM	52 DIVISION ST, AMSTERDAM, NY 12010	0	9,000
NY: VILLAGE OF COBLESKILL	349 MINERAL SPRINGS RD, COBLESKILL, NY 12043.	0	12,400
NY: NYS HSG TRUST FUND CORP	38–40 STATE ST, ALBANY, NY 12207	0	25,600
OR: COMM SERV AGENCY OF LANE CO	177 DAY ISLAND RD, EUGENE, OR 97401	0	4,000
OR: HA OF JACKSON COUNTY	2231 TABLE ROCK RD, MEDFORD, OR 97501	0	9,600
PA: PHILADELPHIA HA	12 SOUTH 23RD ST, PHILADELPHIA, PA 19103	0	9,800
PA: ALLEGHENY COUNTY HA	625 STANWIX ST, 12TH FL, PITTSBURGH, PA 15222.	0	5,400
PA: HA OF THE COUNTY OF BUTLER	114 WOODY DR, BUTLER, PA 16001	0	600
PA: JOHNSTOWN HA	501 CHESTNUT ST, JOHNSTOWN, PA 15907	0	6,800
PA: ERIE COUNTY HA	120 S. CENTER, CORRY, PA 16407	0	4,800
RQ: MUNICIPALITY OF CAROLINA	PO BOX 8, CAROLINA, PR 00986	0	11,400
SD: CITY OF LENNOX HSNG & REDEV	217 SOUTH PINE ST, LENNOX, SD 57039	0	600
SD: HURON HA	PO BOX 283, HURON, SD 57350	0	800
TN: KNOXVILLE COMM DEV CORP	PO BOX 3550, KNOXVILLE, TN 37927	0	13,000
TN: METROPOLITAN DEV & HA	701 SOUTH SIXTH ST, NASHVILLE, TN 37202	0	67,200
TN: HA MURFREESBORO	415 NORTH MAPLE ST, MURFREESBORO, TN 37130.	0	3,000
TX: BEEVILLE HA	PO BOX 427, BEEVILLE, TX 78104	0	4,800

SECTION 8 RENTAL ASSISTANCE PROGRAMS ANNOUNCEMENT OF AWARDS FOR FISCAL YEAR 2012—Continued

Housing agency	Address	Units	Award
UT: HA OF CITY OF OGDEN	1100 GRANT AVE, OGDEN, UT 84404	0	6,200
WA: SEATTLE HA	120 SIXTH AVE NORTH, SEATTLE, WA 98109	0	9,600
WA: KING COUNTY HA	600 ANDOVER PARK WEST, SEATTLE, WA 98188.	0	18,600
WA: HA OF CITY OF BREMERTON	110 RUSSELL RD, BREMERTON, WA 98312	0	9,800
WA: HA CITY OF EVERETT	3107 COLBY AVE, EVERETT, WA 98206	0	12,800
WA: HA OF SNOHOMISH COUNTY	12625 4TH AVE W, STE 200, EVERETT, WA 98204.	0	8,400
WA: SPOKANE HA WEST	55 MISSION ST, STE 104, SPOKANE, WA 99201	0	3,200
WI: BROWN COUNTY HA	100 N JEFFERSON ST, RM 608, GREEN BAY, WI 54301.	0	26,800
WI: MILWAUKEE CO HA	2711 W WELLS ST, FL 1, RM 102, MILWAUKEE, WI 53208.	0	5,800
WY: ROCK SPRINGS HA	233 C ST, ROCK SPRINGS, WY 82901	0	4,400
Total for Special Fees—Opt-Outs/Terminations		0	660,600
Special Fees—PD Relocation			
MO: ST. LOUIS HA	3520 PAGE BLVD, ST. LOUIS, MO 63106	0	6,400
MS: MERIDIAN HA	PO BOX 870, MERIDIAN, MS 39302	0	3,800
MS: HA SOUTH DELTA	202 WESTON AVE, LELAND, MS 38756	0	2,000
Total for Special Fees—PD Relocation		0	12,200
Special Fees—Prepayments			
CA: OAKLAND HA	1619 HARRISON ST, OAKLAND, CA 94612	0	16,600
CA: CITY OF LOS ANGELES HA	2600 WILSHIRE BLVD, 3RD FL, LOS ANGELES, CA 90057.	0	1,200
CA: COUNTY OF MONTEREY HA	123 RICO ST, SALINAS, CA 93907	0	21,000
CA: ALAMEDA COUNTY HA	22941 ATHERTON ST, HAYWARD, CA 94541	0	18,800
CA: COUNTY OF ORANGE HA	1770 NORTH BROADWAY, SANTA ANA, CA 92706.	0	3,200
CO: HA OF CITY AND CO OF DENVER	777 GRANT ST, DENVER, CO 80203	0	22,000
CT: CONN DEPT OF SOC SERV	25 SIGOURNEY ST, 9TH FL, HARTFORD, CT 06105.	0	29,400
FL: MIAMI DADE HA	701 NW 1ST COURT, 16TH FL, MIAMI, FL 33136	0	39,800
FL: HA OF HOLLYWOOD	7300 N. DAVIE RD EXT, HOLLYWOOD, FL 33024	0	19,800
IL: CHICAGO HA	60 EAST VAN BUREN ST, 11TH FL, CHICAGO, IL 60605.	0	31,200
IL: ELGIN HA	120 SOUTH STATE ST, ELGIN, IL 60123	0	6,000
KY: LOUISVILLE HA	420 SOUTH EIGHTH ST, LOUISVILLE, KY 40203	0	80,200
KY: MAYFIELD HA	312 BROOKSIDE DR, MAYFIELD, KY 42066	0	11,400
MA: BOSTON HA	52 CHAUNCY ST, BOSTON, MA 02111	0	5,600
MA: CAMBRIDGE HA	675 MASSACHUSETTS AVE, CAMBRIDGE, MA 02139.	0	6,400
MA: BEVERLY HA	137 REAR BRIDGE ST, BEVERLY, MA 01915	0	20,000
MA: COMM DEV PROG COMM OF MA, EOCD	100 CAMBRIDGE ST, BOSTON, MA 02114	0	66,000
MD: HARFORD COUNTY HA	15 SOUTH MAIN ST, STE 106, BEL AIR, MD 21014.	0	32,000
MD: BALTIMORE CO. HSNG OFFICE	6401 YORK RD, 1 ST FL, BALTIMORE, MD 21212.	0	20,000
MI: DETROIT HSNG COMM	1301 EAST JEFFERSON AVE, DETROIT, MI 48207.	0	7,000
MI: MICHIGAN STATE HSG DEV AUTH	P.O. BOX 30044, LANSING, MI 48909	0	12,600
MN: WORTHINGTON HRA	819 TENTH ST, WORTHINGTON, MN 56187	0	4,600
NC: WESTERN PIEDMONT COG	736 4TH STREET SW., HICKORY, NC 28603	0	800
NE: BELLEVUE HA	8214 ARMSTRONG CIRCLE, BELLEVUE, NE 68147.	0	11,000
NY: HA OF SYRACUSE	516 BURT ST, SYRACUSE, NY 13202	0	69,800
NY: HA OF SCHENECTADY	375 BROADWAY, SCHENECTADY, NY 12305	0	4,000
NY: HA OF ROCHESTER	675 WEST MAIN ST, ROCHESTER, NY 14611	0	95,800
NY: THE CITY OF NEW YORK DHPD	100 GOLD ST, RM 501, NEW YORK, NY 10038	0	182,800
NY: CITY OF NIAGARA FALLS DCD	1022 MAIN ST, NIAGARA FALLS, NY 14302	0	3,400
NY: NYS HSG TRUST FUND CORP	38–40 STATE ST, ALBANY, NY 12207	0	102,800
OH: CUYAHOGA MHA	8120 KINSMAN RD, CLEVELAND, OH 44104	0	1,600
OH: CINCINNATI METRO HA	16 WEST CENTRAL PKWY, CINCINNATI, OH 45210.	0	4,800
OH: GREENE METRO HA	538 NORTH DETROIT ST, XENIA, OH 45385	0	9,200
OK: OKLAHOMA HSNG FIN AGENCY	PO BOX 26720, OKLAHOMA CITY, OK 73126	0	4,600
OR: HA OF THE COUNTY OF	PO BOX 1510, OREGON CITY, OR 97045	0	8,200

SECTION 8 RENTAL ASSISTANCE PROGRAMS ANNOUNCEMENT OF AWARDS FOR FISCAL YEAR 2012—Continued

Housing agency	Address	Units	Award
OR: COMM SERV AGENCY OF LANE CO	177 DAY ISLAND RD, EUGENE, OR 97401	0	9,200
PA: PHILADELPHIA HA	12 SOUTH 23RD ST, PHILADELPHIA, PA 19103	0	10,000
PA: HARRISBURG HA	351 CHESTNUT ST, 12TH FL, HARRISBURG, PA 17101.	0	21,200
PA: BEAVER COUNTY HA	300 STATE ST, BEAVER, PA 15009	0	13,600
PA: WASHINGTON COUNTY HA	100 SOUTH FRANKLIN ST, WASHINGTON, PA 15301.	0	12,600
PA: JOHNSTOWN HA	501 CHESTNUT ST, JOHNSTOWN, PA 15907	0	26,800
PA: ERIE COUNTY HA	120 S. CENTER, CORRY, PA 16407	0	9,400
RI: EAST PROVIDENCE HA	99 GOLDSMITH AVE, EAST PROVIDENCE, RI 02914.	0	19,000
RI: RHODE ISLAND HSG MORT FIN CORP	44 WASHINGTON ST, PROVIDENCE, RI 02903	0	10,200
SC: HA SOUTH CAROLINA REG NO 1	404 CHURCH ST, LAURENS, SC 29360	0	4,000
SC: HA GREENWOOD	PO BOX 973, GREENWOOD, SC 29648	0	16,400
TN: METROPOLITAN DEV & HA	701 SOUTH SIXTH ST, NASHVILLE, TN 37202	0	19,800
TX: SAN ANTONIO HA	818 S. FLORES ST, SAN ANTONIO, TX 78295	0	19,600
TX: MC ALLEN HA	2301 JASMINE AVE, MC ALLEN, TX 78501	0	15,800
VA: ALEXANDRIA REDEV & HA	600 N FAIRFAX ST, ALEXANDRIA, VA 22314	0	4,000
VA: ROANOKE REDEV & HA	2624 SALEM TRNPK, NW., ROANOKE, VA 24017	0	0
VA: CHARLOTTESVILLE REDEV & HA	605 EAST MAIN ST, RM A040, CHARLOTTES-VILLE, VA 22902.	0	32,400
VA: HAMPTON REDEV & HA	P.O. BOX 280, HAMPTON, VA 23669	0	600
VA: VIRGINIA HSNG DEV AUTH	601 SOUTH BELVIDERE ST, RICHMOND, VA 23220.	0	32,000
VT: RUTLAND HA	5 TREMONT ST, RUTLAND, VT 05701	0	24,200
WA: SEATTLE HA	120 SIXTH AVE NORTH, SEATTLE, WA 98109	0	39,800
WA: HA OF CITY OF YAKIMA	810 N 6TH AVE, YAKIMA, WA 98902	0	3,200
WI: SHEBOYGAN HA	PO BOX 1052, SHEBOYGAN, WI 53082	0	1,600
WY: ROCK SPRINGS HA	233 C ST, ROCK SPRINGS, WY 82901	0	1,000
Total for Special Fees—Prepayments		0	1,320,000
Special Fees—Rent Supplements			
CA: CITY OF SAN LUIS OBISPO HA	487 LEFF STREET, SAN LUIS OBISPO, CA 93406.	0	1,400
CT: TORRINGTON HA	110 PROSPECT ST, TORRINGTON, CT 06790	0	7,200
CT: CONN DEPT OF SOC SERV	25 SIGOURNEY ST, 9TH FL, HARTFORD, CT 06105.	0	2,600
MA: BOSTON HA	52 CHAUNCY ST, BOSTON, MA 02111	0	6,200
NY: HA OF HARRIETSTOWN	14 KIWASSA ROAD, STE 1, SARANAC LAKE, NY 12983.	0	1,600
SD: CANTON HSNG & REDEV COMM	903 W. FIFTH ST, CANTON, SD 57013	0	1,000
WA: SEATTLE HA	120 SIXTH AVE NORTH, SEATTLE, WA 98109	0	16,800
Total for Special Fees—Rent Supplements		0	36,800
Total for Special Fees		0	2,029,660
Grand Total		16,436	119,362,818

[FR Doc. 2013–01891 Filed 1–29–13; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Office of the Secretary

[Docket No. ONRR–2012–0003]

U.S. Extractive Industries Transparency Initiative Advisory Committee

AGENCY: Interior, Office of the Secretary.

ACTION: Notice of meeting.

SUMMARY: In accordance with the requirements of the Federal Advisory Committee Act, 5 U.S.C. Appendix 2, the Department of the Interior, U.S. Extractive Industries Transparence Initiative Advisory Committee will meet as indicated below.

DATES: Wednesday, February 13, 2013, from 8:30 a.m. to 4:30 p.m., Eastern Standard Time.

ADDRESSES: Department of the Interior, 1849 C Street NW., Conference Room 5160, Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT: Ms. Shirley Conway, Office of Natural Resources Revenue; 1849 C Street NW., Room 4217; Washington, DC 20240; telephone number (202) 513–0598; fax number (202) 513–0682; email *Shirley.Conway@onrr.gov.* Additional Committee information can be found at: *http://www.doi.gov/eiti/FACA.*

SUPPLEMENTARY INFORMATION: The USEITI Advisory Committee will serve as the initial USEITI Multi-Stakeholder Group and its duties will include consideration and fulfillment of the tasks required to achieve candidate and compliant status in the Extractive Industries Transparency Initiative (EITI). The Committee includes representatives from Government agencies, extractive industry, civil society organizations, and public stakeholders. Through a multi-year, consensus-based process the Committee will provide advice to the Secretary of the Interior to guide and oversee implementation of USEITI.

The EITI is a voluntary, global effort designed to increase transparency, strengthen the accountability of natural resource revenue reporting, and build public trust for the governance of these vital activities. Participating countries publicly disclose revenues received by the government for oil, gas, and mining development, while companies make corresponding disclosures regarding these same payments to the government, and both sets of data are reviewed and reconciled by a mutually agreed upon independent third party. Results are then released in a public report.

Meeting Agenda: At the first meeting, the Committee will receive informational briefings and will discuss and develop its goals and procedures, a meeting schedule and work plan for 2013.

Public Input: Interested members of the public may present, either orally or through written comments, information for the Committee to consider during the public meeting. The meeting is open to the public, but space is limited, so all interested in attending should preregister by close of business February 6, 2013. Individuals or groups requesting to make comments at the public Committee meeting will be allocated up to 3 minutes as time permits. Speakers who wish to expand their oral statements, or those who had wished to speak, but could not be accommodated during the public comment period are encouraged to submit their comments in written form after the meeting. To register, request placement on the speaker list, or submit written comments, please contact Ms. Shirley Conway via email at *Shirley.Conway@onrr.gov,* by phone at (202) 513–0598 or fax (202) 513–0682.

Dated: January 24, 2013.

Amy Holley,

Acting Assistant Secretary for Policy, Management and Budget Department of the Interior.

[FR Doc. 2013–01903 Filed 1–29–13; 8:45 am]

BILLING CODE 4310–T2–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R1–ES–2013–N014; FXES11130100000F5–134–FF01E00000]

Endangered and Threatened Wildlife and Plants; Recovery Permit Applications

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability; request for comments.

SUMMARY: We, the U.S. Fish and Wildlife Service, invite the public to comment on the following application for a permit to conduct activities with the purpose of enhancing the survival of endangered species. The Endangered Species Act of 1973, as amended (Act), prohibits certain activities with respect to endangered species unless a Federal permit allows such activity. The Act also requires that we invite public comment before issuing such permits.

DATES: To ensure consideration, please send your written comments by March 1, 2013.

ADDRESSES: Endangered Species Program Manager, Ecological Services, U.S. Fish and Wildlife Service, Pacific Regional Office, 911 NE 11th Avenue, Portland, OR 97232–4181. Please refer to the permit number for the application when submitting comments.

FOR FURTHER INFORMATION CONTACT: Grant Canterbury, Fish and Wildlife Biologist, at the above address or by telephone (503–231–6131) or fax (503–231–6243).

SUPPLEMENTARY INFORMATION:

Background

The Act (16 U.S.C. 1531 et seq.) prohibits certain activities with respect to endangered and threatened species unless a Federal permit allows such activity. Along with our implementing regulations in the Code of Federal Regulations (CFR) at 50 CFR part 17, the Act provides for certain permits, and requires that we invite public comment before issuing these permits for endangered species.

A permit granted by us under section 10(a)(1)(A) of the Act authorizes the permittee to conduct activities (including take or interstate commerce) with respect to U.S. endangered or threatened species for scientific purposes or enhancement of propagation or survival. Our regulations implementing section 10(a)(1)(A) of the Act for these permits are found at 50 CFR 17.22 for endangered wildlife species, 50 CFR 17.32 for threatened wildlife species, 50 CFR 17.62 for endangered plant species, and 50 CFR 17.72 for threatened plant species.

Applications Available for Review and Comment

We invite local, State, and Federal agencies, and the public to comment on the following application. Please refer to the appropriate permit number for the application when submitting comments.

Documents and other information submitted with this application are available for review by request from the Endangered Species Program Manager at the address listed in the **ADDRESSES** section of this notice, subject to the requirements of the Privacy Act (5 U.S.C. 552a) and Freedom of Information Act (5 U.S.C. 552).

Permit Number: TE–096741

Applicant: Naval Facilities Engineering Command Pacific, Pearl Harbor, Hawaii

The applicant requests an amendment to an existing recovery permit to take (conduct taped-playback surveys) the Micronesian megapode (*Megapodius laperouse laperouse*), nightingale reed-warbler (*Acrocephalus luscinia*), and Mariana common moorhen (*Gallinula chloropus guami*), in conjunction with research in the Commonwealth of the Northern Mariana Islands, for the purpose of enhancing their survival. This permit currently covers take of the Hawaiian picture-wing flies *Drosophila aglaia, D. hemipeza, D. montgomeryi, D. obatai, D. substenoptera, D. tarphytrichia,* and *D. musaphilia;* and removal and reduction to possession of *Abutilon menziesii* (ko'oloa'ula), *Abutilon sandwicense* (no common name), *Achyranthes splendens* var. *rotundata* (round-leaved chaff flower), *Alectryon macrococcus* var. *micrococcus* (mahoe), *Bonamia menziesii* (no common name), *Chamaesyce kuwaleana* (akoko), *Chamaesyce skottsbergii* var. *kalaeloana* ('Ewa Plains 'akoko), *Cyperus trachysanthos* (puukaa), *Flueggea neowawraea* (mehamehame), *Hedyotis parvula* (no common name), *Lepidium arbuscula* (anaunau), *Lipochaeta lobata* var. *leptophylla* (nehe), *Lipochaeta tenuifolia* (nehe), *Lobelia niihauensis* (no common name), *Marsilea villosa* (ihi'ihi), *Melicope pallida* (alani), *Melicope saint-johnii* (alani), *Neraudia angulata* (no common name), *Nototrichium humile* (kului), *Schiedea hookeri* (no common name), *Tetramolopium filiforme* (no common name), *Tetramolopium lepidotum* ssp. *lepidotum* (no common name), and *Viola chamissoniana ssp. chamissoniana* (pamakani), for which notices were originally published in the **Federal Register** on January 7, 2005 (70 FR 1456) and April 22, 2009 (74 FR 18396).

Public Availability of Comments

All comments and materials we receive in response to this request will be available for public inspection, by appointment, during normal business hours at the address listed in the **ADDRESSES** section of this notice.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority

We provide this notice under section 10 of the Act (16 U.S.C. 1531 *et seq.*).

Dated: January 22, 2013.

Richard R. Hannan,

Acting Regional Director, Pacific Region, U.S. Fish and Wildlife Service.

[FR Doc. 2013–01952 Filed 1–29–13; 8:45 am]

BILLING CODE 4310–55–P

INTERNATIONAL TRADE COMMISSION

Certain Wireless Communications Base Stations and Components Thereof Notice of Receipt of Complaint; Solicitation of Comments Relating to the Public Interest

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has received a complaint entitled *Certain Wireless Communications Base Stations and Components Thereof,* DN 2934; the Commission is soliciting comments on any public interest issues raised by the complaint or complainant's filing under section 210.8(b) of the Commission's Rules of Practice and Procedure (19 CFR 210.8(b)).

FOR FURTHER INFORMATION CONTACT: Lisa R. Barton, Acting Secretary to the Commission, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–2000. The public version of the complaint can be accessed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov,* and will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–2000.

General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission has received a complaint and a submission pursuant to section 210.8(b) of the Commission's Rules of Practice and Procedure filed on behalf of Adaptix, Inc. on January 24, 2013. The complaint alleges violations of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain wireless communications base stations and components thereof. The complaint names as respondents Telefonaktiebolaget LM Ericsson of Sweden and Ericsson Inc. of Plano, TX.

Proposed respondents, other interested parties, and members of the public are invited to file comments, not to exceed five (5) pages in length, inclusive of attachments, on any public interest issues raised by the complaint or section 210.8(b) filing. Comments should address whether issuance of the relief specifically requested by the complainant in this investigation would affect the public health and welfare in the United States, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers.

In particular, the Commission is interested in comments that:

(i) Explain how the articles potentially subject to the requested remedial orders are used in the United States;

(ii) Identify any public health, safety, or welfare concerns in the United States relating to the requested remedial orders;

(iii) Identify like or directly competitive articles that complainant, its licensees, or third parties make in the United States which could replace the subject articles if they were to be excluded;

(iv) Indicate whether complainant, complainant's licensees, and/or third party suppliers have the capacity to replace the volume of articles potentially subject to the requested exclusion order and/or a cease and desist order within a commercially reasonable time; and

(v) Explain how the requested remedial orders would impact United States consumers.

Written submissions must be filed no later than by close of business, eight calendar days after the date of publication of this notice in the **Federal Register**. There will be further opportunities for comment on the public interest after the issuance of any final initial determination in this investigation.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above and submit 8 true paper copies to the Office of the Secretary by noon the next day pursuant to section 210.4(f) of the Commission's Rules of Practice and Procedure (19 CFR 210.4(f)). Submissions should refer to the docket number (''Docket No. 2934'') in a prominent place on the cover page and/or the first page. (*See* Handbook for Electronic Filing Procedures, *http://www.usitc.gov/secretary/fed_reg_notices/rules/handbook_on_electronic_filing.pdf*). Persons with questions regarding filing should contact the Secretary (202–205–2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and of sections 201.10 and 210.8(c) of the Commission's Rules of Practice and Procedure (19 CFR 201.10, 210.8(c)).

By order of the Commission.

Issued: January 24, 2013.

Lisa R. Barton,

Acting Secretary to the Commission.

[FR Doc. 2013–01875 Filed 1–29–13; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

[OMB Number 1122–0023]

Agency Information Collection Activities: Extension of a Currently Approved Collection; Comments Requested; Semi-Annual Progress Report for the Sexual Assault Services Program—Grants to Culturally Specific Programs

ACTION: 30-Day notice.

The Department of Justice, Office on Violence Against Women (OVW) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** Volume 77, Number 219, page 67668 on November 13, 2012.

The purpose of this notice is to allow for an additional 30 days for public comment until March 1, 2013. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to The Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20503. Additionally, comments may be submitted to OMB via facsimile to (202) 395–7285.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Semi-Annual Progress Report for Grantees from the Sexual Assault Services Program—Grants to Culturally Specific Programs (SASP—Culturally Specific Program).

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection: Form Number:* 1122–0023. U.S. Department of Justice, Office on Violence Against Women.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* The affected public includes the approximately 11 grantees of the SASP Culturally Specific Program. This program supports projects that create, maintain and expand sustainable sexual assault services provided by culturally specific organizations, which are uniquely situated to respond to the needs of sexual assault victims within culturally specific populations.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply:* It is estimated that it will take the approximately 11 respondents (SASP—Culturally Specific Program grantees) approximately one hour to complete a semi-annual progress report. The semi-annual progress report is divided into sections that pertain to the different types of activities in which grantees may engage. A SASP—Culturally Specific Program grantee will only be required to complete the sections of the form that pertain to its own specific activities.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total annual hour burden to complete the data collection forms is 22 hours, that is 11 grantees completing a form twice a year with an estimated completion time for the form being one hour.

If additional information is required contact: Jerri Murray, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE., Room 1407B, Washington, DC 20530.

Dated: January 24, 2013.

Jerri Murray,

Department Clearance Officer for PRA, United States Department of Justice.

[FR Doc. 2013–01870 Filed 1–29–13; 8:45 am]

BILLING CODE 4410–FX–P

DEPARTMENT OF JUSTICE

[OMB Number 1121–0218]

Agency Information Collection Activities: Proposed Collection; Comments Requested; Census of Juveniles in Residential Placement (Revision of a Currently Approved Collection)

ACTION: 30-Day Notice.

The Department of Justice (DOJ), Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies.

This proposed information collection was previously published in the **Federal Register** Volume 78, Number 9, page 2692–2693, on January 14, 2013, allowing for a 60 day comment period.

Comments are encouraged and will be accepted for ''thirty days'' until March 1, 2013. This process is conducted in accordance with 5 CFR 1320.10.

If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Brecht Donoghue, (202) 305–1270, Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, U.S. Department of Justice, 810 Seventh Street NW., Washington, DC 20531.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information,

including the validity of the methodology and assumptions used;
—Enhance the quality, utility, and clarity of the information to be collected; and
—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information Collection Back to Top

(1) *Type of information collection:* Revision of a Currently Approved Collection.

(2) *The title of the form/collection:* Census of Juveniles in Residential Placement.

(3) The agency form number, if any, and the applicable component of the Department sponsoring the collection: The form number is CJ–14, Office of Juvenile Justice and Delinquency Prevention, United States Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Federal Government, State, Local or Tribal. Other: Not-for-profit institutions; Business or other for-profit.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply:* It is estimated that 2,550 respondents will complete a 3.5-hour questionnaire.

(6) *An estimate of the total public burden (in hours) associated with the collection:* Approximately 9,225 hours.

If additional information is required, contact: Jerri Murray, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE., Room 3W–1407B, Washington, DC 20530.

Dated: January 24, 2013.

Jerri Murray,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2013–01867 Filed 1–29–13; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF JUSTICE

[OMB Number 1140–0094]

Agency Information Collection Activities; Proposed Collection; Comments Requested: Certification of Qualifying State Relief From Disabilities Program

ACTION: 30-Day notice.

The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** Volume 77, Number 225, page 69895 on November 21, 2012, allowing for a 60 day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until March 1, 2013. This process is conducted in accordance with 5 CFR 1320.10.

Written comments concerning this information collection should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attn: DOJ Desk Officer. The best way to ensure your comments are received is to email them to *oira_submission@omb.eop.gov* or fax them to 202–395–7285. All comments should reference the eight digit OMB number or the title of the collection.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:
—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
—Enhance the quality, utility, and clarity of the information to be collected; and
—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Summary of Information Collection:

(1) *Type of Information Collection:* Revision of a currently approved collection.

(2) *Title of the Form/Collection:* Certification of Qualifying State Relief from Disabilities Program.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form Number: ATF F 3210.12. Bureau of Alcohol, Tobacco, Firearms and Explosives.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract.* Primary: State, Local or Tribal Government. Other: None.

Need for Collection

The form is used by a State to certify to the U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) that it has established a qualifying mental health relief from firearms disabilities program that satisfies certain minimum criteria under Section 105 of the National Instant Check System Improvement Act. Changes to the form include changing the form submission address and requesting the citation for the relief program.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* It is estimated that 50 respondents will complete a 15 minute form.

(6) *An estimate of the total public burden (in hours) associated with the collection:* There are an estimated 13 annual total burden hours associated with this collection.

If additional information is required contact: Jerri Murray, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, Department of Justice, Two Constitution Square, 145 N Street NE., Room 3W–1407B, Washington, DC 20530.

Dated: January 24, 2013.

Jerri Murray,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2013–01869 Filed 1–29–13; 8:45 am]

BILLING CODE 4410–FY–P

DEPARTMENT OF JUSTICE

[OMB Number 1190—NEW]

Agency Information Collection Activities Under Review: Related Unfair Employment Practices; Office of Special Counsel for Immigration-Related Unfair Employment Practices Charge Form (OSC Charge Form)

ACTION: 30-Day notice.

The Department of Justice, Civil Rights Division, Office of Special Counsel for Immigration-Related Unfair Employment Practices, will be submitting the following information collection request to the Office of Management and Budget for review and approval in accordance with the Paperwork Reduction Act of 1995. The information collection extension is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register**, Volume 77, Number 217, page 67025, on November 8, 2012, allowing for a 60-day comment period. The purpose of this notice is to allow for an additional 30 days for public comment until March 1, 2013.

The purpose of this notice is to allow an additional 30 days for public comment. Comments are encouraged and will be accepted until March 1, 2013. This process is conducted in accordance with 5 CFR 1320.10.

To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: DOJ Desk Officer, Fax: 202 395–7285, or emailed to *oira_submission@omb.eop.gov.* All comments should be identified with the OMB control number [1190]. Also include the DOJ docket number found in brackets in the heading of this document.

Written comments and/or suggestions are requested from the public and affected agencies concerning the proposed collection of information. Your comments should address one or more of the following four points:

(1) Evaluate whether the collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of Information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (e.g., permitting electronic submission of responses).

Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time should be directed to the Office of Management and Budget (OMB), Office of Regulatory Affairs, Attention: Department of Justice Desk Officer, Washington, DC 20503. Additionally, comments may be submitted to OMB via facsimile to (202) 395–7285. Comments may also be submitted to the U.S. Department of Justice (DOJ), Justice Management Division, Policy and Planning Staff, Attention: Department Clearance Officer, Two Constitution Square, 145 N Street NE., Suite 2E–502, Washington, DC 20530, Suite 3W–1407B, Washington, DC 20530.

The information collection is listed below:

(1) *Type of information collection.* Extension of Currently Approved Collection.

(2) *The title of the form/collection.* Office of Special Counsel for Immigration-Related Unfair Employment Practices Charge Form [OSC Charge Form].

(3) *The agency form number and applicable component of the Department sponsoring the collection.* Form OSC–1. Office of Special Counsel for Immigration-Related Unfair Employment Practices, Civil Rights Division, U.S. Department of Justice.

(4) *Affected public who will be asked to respond, as well as a brief abstract: Primary:* The Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) enforces the anti-discrimination provision (§ 274B) of the Immigration and Nationality Act (INA), 8 U.S.C. 1324b. Individuals alleging discrimination by public and private entities based on (1) Citizenship or immigration status discrimination in hiring, firing, or recruitment or referral for a fee, (2) national origin discrimination in hiring, firing, or recruitment or referral for a fee, (3) discriminatory documentary practices during the employment eligibility verification (Form I–9 and E-Verify) process (''document abuse''), and (4) retaliation or intimidation for asserting rights covered by the statute. The Department's Civil Rights Division, Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC), investigates and, where reasonable cause is found, litigates charges alleging discrimination. OSC also initiates independent investigations, at times based on information developed during individual charge investigations. Independent investigations normally involve alleged discriminatory policies that potentially affect many employees or applicants. These investigations may result in complaints alleging a pattern or practice of discriminatory activity. If the Department lacks jurisdiction over a particular charge but believes another agency has jurisdiction over the claim, the charge is forwarded to the applicable Federal, state or local agency for any action deemed appropriate.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 300 respondents per year at 30 minutes per charge form.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 150 hours annual burden hours associated with this collection.

If additional information is required contact: Jerri Murray, Department Clearance Officer, United States Department of Justice, Policy and Planning Staff, Justice Management Division, Two Constitution Square, 145 N Street NE., Suite 3W–1407B, Washington, DC 20530.

Dated: January 24, 2013.

Jerri Murray,

Department Clearance Officer, PRA, United States Department of Justice.

[FR Doc. 2013–01884 Filed 1–29–13; 8:45 am]

BILLING CODE 4410–13–P

DEPARTMENT OF JUSTICE

[OMB Number 1140–0076]

Agency Information Collection Activities; Proposed Collection; Comments Requested: Relief of Disabilities

ACTION: 30-Day notice of information collection under review.

The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** Volume 77, Number 225, page 69895 on November 21, 2012, allowing for a 60 day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until March 1, 2013. This process is conducted in accordance with 5 CFR 1320.10.

Written comments concerning this information collection should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attn: DOJ Desk Officer. The best way to ensure your comments are received is to email them to *oira_submission@omb.eop.gov* or fax them to 202–395–7285. All comments should reference the eight digit OMB number of the title of the information collection.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
—Enhance the quality, utility, and clarity of the information to be collected; and
—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Summary of Information Collection

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Relief of Disabilities.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form Number: None. Bureau of Alcohol, Tobacco, Firearms and Explosives.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Business or other for-profit. Other: None.

Need for Collection

Any person prohibited from shipping or transporting any explosive in or affecting interstate or foreign commerce or from receiving or possessing any explosive which has been shipped or transported in or affecting interstate or foreign commerce may make application for relief from disabilities.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* It is estimated that 50 respondents will take 1 minute to support documentation for relief.

(6) *An estimate of the total burden (in hours) associated with the collection:* The estimated annual total burden associated with this collection is 1 hour.

If additional information is required contact: Jerri Murray, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, Department of Justice, Two Constitution Square, 145 N Street NE., Room 3W–1407B, Washington, DC 20530.

Dated: January 24, 2013.

Jerri Murray,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2013–01872 Filed 1–29–13; 8:45 am]

BILLING CODE 4410–FY–P

DEPARTMENT OF JUSTICE

[OMB Number 1117–0031]

Agency Information Collection Activities; Proposed Collection; Comments Requested: Application for Registration Under Domestic Chemical Diversion Control Act of 1993 and Renewal Application for Registration Under Domestic Chemical Diversion Control Act of 1993; DEA Forms 510 and 510a

ACTION: 30-Day notice.

The Department of Justice (DOJ), Drug Enforcement Administration (DEA) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** Volume 77, Number 227, page 70471–70472 on November 26, 2012, allowing for a 60 day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until March 1, 2013. This process is conducted in accordance with 5 CFR 1320.10.

If you have comments, especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Cathy A. Gallagher, Acting Chief, Liaison and Policy Section, Office of Diversion Control, Drug Enforcement Administration, 8701 Morrissette Drive, Springfield, VA 22152; (202) 307–7297.

Written comments concerning this information collection should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attn: DOJ Desk Officer. The best way to ensure your comments are received is to email them to *oira_submission@omb.eop.gov* or fax them to (202) 395–7285. All comments should reference the eight-digit OMB number for the collection or the title of the collection. If you have questions concerning the collection, please contact Cathy A. Gallagher, Acting Chief, Liaison and Policy Section, Office of Diversion Control, Drug Enforcement Administration, 8701 Morrissette Drive, Springfield, VA 22152, (202) 307–7297, or the DOJ Desk Officer at (202) 395–3176.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

• Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

• Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

• Enhance the quality, utility, and clarity of the information to be collected; and

• Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of Information Collection 1117–0031

(1) *Type of Information Collection:* Extension of a currently approved collection

(2) *Title of the Form/Collection:* Application for Registration under Domestic Chemical Diversion Control Act of 1993 and Renewal Application for Registration under Domestic Chemical Diversion Control Act of 1993.

(3) *Agency form number, if any, and the applicable component of the Department sponsoring the collection:*

Form number: DEA Forms 510 and 510a.

Component: Office of Diversion Control, Drug Enforcement Administration, Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:*

Primary: Business or other for-profit.

Other: None.

Abstract: The Domestic Chemical Diversion Control Act requires that manufacturers, distributors, importers, and exporters of List I chemicals which may be diverted in the United States for the production of illicit drugs must register with DEA. Registration provides a system of controls to aid in the tracking of the distribution of List I chemicals.

(4) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:*

	Respondents	Burden (minutes)	Total hour burden	@ $50.14/hour =
DEA–510 (paper)	17	0.5 hours	8.5	$448.80
DEA–510 (electronic)	143	0.25 hours	35.75	1,887.60
DEA–510a (paper)	158	0.5 hours	79	4,171.20
DEA–510a (electronic)	896	0.25 hours	224	11,827.20
Total	1,054		347.25	18,334.80

Total percentage electronic: 98.5%

(5) *An estimate of the total public burden (in hours) associated with the collection:* DEA estimates that this collection takes 347.25 annual burden hours.

If additional information is required contact: Jerri Murray, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE., Room 3W–1407B, Washington, DC 20530.

Dated: January 24, 2013.

Jerri Murray,

Department Clearance Officer, PRA, U.S. Department of Justice.

[FR Doc. 2013–01868 Filed 1–29–13; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[OMB Number 1117–0029]

Agency Information Collection Activities; Proposed Collection; Comments Requested: Annual Reporting Requirement for Manufacturers of Listed Chemicals

ACTION: 30-Day notice.

The Department of Justice (DOJ), Drug Enforcement Administration (DEA), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** Volume 77, Number 227, pages 70472–70473 on November 26, 2012, allowing for a 60 day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until March 1, 2013. This process is conducted in accordance with 5 CFR 1320.10. Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20503. Additionally, comments may be submitted to OMB via facsimile to (202) 395–7285. Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Annual Reporting Requirement for Manufacturers of Listed Chemicals.

(3) *Agency form number, if any, and the applicable component of the Department sponsoring the collection:* Form number: None. Office of Diversion Control, Drug Enforcement Administration, U.S. Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:*

Primary: Business or other for-profit.

Other: None.

Abstract: This information collection permits the Drug Enforcement Administration to monitor the volume and availability of domestically manufactured listed chemicals. These listed chemicals may be subject to diversion for the illicit production of controlled substances. This information collection is required by law.

(5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond: It is estimated that there are one hundred (100) total respondents for

this information collection. One hundred (100) persons respond at 1 hour per response.

(6) An estimate of the total public burden (in hours) associated with the collection: It is estimated that there are 100 annual burden hours associated with this collection.

If additional information is required contact: Jerri Murray, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE., Room 3W–1407B, Washington, DC 20530.

Dated: January 24, 2013.

Jerri Murray,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2013–01874 Filed 1–29–13; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Application; PCAS-Nanosyn, LLC

Pursuant to § 1301.33(a), Title 21 of the Code of Federal Regulations (CFR), this is notice that on December 4, 2012, PCAS-Nanosyn, LLC, 3331–B Industrial Drive, Santa Rosa, California 95403, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of the following basic classes of controlled substances:

Drug	Schedule
Amphetamine (1100)	II
Methamphetamine (1105)	II
Methylphenidate (1724)	II
Phencyclidine (7471)	II
Codeine (9050)	II
Oxycodone (9143)	II
Hydromorphone (9150)	II
Hydrocodone (9193)	II
Methadone (9250)	II
Morphine (9300)	II
Oxymorphone (9652)	II
Fentanyl (9801)	II

The company is a contract manufacturer. At the request of the company's customers, it manufactures derivatives of controlled substances in bulk form only.

Any other such applicant, and any person who is presently registered with DEA to manufacture such substances, may file comments or objections to the issuance of the proposed registration pursuant to 21 CFR 1301.33(a).

Any such written comments or objections should be addressed, in quintuplicate, to the Drug Enforcement Administration, Office of Diversion Control, Federal Register Representative (ODL), 8701 Morrissette Drive, Springfield, Virginia 22152; and must be filed no later than April 1, 2013.

Dated: January 15, 2013.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 2013–01864 Filed 1–29–13; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2012–0040]

The Standard on 4,4′-Methylenedianiline for General Industry; Extension of the Office of Management and Budget's (OMB) Approval of Information Collection (Paperwork) Requirements

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Request for public comments.

SUMMARY: OSHA solicits public comments concerning its proposal to extend the Office of Management and Budget's (OMB) approval of the information collection requirements specified in the Standard on 4,4′-Methylenedianiline for General Industry (29 CFR 1910.1050).

DATES: Comments must be submitted (postmarked, sent, or received) by April 1, 2013.

ADDRESSES:

Electronically: You may submit comments and attachments electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments.

Facsimile: If your comments, including attachments, are not longer than 10 pages, you may fax them to the OSHA Docket Office at (202) 693–1648.

Mail, hand delivery, express mail, messenger, or courier service: When using this method, you must submit a copy of your comments and attachments to the OSHA Docket Office, Docket No. OSHA–2012–0040, Occupational Safety and Health Administration, U.S. Department of Labor, Room N–2625, 200 Constitution Avenue NW., Washington, DC 20210. Deliveries (hand, express mail, messenger, and courier service) are accepted during the Department of Labor's and Docket Office's normal business hours, 8:15 a.m. to 4:45 p.m., e.t.

Instructions: All submissions must include the Agency name and OSHA docket number (OSHA–2012–0040) for the Information Collection Request (ICR). All comments, including any personal information you provide, are placed in the public docket without change, and may be made available online at *http://www.regulations.gov.* For further information on submitting comments see the ''Public Participation'' heading in the section of this notice titled **SUPPLEMENTARY INFORMATION.**

Docket: To read or download comments or other material in the docket, go to *http://www.regulations.gov* or the OSHA Docket Office at the address above. All documents in the docket (including this **Federal Register** notice) are listed in the *http://www.regulations.gov* index; however, some information (e.g., copyrighted material) is not publicly available to read or download from the Web site. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. You may also contact Theda Kenney at the address below to obtain a copy of the ICR.

FOR FURTHER INFORMATION CONTACT: Theda Kenney or Todd Owen, Directorate of Standards and Guidance, OSHA, U.S. Department of Labor, Room N–3609, 200 Constitution Avenue NW., Washington, DC 20210; telephone (202) 693–2222.

SUPPLEMENTARY INFORMATION:

I. Background

The Department of Labor, as part of its continuing effort to reduce paperwork and respondent (i.e., employer) burden, conducts a preclearance consultation program to provide the public with an opportunity to comment on proposed and continuing information collection requirements in accord with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506(c)(2)(A)). This program ensures that information is in the desired format, reporting burden (time and costs) is minimal, collection instruments are clearly understood, and OSHA's estimate of the information collection burden is accurate. The Occupational Safety and Health Act of 1970 (the OSH Act) (29 U.S.C. 651 *et seq.*) authorizes information collection by employers as necessary or appropriate for enforcement of the OSH Act or for developing information regarding the causes and prevention of occupational injuries, illnesses, and accidents (29 U.S.C. 657). The OSH Act also requires that OSHA obtain such information with minimum burden upon employers, especially those operating small businesses, and to reduce to the maximum extent feasible unnecessary duplication of efforts in obtaining information (29 U.S.C. 657).

The information collection requirements specified in the 4,4'-Methylenedianiline Standard for General Industry (the ''MDA Standard'') (29 CFR 1910.1050) protect workers from the adverse health effects that may result from their exposure to MDA, including cancer, liver and skin disease. The major paperwork requirements specify that employers must perform initial, periodic, and additional exposure monitoring; notify each worker in writing of their results as soon as possible but no longer than 5 days after receiving exposure monitoring results; and routinely inspect the hands, face, and forearms of each worker potentially exposed to MDA for signs of dermal exposure to MDA. Employers must also: establish a written compliance program; institute a respiratory protection program in accordance with 29 CFR 1910.134 (OSHA's Respiratory Protection Standard); and develop a written emergency plan for any construction operation that could have an emergency (i.e., an unexpected and potentially hazardous release of MDA).

Employers must label any material or products containing MDA, including containers used to store MDA-contaminated protective clothing and equipment. They also must inform personnel who launder MDA-contaminated clothing of the requirement to prevent release of MDA, while personnel who launder or clean MDA-contaminated protective clothing or equipment must receive information about the potentially harmful effects of MDA. In addition, employers are to post warning signs at entrances or accessways to regulated areas, as well as train workers exposed to MDA at the time of their initial assignment, and at least annually thereafter.

Other paperwork provisions of the MDA Standard require employers to provide workers with medical examinations, including initial, periodic, emergency and follow-up examinations. As part of the medical surveillance program, employers must ensure that the examining physician receives specific written information, and that they obtain from the physician a written opinion regarding the worker's medical results and exposure limitations.

The MDA Standard also specifies that employers are to establish and maintain exposure monitoring and medical surveillance records for each worker who is subject to these respective requirements, make any required record available to OSHA compliance officers and the National Institute for Occupational Safety and Health (NIOSH) for examination and copying, and provide exposure monitoring and medical surveillance records to workers and their designated representatives. Finally, employers who cease to do business within the period specified for retaining exposure monitoring and medical surveillance records, and who have no successor employer, must notify NIOSH at least 90 days before disposing of the records and transmit the records to NIOSH if so requested.

II. Special Issues for Comment

OSHA has a particular interest in comments on the following issues:

- Whether the proposed information collection requirements are necessary for the proper performance of the Agency's functions, including whether the information is useful;
- The accuracy of OSHA's estimate of the burden (time and costs) of the information collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and
- Ways to minimize the burden on employers who must comply; for example, by using automated or other technological information collection and transmission techniques.

III. Proposed Actions

The Agency is requesting an adjustment of 73 burden hours from 297 to 370 hours. This adjustment is the result of increasing the job hire rate from 10% to 25.6%, resulting in an increased number of workers receiving initial medical examinations, being trained, and requesting access to records. Also, there was an increase in the methods of compliance section.

The Agency will summarize the comments submitted in response to this notice and will include this summary in the request to OMB to extend the approval of the information collection requirements contained in the Standard.

Type of Review: Extension of a currently approved collection.

Title: 4,4'—Methylenedialine Standard for General Industry (29 CFR 1910.1050).

OMB Control Number: 1218–0184.

Affected Public: Business or other for-profits; Not-for-profit organizations; Federal Government; State, Local, or Tribal Government.

Number of Respondents: 11.

Total Responses: 659.

Frequency: On occasion.

Average Time per Response: Varies from 5 minutes (.08 hour) for employers to provide information to the physician to 2 hours for initial monitoring.

Estimated Total Burden Hours: 370.

Estimated Cost (Operation and Maintenance): $27,982.

IV. Public Participation—Submission of Comments on This Notice and Internet Access to Comments and Submissions

You may submit comments in response to this document as follows: (1) Electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal; (2) by facsimile (fax); or (3) by hard copy. All comments, attachments, and other material must identify the Agency name and the OSHA docket number for the ICR (Docket No. OSHA–2012–0040). You may supplement electronic submissions by uploading document files electronically. If you wish to mail additional materials in reference to an electronic or facsimile submission, you must submit them to the OSHA Docket Office (see the section of this notice titled **ADDRESSES**). The additional materials must clearly identify your electronic comments by your name, date, and the docket number so the Agency can attach them to your comments.

Because of security procedures, the use of regular mail may cause a significant delay in the receipt of comments. For information about security procedures concerning the delivery of materials by hand, express delivery, messenger, or courier service, please contact the OSHA Docket Office at (202) 693–2350, (TTY (877) 889–5627). Comments and submissions are posted without change at *http://www.regulations.gov.* Therefore, OSHA cautions commenters about submitting personal information such as social security numbers and dates of birth. Although all submissions are listed in the *http://www.regulations.gov* index, some information (e.g., copyrighted material) is not publicly available to read or download through this Web site.

All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. Information on using the *http://www.regulations.gov* Web site to submit comments and access the docket is available at the Web site's ''User Tips'' link. Contact the OSHA Docket Office for information about materials not available through the Web site, and for assistance in using the Internet to locate docket submissions.

V. Authority and Signature

David Michaels, Ph.D., MPH, Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506 *et seq.*) and Secretary of Labor's Order No. 1–2012 (77 FR 3912).

David Michaels,

Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2013–01968 Filed 1–29–13; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2013–0004]

Personal Protective Equipment for General Industry; Extension of the Office of Management and Budget's (OMB) Approval of Information Collection (Paperwork) Requirements

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Request for public comments.

SUMMARY: OSHA solicits public comments concerning its proposal to extend the Office of Management and Budget's (OMB) approval of the information collection requirements contained in the Personal Protective Equipment Standard for General Industry (29 CFR part 1910, subpart I).

DATES: Comments must be submitted (postmarked, sent, or received) by April 1, 2013.

ADDRESSES:

Electronically: You may submit comments and attachments electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments.

Facsimile: If your comments, including attachments, are not longer than 10 pages, you may fax them to the OSHA Docket Office at (202) 693–1648.

Mail, hand delivery, express mail, messenger, or courier service: When using this method, you must submit a copy of your comments and attachments to the OSHA Docket Office, Docket No. OSHA–2013–0004, U.S. Department of Labor, Occupational Safety and Health Administration, Room N–2625, 200 Constitution Avenue NW., Washington, DC 20210. Deliveries (*hand, express mail, messenger, and courier service*) are accepted during the Department of Labor's and Docket Office's normal business hours, 8:15 a.m. to 4:45 p.m., e.t.

Instructions: All submissions must include the Agency name and OSHA docket number for this Information Collection Request (ICR) (OSHA–2013–0004). All comments, including any personal information you provide, are placed in the public docket without change, and may be made available online at *http://www.regulations.gov.* For further information on submitting comments see the ''Public Participation'' heading in the section of this notice titled **SUPPLEMENTARY INFORMATION.**

Docket: To read or download comments or other material in the docket, go to *http://www.regulations.gov* or the OSHA Docket Office at the address above. All documents in the docket (including this **Federal Register** notice) are listed in the *http://www.regulations.gov* index; however, some information (e.g., copyrighted material) is not publicly available to read or download through the Web site. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. You may contact Theda Kenney at the address below to obtain a copy of the ICR.

FOR FURTHER INFORMATION CONTACT: Theda Kenney or Todd Owen, Directorate of Standards and Guidance, OSHA, U.S. Department of Labor, Room N–3609, 200 Constitution Avenue NW., Washington, DC 20210; telephone (202) 693–2222.

SUPPLEMENTARY INFORMATION:

I. Background

The Department of Labor, as part of its continuing effort to reduce paperwork and respondent (i.e., employer) burden, conducts a preclearance consultation program to provide the public with an opportunity to comment on proposed and continuing information collection requirements in accordance with the Paperwork Reduction Act of 1995 (PRA–95) (44 U.S.C. 3506(c)(2)(A)).

This program ensures that information is in the desired format, reporting burden (time and costs) is minimal, collection instruments are clearly understood, and OSHA's estimate of the information collection burden is accurate. The Occupational Safety and Health Act of 1970 (the OSH Act) (29 U.S.C. 651 *et seq.*) authorizes information collection by employers as necessary or appropriate for enforcement of the OSH Act or for developing information regarding the causes and prevention of occupational injuries, illnesses, and accidents (29 U.S.C. 657).

Subpart I specifies several paperwork requirements. The following describes the information collection requirements in subpart I and addresses who will use the information.

Hazard Assessment and Verification (§ 1910.132(d))

Paragraph (d)(1) requires employers to perform a hazard assessment of the workplace to determine if hazards are present, or likely to be present, that make the use of personal protective equipment (PPE) necessary. Where such hazards are present, employers must communicate PPE selection decisions to each affected employee (paragraph (d)(1)(ii)).

Paragraph (d)(2) requires employers to certify in writing that they have performed the hazard assessment. The certification must include the date and the person certifying that the hazard assessment was conducted, and the identification of the workplace evaluated (area or location).

The hazard assessment assures that potential workplace hazards necessitating PPE use have been identified and that the PPE selected is appropriate for those hazards and the affected employees. The required certification of the hazard assessment verifies that the required hazard assessment was conducted.

II. Special Issues for Comment

OSHA has a particular interest in comments on the following issues:

- Whether the proposed information collection requirements are necessary for the proper performance of the Agency's functions, including whether the information is useful;
- The accuracy of OSHA's estimate of the burden (time and costs) of the information collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and
- Ways to minimize the burden on employers who must comply; for example, by using automated or other technological information collection and transmission techniques.

III. Proposed Actions

OSHA is requesting that OMB extend its approval of the information collection requirements contained in the Personal Protective Equipment Standard for General Industry (29 CFR part 1910, subpart I). OSHA is proposing that the burden hours in the currently approved information collection remain the same. There has been no change in the data for the number of firms and workers affected by the Standard.

The Agency will summarize the comments submitted in response to this notice and will include this summary in the request to OMB.

Type of Review: Extension of a currently approved collection.

Title: Personal Protective Equipment (PPE) for General Industry (29 CFR part 1910, subpart I).

OMB Control Number: 1218–0205.

Affected Public: Business or other for-profits; Federal Government; State, Local, or Tribal Government.

Number of Respondents: 3,500,000.

Frequency of Response: On occasion.

Average Time per Response: Varies from one minute (.02 hour) to maintain a training certification record to 29 hours to perform a hazard assessment.

Estimated Total Burden Hours: 1,696,991.

Estimated Cost (Operation and Maintenance): $0.

IV. Public Participation—Submission of Comments on this Notice and Internet Access to Comments and Submissions

You may submit comments in response to this document as follows: (1) Electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal; (2) by facsimile (fax); or (3) by hard copy. All comments, attachments, and other material must identify the Agency name and the OSHA docket number for the ICR (Docket No. OSHA–2013–0004). You may supplement electronic submissions by uploading document files electronically. If you wish to mail additional materials in reference to an electronic or facsimile submission, you must submit them to the OSHA Docket Office (see the section of this notice titled **ADDRESSES**). The additional materials must clearly identify your electronic comments by your name, date, and the docket number so the Agency can attach them to your comments.

Because of security procedures, the use of regular mail may cause a significant delay in the receipt of comments. For information about security procedures concerning the delivery of materials by hand, express delivery, messenger, or courier service, please contact the OSHA Docket Office at (202) 693–2350, (TTY (877) 889–5627).

Comments and submissions are posted without change at *http://www.regulations.gov.* Therefore, OSHA cautions commenters about submitting personal information such as social security numbers and dates of birth. Although all submissions are listed in the *http://www.regulations.gov* index, some information (e.g., copyrighted material) is not publicly available to read or download through this Web site. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. Information on using the *http://www.regulations.gov* Web site to submit comments and access the docket is available at the Web site's ''User Tips'' link. Contact the OSHA Docket Office for information about materials not available through the Web site, and for assistance in using the Internet to locate docket submissions.

V. Authority and Signature

David Michaels, Ph.D., MPH, Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506 *et seq.*) and Secretary of Labor's Order No. 1–2012 (77 FR 3912).

David Michaels,

Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2013–01860 Filed 1–29–13; 8:45 am]

BILLING CODE 4510–26–P

OFFICE OF MANAGEMENT AND BUDGET

2012 Statutory Pay-As-You-Go Act Annual Report

AGENCY: Office of Management and Budget (OMB).

ACTION: Notice.

SUMMARY: This report is being published as required by the Statutory Pay-As-You-Go (PAYGO) Act of 2010, 2 U.S.C. 931 et seq. The Act requires that OMB issue (1) an annual report as specified in 2 U.S.C. 934(a) and (2) a sequestration order, if necessary.

FOR FURTHER INFORMATION CONTACT: Patrick Locke. 202–395–3672.

SUPPLEMENTARY INFORMATION: This report and additional information about the PAYGO Act can be found at *http://www.whitehouse.gov/omb/paygo_default.*

Authority: 2 U.S.C. 934.

Courtney Timberlake,

Assistant Director for Budget.

This Report is being published pursuant to section 5 of the Statutory Pay-As-You-Go (PAYGO) Act of 2010, Public Law 111–139, 124 Stat. 8, 2 U.S.C. 934, which requires that OMB issue an annual PAYGO report, including a sequestration order if necessary, no later than 14 working days after the end of a congressional session.

This Report describes the budgetary effects of all legislation enacted during the second session of the 112th Congress and presents the 5-year and 10-year PAYGO scorecards maintained by OMB. Because neither the 5-year nor 10-year scorecard shows a debit for the budget year, which for purposes of this Report is fiscal year 2013,[1] a sequestration order under subsection 5(b) of the PAYGO Act, 2 U.S.C 934(b), is not necessary.

There was no legislation designated as emergency legislation under section 4(g) of the PAYGO Act, 2 U.S.C. 933(g) enacted during the second session of the 112th Congress. In addition, the scorecards include no current policy adjustments made under section 4(c) of the PAYGO Act, 2 U.S.C. 933(c), for legislation enacted during the second session of the 112th Congress. For these reasons, the Report does not contain any information about emergency legislation or a description of any current policy adjustments.

I. PAYGO Legislation with Budgetary Effects

PAYGO legislation is authorizing legislation that affects direct spending or revenues; and appropriations legislation that affects direct spending in the years beyond the budget year or affects revenues in any year.[2] For a more complete description of the Statutory PAYGO Act, see the OMB Web site, *http://www.whitehouse.gov/omb/paygo_description,* and Chapter 14, ''Budget Process,'' of the *Analytical Perspectives* volume of the 2013 Budget, *http://www.gpo.gov/fdsys/pkg/BUDGET-2013-PER/pdf/BUDGET-2013-PER.pdf.*

The 5-year PAYGO scorecard shows that PAYGO legislation enacted in the second session of the 112th Congress was estimated to have PAYGO budgetary effects that decreased the deficit by $839 million each year from 2013 through 2017.[3] Balances carried

[1] References to years on the PAYGO scorecards are to fiscal years.

[2] Provisions in appropriations acts that affect direct spending in the years beyond the budget year (also known as ''outyears'') or affect revenues in any year are scorable for the purposes of the PAYGO scorecards except if the provisions produce outlay changes that net to zero over the current year, budget year, and the four subsequent years. As specified in section 3 of the Statutory PAYGO Act, off-budget effects are not counted as budgetary effects. Off-budget effects refer to effects on the Social Security trust funds (Old-Age and Survivors Insurance and Disability Insurance) and the Postal Service.

[3] As provided in section 4(d) of the PAYGO Act, 2 U.S.C. 933(d), budgetary effects on the PAYGO

Continued

over from prior sessions of the Congress further increase the savings being shown on the 5-year scorecard in years 2013 through 2015 but would increase the deficit in 2016. The 10-year PAYGO scorecard shows that PAYGO legislation for the second session of the 112th Congress decreased the deficit by $1,134 million each year from 2013 through 2022. Balances from prior sessions further increase the savings in years 2013 through 2021.

In the second session of the 112th Congress, 56 laws were enacted that were determined to constitute PAYGO legislation. Of the 56 enacted PAYGO laws, two laws were estimated to have PAYGO budgetary effects (costs or savings) in excess of $500 million over one or both of the 5-year or 10-year PAYGO windows. These were:

- An Act to extend the National Flood Insurance Program, and for other purposes, Public Law 112–123; and
- National Defense Authorization Act for Fiscal Year 2013, Public Law 112–239.

In addition, 8 laws were enacted that were estimated to have PAYGO budgetary effects (costs or savings) greater than zero but less than $500 million over one or both of the 5-year or 10-year PAYGO windows. These acts were:

- FAA Modernization and Reform Act of 2012, Public Law 112–95;
- St. Croix River Crossing Project Authorization Act, Public Law 112–100;
- Honoring America's Veterans and Caring for Camp Lejeune Families Act of 2012, Public Law 112–154;
- An Act to amend the African Growth and Opportunity Act to extend the third-country fabric program and to add South Sudan to the list of countries eligible for designation under that Act, to make technical corrections to the Harmonized Tariff Schedule of the United States relating to the textile and apparel rules of origin for the Dominican Republic-Central America-United States Free Trade Agreement, to approve the renewal of import restrictions contained in the Burmese Freedom and Democracy Act of 2003, and for other purposes, Public Law 112–163;
- Lions Clubs International Century of Service Commemorative Coin Act, Public Law 112–181;
- Medicare IVIG Access and Strengthening Medicare and Repaying Taxpayers Act of 2012, Public Law 112–242;
- Dignified Burial and Other Veterans' Benefits Improvement Act of 2012, Public Law 112–260; and
- An Act to amend title 5, United States Code, to make clear that accounts in the Thrift Savings Fund are subject to certain Federal tax levies, Public Law 112–267.

Finally, in addition to the laws identified above, 46 laws enacted in the second session were estimated to have negligible budgetary effects. The budgetary effects of these laws were estimated to fall below $500,000 in each year and in the aggregate from 2013 through 2022.

II. Budgetary Effects Excluded From the Scorecard Balances

Three laws enacted in the second session of the 112th Congress had estimated budgetary effects on direct spending and revenues that are not included in the calculations for the PAYGO scorecards due to exclusions required by law. Public Law 112–96, the Middle Class Tax Relief and Job Creation Act of 2012; Public Law 112–141, the Moving Ahead for Progress in the 21st Century Act; and Public Law 112–240, the American Taxpayer Relief Act of 2012, all contain provisions that state ''[t]he budgetary effects of this Act shall not be entered on either PAYGO scorecard maintained pursuant to section 4(d) of the Statutory Pay-As-You-Go Act of 2010.'' For this reason, the budgetary effects of these laws are not included in the PAYGO scorecards.

III. PAYGO Scorecards

STATUTORY PAY-AS-YOU-GO SCORECARDS

[in millions of dollars, negative amounts portray decreases in deficits]

	2013	2014	2015	2016	2017					
Second Session of the 112th Congress	−839	−839	−839	−839	−839					
Balances from Previous Sessions	*−9,155*	*−9,155*	*−9,155*	*1,880*	*0*					
Five-year PAYGO Scorecard	−9,994	−9,994	−9,994	1,041	−839					
	2013	**2014**	**2015**	**2016**	**2017**	**2018**	**2019**	**2020**	**2021**	**2022**
Second Session of the 112th Congress	−1,134	−1,134	−1,134	−1,134	−1,134	−1,134	−1,134	−1,134	−1,134	−1,134
Balances from Previous Sessions	*−7,081*	*−7,081*	*−7,081*	*−7,081*	*−7,081*	*−7,081*	*−7,081*	*−7,081*	*−710*	*0*
Ten-year PAYGO Scorecard	−8,215	−8,215	−8,215	−8,215	−8,215	−8,215	−8,215	−8,215	−1,844	−1,134

The total net budgetary effects of all PAYGO legislation enacted during the second session of the 112th Congress on the five-year scorecard reduces the deficit by $4,196 million. This total is averaged over the years 2013 to 2017 on

scorecards are based on congressional estimates for bills including a reference to a congressional estimate in the Congressional Record, and for which such a reference is indeed present in the Record. Absent such a congressional cost estimate, OMB is required to use its own estimate for the scorecard. Only one bill enacted during the second session of the 112th Congress (Pub. L. 112–154) had such a congressional estimate and therefore OMB was required to provide an estimate for all other PAYGO laws enacted during the session.

the 5-year PAYGO scorecard, resulting in a savings of $839 million in each year. Balances carried over from prior sessions of the Congress add to these savings in 2013 through 2015, resulting in a savings of $9,994 million each year in 2013 through 2015. However, the balance carried over for 2016 reduces the 2016 savings by $1,880 million, which results in a net cost on the 5-year PAYGO scorecard in 2016 of $1,041 million. The five-year PAYGO window extended only through 2016 in the first session of the 112th Congress, so there were no five-year balances to carry over into 2017.

The total 10-year net impact of legislation enacted during the second session of the 112th Congress was a savings of $11,343 million. The 10-year PAYGO scorecard shows the total net impact averaged over the 10-year period, resulting in $1,134 million in savings every year. Balances from prior sessions increase the savings to $8,215 million in 2013 through 2020 and to $1,844 million in 2021.

IV. Sequestration Order

As shown on the scorecards, the budgetary effects of PAYGO legislation enacted in the second session of the 112th Congress, combined with the balances left on the scorecard from previous sessions of the Congress, resulted in net savings on both the 5-year and the 10-year scorecard in the budget year, which is 2013 for the purposes of this Report. Because the costs for the budget year, as shown on the scorecards, do not exceed savings for the budget year, there is no ''debit'' on either scorecard under section 3 of the PAYGO Act, 2 U.S.C. 932, and there is no need for a sequestration order.

The savings shown on the scorecards for 2013 will be removed from the scorecards that are used to record the budgetary effects of PAYGO legislation enacted in the first session of the 113th Congress. The totals shown in 2014 through 2022 will remain on the scorecards and will be used in determining whether a sequestration order will be necessary at the end of future sessions of the Congress.

[FR Doc. 2013–01896 Filed 1–29–13; 8:45 am]

BILLING CODE P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Records Schedules; Availability and Request for Comments

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice of availability of proposed records schedules; request for comments.

SUMMARY: The National Archives and Records Administration (NARA) publishes notice at least once monthly of certain Federal agency requests for records disposition authority (records schedules). Once approved by NARA, records schedules provide mandatory instructions on what happens to records when no longer needed for current Government business. They authorize the preservation of records of continuing value in the National Archives of the United States and the destruction, after a specified period, of records lacking administrative, legal, research, or other value. Notice is published for records schedules in which agencies propose to destroy records not previously authorized for disposal or reduce the retention period of records already authorized for disposal. NARA invites public comments on such records schedules, as required by 44 U.S.C. 3303a(a).

DATES: Requests for copies must be received in writing on or before March 1, 2013. Once the appraisal of the records is completed, NARA will send a copy of the schedule. NARA staff usually prepare appraisal memorandums that contain additional information concerning the records covered by a proposed schedule. These, too, may be requested and will be provided once the appraisal is completed. Requesters will be given 30 days to submit comments.

ADDRESSES: You may request a copy of any records schedule identified in this notice by contacting Records Management Services (ACNR) using one of the following means:

Mail: NARA (ACNR), 8601 Adelphi Road, College Park, MD 20740–6001

Email: *request.schedule@nara.gov.*

FAX: 301–837–3698

Requesters must cite the control number, which appears in parentheses after the name of the agency which submitted the schedule, and must provide a mailing address. Those who desire appraisal reports should so indicate in their request.

FOR FURTHER INFORMATION CONTACT: Margaret Hawkins, Director, Records Management Services (ACNR), National Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740–6001. Telephone: (301) 837–1799. Email: *request.schedule@nara.gov.*

SUPPLEMENTARY INFORMATION: Each year Federal agencies create billions of records on paper, film, magnetic tape, and other media. To control this accumulation, agency records managers prepare schedules proposing retention periods for records and submit these schedules for NARA's approval, using the Standard Form (SF) 115, Request for Records Disposition Authority. These schedules provide for the timely transfer into the National Archives of historically valuable records and authorize the disposal of all other records after the agency no longer needs them to conduct its business. Some schedules are comprehensive and cover all the records of an agency or one of its major subdivisions. Most schedules, however, cover records of only one office or program or a few series of records. Many of these update previously approved schedules, and some include records proposed as permanent.

The schedules listed in this notice are media neutral unless specified otherwise. An item in a schedule is media neutral when the disposition instructions may be applied to records regardless of the medium in which the records are created and maintained. Items included in schedules submitted to NARA on or after December 17, 2007, are media neutral unless the item is limited to a specific medium. (See 36 CFR 1225.12(e).)

No Federal records are authorized for destruction without the approval of the Archivist of the United States. This approval is granted only after a thorough consideration of their administrative use by the agency of origin, the rights of the Government and of private persons directly affected by the Government's activities, and whether or not they have historical or other value.

Besides identifying the Federal agencies and any subdivisions requesting disposition authority, this public notice lists the organizational unit(s) accumulating the records or indicates agency-wide applicability in the case of schedules that cover records that may be accumulated throughout an agency. This notice provides the control number assigned to each schedule, the total number of schedule items, and the number of temporary items (the records proposed for destruction). It also includes a brief description of the temporary records. The records schedule itself contains a full description of the records at the file unit level as well as their disposition. If NARA staff has prepared an appraisal memorandum for the schedule, it too includes information about the records. Further information about the disposition process is available on request.

Schedules Pending

1. Department of the Army, Agency-wide (N1–AU–10–8, 1 item, 1 temporary item). Master files of an electronic system that contains manpower and equipment allocation data.

2. Department of the Army, Agency-wide (N1–AU–10–10, 2 items, 2 temporary items). Master files of electronic systems used to track personnel physical disability case files and temporary disability retirement listings.

3. Department of the Army, Agency-wide (N1–AU–10–92, 1 item, 1 temporary item). Master files of an electronic system used to track comments and changes to construction project designs.

4. Department of the Army, Agency-wide (N1–AU–10–96, 1 item, 1 temporary item). Master files of an electronic system used to track real property planning, maintenance, and disposal.

5. Department of the Army, Agency-wide (N1–AU–10–100, 1 item, 1 temporary item). Master files of an electronic system used to track criminal investigation case files.

6. Department of Commerce, Bureau of the Census (N1–29–10–3, 18 items, 15 temporary items). Master files, inputs, and system documentation of an electronic system used to manage data collected for economic and island area surveys, including preliminary data. Proposed for permanent retention are final survey contents, final products and summary information, and data documentation.

7. Department of Commerce, National Oceanic and Atmospheric Administration (N1–370–11–2, 14 items, 4 temporary items). Textual weather observation records and weather station history files that have been converted to an electronic medium and verified. Proposed for permanent retention are textual and digitized observations of national and international weather conditions, weather station history files, publications, and an index for scanned records.

8. Department of Defense, Office of the Secretary of Defense, (DAA–0330–2012–0006, 2 items, 2 temporary items). Records documenting offers of gifts and donations to the Department.

9. Department of Defense, Office of the Secretary of Defense (DAA–0330–2013–0001, 1 item, 1 temporary item.). Records documenting eligibility and participation in the Women Infant and Children Overseas Program.

10. Department of Energy, Office of Civilian Radioactive Waste Management (N1–434–11–2, 1 temporary item). Administrative records and copies of documents related to a nuclear waste disposal facility application.

11. Department of Health and Human Services, Centers for Medicare & Medicaid Services (DAA–0440–2012–0016, 2 items, 1 temporary item). Duplicate versions of publications issued by the Office of Communications. Proposed for permanent retention are the official recordkeeping copies of each published product.

12. Department of Health and Human Services, Centers for Medicare & Medicaid Services (DAA–0440–2012–0017, 3 items, 1 temporary item). Records related to the administration and implementation of elements of the Patient Protection and Affordable Care Act. Proposed for permanent retention are enrollment records and actuarial models related to pre-existing conditions.

13. Department of Homeland Security, U.S. Citizenship and Immigration Services (N1–566–12–3, 1 item, 1 temporary item). Hardcopy forms used to request permission to immigrate or adjust immigrant status scanned into an electronic document management system.

14. Department of Justice, Civil Rights Division (DAA–0060–2012–0027, 1 item, 1 temporary item). Survey information used for quality assurance.

15. Department of Justice, Department-wide (DAA–0060–2012–0005, 1 item, 1 temporary item). Component- and office-level organizational charts which document the structure and function of the organization.

16. Department of Justice, Department-wide (DAA–0060–2012–0023 1 item, 1 temporary item). Annual confirmation on the status of attorneys' active bar membership.

17. Department of Justice, Federal Bureau of Investigation (N1–65–13–1, 2 items, 1 temporary item). Records of miscellaneous case files consisting of routine information requests, routine investigations into civil matters, and crank mail. Proposed for permanent retention are significant cases are individually identified by NARA.

18. Department of Justice, Office of Attorney Recruitment and Management (DAA–0060–2012–0026 1 item, 1 temporary item). Annual report on the status of attorneys' bar certification.

19. Department of Justice, Office of the Inspector General (DAA–0060–2012–0011, 9 items, 4 temporary items). Subject files and correspondence of senior officials not maintained under records of the Inspector General which are proposed for permanent retention; working files; and internal office newsletters. Proposed for permanent retention are records of the Inspector General and Deputy Inspector General; records documenting testimony before Congress; semi-annual reports to Congress; and press releases.

20. Consumer Financial Protection Bureau, Agency-wide (N1–587–12–6, 14 items, 14 temporary items). Administrative and non-policy records common to most offices as well as reference copies of significant records maintained elsewhere.

21. Environmental Protection Agency, Agency-wide (DAA–0412–2012–0006, 4 items, 4 temporary items). Records related to the acquisition and management of motor vehicles, equipment, and other personal property.

22. Environmental Protection Agency, Agency-wide (DAA–0412–2013–0002, 1 item, 1 temporary item). Reduction in retention period for input forms to the Toxics Release Inventory System.

23. Federal Communications Commission, Media Bureau (N1–173–11–4, 4 items, 4 temporary items). Records of local rate orders concerning cable programming service tier rates submitted by cable operators, including appeals files and associated tracking log.

24. Office of the Director of National Intelligence, Civil Liberties and Privacy Office (N1–576–11–7, 13 items, 9 temporary items). Records include internal briefings, Web site records, agency copies of System of Records Notices, non-substantive drafts, and reference materials. Also included are records related to policy development and complaint files typically covered by the General Records Schedule. Proposed for permanent retention are compliance and assessment reports, community level board records, external speeches, and substantive working papers.

Dated: January 24, 2013.

Paul M. Wester, Jr.,

Chief Records Officer for the U.S. Government.

[FR Doc. 2013–01967 Filed 1–29–13; 8:45 am]

BILLING CODE 7515–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 070–3098; NRC–2011–0081]

Notice of Consideration of Approval of Application Regarding Proposed Indirect Transfer of Control of the Construction Authorization for the Mixed Oxide Fuel Fabrication Facility in Aiken, SC; Correction

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice; correction.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is correcting a notice that was published in the **Federal Register** on October 25, 2012 (77 FR 65208), regarding NRC consideration of an application for approval of an indirect transfer of control regarding Construction Authorization CAMOX–001. This action is necessary to correct the corporate name of the proposed transferee.

DATES: The correction is effective on January 30, 2013.

FOR FURTHER INFORMATION CONTACT: David Tiktinsky, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–492–3229; email: *David.Tiktinsky@nrc.gov.*

SUPPLEMENTARY INFORMATION: On October 25, 2012, the NRC published a notice in the **Federal Register** regarding NRC consideration of an application for approval of an indirect transfer of control regarding Construction Authorization CAMOX–001 (77 FR 65208). This document is necessary to correct a typographical error in the corporate name of the proposed transferee. On page 65208, in the second column, in the second full paragraph, the name of the proposed transferee is changed from ''Chicago Bridge and Iron Company NV Shaw (CB&I Shaw)'' to ''Chicago Bridge and Iron Company NV (CB&I).''

Dated at Rockville, Maryland, this 25th day of January 2013.

For the Nuclear Regulatory Commission.

Leslie Terry,

Acting Chief, Rules, Announcements, and Directives Branch, Division of Administrative Services, Office of Administration.

[FR Doc. 2013–01959 Filed 1–29–13; 8:45 am]

BILLING CODE 7590–01–P

OFFICE OF PERSONNEL MANAGEMENT

Submission for Renewal: New Information Collection, Fingerprint Chart Standard Form 87 (SF 87)

AGENCY: U.S. Office of Personnel Management.

ACTION: 30-Day notice and request for comments.

SUMMARY: Federal Investigative Services (FIS), U.S. Office of Personnel Management (OPM) offers the general public and other federal agencies the opportunity to comment on a new information collection request (ICR), Office of Management and Budget (OMB) Control No. 3206–0150, for the Fingerprint Chart Standard Form 87 (SF 87). As required by the Paperwork Reduction Act of 1995, (Pub. L. 104–13, 44 U.S.C. chapter 35) as amended by the Clinger-Cohen Act (Pub. L. 104–106), OPM is soliciting comments for this collection. The Office of Management and Budget (OMB) is particularly interested in comments that:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
3. Enhance the quality, utility, and clarity of the information to be collected; and
4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

DATES: Comments are encouraged and will be accepted until March 1, 2013. This process is conducted in accordance with 5 CFR 1320.1.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street NW., Washington, DC 20503, Attention: Desk Officer for the Office of Personnel Management or sent via electronic mail to *oira_submission@opm.eop.gov* or faxed to (202) 395–6974; and Federal Investigative Service, U.S Office of Personnel Management, 1900 E Street NW., Washington, DC 20415, Attention: Donna McLeod or sent via electronic mail to *FISFormsComments@opm.gov*.

FOR FURTHER INFORMATION CONTACT: A copy of this ICR, with applicable supporting documentation, may be obtained by contacting Federal Investigative Services, U.S. Office of Personnel Management, 1900 E Street NW., Washington, DC 20415, Attention: Donna McLeod or sent via electronic mail to *FISFormsComments@opm.gov*.

SUPPLEMENTARY INFORMATION: The SF 87 is a fingerprint card, which is utilized to conduct a national criminal history check, which is a component of a background investigation. The SF 87 is completed by applicants who are under consideration for Federal employment; by Federal employees, to determine whether they should be retained in such employment; by individuals being considered to perform work for the Federal Government under a Government contract or to continue such work; and by persons seeking long-term access to Federal facilities and systems. The SF 87 fingerprint chart is used in background investigations to help establish facts required to determine, for example, whether the subject of the investigation should be adjudicated to be eligible for logical and physical access to Government facilities and systems; suitable or fit for Federal employment; fit to perform work on behalf of the Federal Government under a Government contract; eligible to hold a position that is sensitive for national security reasons; or eligible for access to classified information. The SF 87 form is utilized only when a hardcopy fingerprint chart must be obtained, as opposed to the electronic collection of fingerprints. Modifications to the SF 87 include the addition of four blocks, Submitting Office Number (SON), Security Office Identifier (SOI), Intra-Government Payment, Collection Code (IPAC) and Miscellaneous Identification Number (MNU) and the removal of the printed ORI number, USOPMOOOZ–FIPC Boyer, PA. The addition of the SON, SOI, IPAC and MNU blocks support billing and processing enhancements. The printed ORI number is no longer necessary because SF 87 forms are converted to images and transmitted to the FBI electronically. The Public Burden Statement address is updated to state U.S. Office of Personnel Management, Federal Investigative Services, Attn: OMB Number 3206–0150, 1900 E Street NW., Washington, DC 20415.

Because OPM is eliminating the printed ORI number, a separate collection that does not have an ORI number, the SF 87A is redundant. Accordingly, OPM is eliminating the SF 87A form.

Due to the SF 87 form's small size and the fact that it may be maintained in multiple systems of records, it does not list all potentially applicable routine uses under the Privacy Act. Accordingly 5 U.S.C. 552a(e)(3)(C) requires that an agency issuing the SF 87 form must also give the subject a copy of the routine uses for the applicable system of records.

It is estimated that 210,533 SF 87 forms are provided to individuals annually. The SF 87 takes approximately 5 minutes to complete.

The estimated annual burden is 17,544 hours.

The 2009 OMB Terms of Clearance required an accurate reflection of the number of people who incur a cost for submitting their fingerprints to federal agencies and the total cost per annum. Calculations derived from Federal agency survey data and OPM data estimated that, at a maximum, 52,633 forms are submitted to federal agencies annually by individuals, who may incur a financial burden to obtain fingerprints at local police departments, when security offices are unable to conduct the fingerprinting. The estimated individual financial burden is $17.00. The estimated maximum annual financial burden is $894,765.

The 60 day **Federal Register** Notice was published in the **Federal Register** on Tuesday, November 27, 2012 (**Federal Register** Notices/Vol. 77, Number 228, pages 70848–70849) as required by 5 CFR part 1320, affording the public an opportunity to comment on the form.

U.S. Office of Personnel Management.

John Berry,

Director.

[FR Doc. 2013–01995 Filed 1–29–13; 8:45 am]

BILLING CODE 6325–53–P

POSTAL REGULATORY COMMISSION

[Docket No. MC2013–35 and CP2013–46; Order No. 1636]

New Postal Product

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing concerning the addition of Priority Mail Contract 52 to the competitive product list. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* January 31, 2013.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

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I. Introduction

In accordance with 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.,* the Postal Service filed a formal request and associated supporting information to add Priority Mail Contract 52 to the competitive product list.[1] It asserts that Priority Mail Contract 52 is a competitive product ''not of general applicability'' within the meaning of 39 U.S.C. 3632(b)(3). Request at 1. The Request has been assigned Docket No. MC2013–35.

The Postal Service contemporaneously filed a redacted contract related to the proposed new product under 39 U.S.C. 3632(b)(3) and 39 CFR 3015.5. *Id.* Attachment B. The instant contract has been assigned Docket No. CP2013–46.

Request. To support its Request, the Postal Service filed six attachments as follows:

• Attachment A—a redacted copy of Governors' Decision No. 11–6, authorizing the new product;
• Attachment B—a redacted copy of the contract;
• Attachment C—proposed changes to the Mail Classification Schedule competitive product list with the addition underlined;
• Attachment D—a Statement of Supporting Justification as required by 39 CFR 3020.32;
• Attachment E—a certification of compliance with 39 U.S.C. 3633(a); and
• Attachment F—an application for non-public treatment of materials to maintain redacted portions of the contract and related financial information under seal.

In the Statement of Supporting Justification, Dennis R. Nicoski, Manager, Field Sales Strategy and Contracts, asserts that the contract will cover its attributable costs, make a positive contribution to covering institutional costs, and increase contribution toward the requisite 5.5 percent of the Postal Service's total institutional costs. *Id.* Attachment D at 1. Mr. Nicoski contends that there will be no issue of market dominant products subsidizing competitive products as a result of this contract. *Id.*

Related contract. The Postal Service included a redacted version of the related contract with the Request. *Id.* Attachment B. The contract is scheduled to become effective either on the day after the Commission issues all regulatory approvals or on a subsequent date mutually agreed upon by the Postal Service and the customer. *Id.* at 3. The contract will expire 3 years from the effective date unless, among other things, either party terminates the agreement upon 30 days' written notice to the other party. *Id.* The Postal Service represents that the contract is consistent with 39 U.S.C. 3633(a). *Id.* Attachment D at 1.

The Postal Service filed much of the supporting materials, including the related contract, under seal. *Id.* Attachment F. It maintains that the redacted portions of the Governors' Decision, contract, customer-identifying information, and related financial information, should remain confidential. *Id.* at 3. This information includes the price structure, underlying costs and assumptions, pricing formulas, information relevant to the customer's mailing profile, and cost coverage projections. *Id.* The Postal Service asks the Commission to protect customer-identifying information from public disclosure indefinitely. *Id.* at 7.

II. Notice of Filings

The Commission establishes Docket Nos. MC2013–35 and CP2013–46 to consider the Request pertaining to the proposed Priority Mail Contract 52 product and the related contract, respectively.

Interested persons may submit comments on whether the Postal Service's filings in the captioned dockets are consistent with the policies of 39 U.S.C. 3632, 3633, or 3642, 39 CFR 3015.5, and 39 CFR part 3020, subpart B. Comments are due no later than January 31, 2013. The public portions of these filings can be accessed via the Commission's Web site (*http://www.prc.gov*).

The Commission appoints Lawrence Fenster to serve as Public Representative in these dockets.

III. Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket Nos. MC2013–35 and CP2013–46 to consider the matters raised in each docket.

2. Pursuant to 39 U.S.C. 505, Lawrence Fenster is appointed to serve as an officer of the Commission (Public Representative) to represent the interests of the general public in these proceedings.

3. Comments by interested persons in these proceedings are due no later than January 31, 2013.

[1] Request of the United States Postal Service to Add Priority Mail Contract 52 to Competitive Product List and Notice of Filing (Under Seal) of Unredacted Governors' Decision, Contract, and Supporting Data, January 23, 2013 (Request).

4. The Secretary shall arrange for publication of this order in the **Federal Register**.

By the Commission.

Shoshana M. Grove,

Secretary.

[FR Doc. 2013–01910 Filed 1–29–13; 8:45 am]

BILLING CODE 7710–FW–P

POSTAL REGULATORY COMMISSION

[Docket No. MC2013–34 and CP2013–45; Order No. 1635]

New Postal Product

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing concerning the addition of Express Mail & Priority Mail Contract 13 to the competitive product list. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* January 31, 2013.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction

In accordance with 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.,* the Postal Service filed a formal request and associated supporting information to add Express Mail & Priority Mail Contract 13 to the competitive product list.[1] The Postal Service asserts that Express Mail & Priority Mail Contract 13 is a competitive product ''not of general applicability'' within the meaning of 39 U.S.C. 3632(b)(3). Request at 1. The Request has been assigned Docket No. MC2013–34.

The Postal Service contemporaneously filed a redacted contract related to the proposed new product under 39 U.S.C. 3632(b)(3) and 39 CFR 3015.5. *Id.* Attachment B. The instant contract has been assigned Docket No. CP2013–45.

Request. To support its Request, the Postal Service filed six attachments as follows:

- Attachment A—a redacted copy of Governors' Decision No. 11–6, authorizing the new product;
- Attachment B—a redacted copy of the contract;
- Attachment C—proposed changes to the Mail Classification Schedule competitive product list with the addition underlined;
- Attachment D—a Statement of Supporting Justification as required by 39 CFR 3020.32;
- Attachment E—a certification of compliance with 39 U.S.C. 3633(a); and
- Attachment F—an application for non-public treatment of materials to maintain redacted portions of the contract and related financial information under seal.

In the Statement of Supporting Justification, Dennis R. Nicoski, Manager, Field Sales Strategy and Contracts, asserts that the contract will cover its attributable costs, make a positive contribution to covering institutional costs, and increase contribution toward the requisite 5.5 percent of the Postal Service's total institutional costs. *Id.* Attachment D at 1. Mr. Nicoski contends that there will be no issue of market dominant products subsidizing competitive products as a result of this contract. *Id.*

Related contract. The Postal Service included a redacted version of the related contract with the Request. *Id.* Attachment B. The contract is scheduled to become effective on the first business day following the date that the Commission issues all regulatory approvals. *Id.* at 5. The contract will expire 5 years from the effective date. *Id.* at 6. The Postal Service represents that the contract is consistent with 39 U.S.C. 3633(a). *Id.* Attachment D.

The Postal Service filed much of the supporting materials, including the related contract, under seal. *Id.* Attachment F. It maintains that the redacted portions of the contract, customer-identifying information, and related financial information should remain confidential. *Id.* at 3. This information includes the price structure, underlying costs and assumptions, pricing formulas, information relevant to the customer's mailing profile, and cost coverage projections. *Id.* The Postal Service asks the Commission to protect customer-identifying information from public disclosure indefinitely. *Id.* at 7.

II. Notice of Filings

The Commission establishes Docket Nos. MC2013–34 and CP2013–45 to consider the Request pertaining to the proposed Express Mail & Priority Mail Contract 13 product and the related contract, respectively.

Interested persons may submit comments on whether the Postal Service's filings in the captioned dockets are consistent with the policies of 39 U.S.C. 3632, 3633, or 3642, 39 CFR 3015.5, and 39 CFR part 3020, subpart B. Comments are due no later than January 31, 2013. The public portions of these filings can be accessed via the Commission's Web site (*http://www.prc.gov*).

The Commission appoints Lyudmila Y. Bzhilyanskaya to serve as Public Representative in these dockets.

III. Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket Nos. MC2013–34 and CP2013–45 to consider the matters raised in each docket.

2. Pursuant to 39 U.S.C. 505, Lyudmila Y. Bzhilyanskaya is appointed to serve as an officer of the Commission (Public Representative) to represent the interests of the general public in these proceedings.

3. Comments by interested persons in these proceedings are due no later than January 31, 2013.

4. The Secretary shall arrange for publication of this order in the **Federal Register**.

By the Commission.

Shoshana M. Grove,

Secretary.

[FR Doc. 2013–01906 Filed 1–29–13; 8:45 am]

BILLING CODE 7710–FW–P

POSTAL REGULATORY COMMISSION

[Docket No. MC2013–33 and CP2013–44; Order No. 1634]

New Postal Product

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing concerning the addition of Express Mail & Priority Mail Contract 12 to the competitive product list. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

[1] Request of the United States Postal Service to Add Express Mail & Priority Mail Contract 13 to Competitive Product List and Notice of Filing (Under Seal) of Unredacted Governors' Decision, Contract, and Supporting Data, January 23, 2013 (Request).

DATES: *Comments are due:* January 31, 2013.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

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I. Introduction

In accordance with 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.,* the Postal Service filed a formal request and associated supporting information to add Express Mail & Priority Mail Contract 12 to the competitive product list.[1] The Postal Service asserts that Express Mail & Priority Mail Contract 12 is a competitive product ''not of general applicability'' within the meaning of 39 U.S.C. 3632(b)(3). Request at 1. The Request has been assigned Docket No. MC2013–33.

The Postal Service contemporaneously filed a redacted contract related to the proposed new product under 39 U.S.C. 3632(b)(3) and 39 CFR 3015.5. *Id.* Attachment B. The instant contract has been assigned Docket No. CP2013–44.

Request. To support its Request, the Postal Service filed six attachments as follows:

- Attachment A—a redacted copy of Governors' Decision No. 11–6, authorizing the new product;
- Attachment B—a redacted copy of the contract;
- Attachment C—proposed changes to the Mail Classification Schedule competitive product list with the addition underlined;
- Attachment D—a Statement of Supporting Justification as required by 39 CFR 3020.32;
- Attachment E—a certification of compliance with 39 U.S.C. 3633(a); and
- Attachment F—an application for non-public treatment of materials to maintain redacted portions of the contract and related financial information under seal.

In the Statement of Supporting Justification, Dennis R. Nicoski, Manager, Field Sales Strategy and Contracts, asserts that the contract will cover its attributable costs, make a positive contribution to covering institutional costs, and increase contribution toward the requisite 5.5 percent of the Postal Service's total institutional costs. *Id.* Attachment D at 1. Mr. Nicoski contends that there will be no issue of market dominant products subsidizing competitive products as a result of this contract. *Id.*

Related contract. The Postal Service included a redacted version of the related contract with the Request. *Id.* Attachment B. The contract does not appear to specify an effective date. *Id.* at 5; *see* Section III, *infra.* However, the contract is scheduled to expire 5 years from the effective date, unless, among other things, either party terminates the agreement with 30 days' written notice to the other party. *Id.* at 6. The Postal Service represents that the contract is consistent with 39 U.S.C. 3633(a). *Id.* Attachment D.

The Postal Service filed much of the supporting materials, including the related contract, under seal. *Id.* Attachment F. It maintains that the redacted portions of the contract, customer-identifying information, and related financial information should remain confidential. *Id.* at 3. This information includes the price structure, underlying costs and assumptions, pricing formulas, information relevant to the customer's mailing profile, and cost coverage projections. *Id.* The Postal Service asks the Commission to protect customer-identifying information from public disclosure indefinitely. *Id.* at 7.

II. Notice of Filings

The Commission establishes Docket Nos. MC2013–33 and CP2013–44 to consider the Request pertaining to the proposed Express Mail & Priority Mail Contract 12 product and the related contract, respectively.

Interested persons may submit comments on whether the Postal Service's filings in the captioned dockets are consistent with the policies of 39 U.S.C. 3632, 3633, or 3642, 39 CFR 3015.5, and 39 CFR part 3020, subpart B. Comments are due no later than January 31, 2013. The public portions of these filings can be accessed via the Commission's Web site (*http://www.prc.gov*).

The Commission appoints Kenneth R. Moeller to serve as Public Representative in these dockets.

III. Supplemental Information

To clarify the record, the Postal Service is requested to provide a written response to the following question. An answer should be provided as soon as it is developed, but no later than January 29, 2013. Many of the terms of the contract, including the termination date and the timing of price adjustments, are dependent on the effective date of the contract. *Id.* Attachment B. The contract does not appear to specify an effective date. *Id.* at 5. Please provide documentation establishing the effective date of the contract, as agreed to by the parties to the contract.

IV. Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket Nos. MC2013–33 and CP2013–44 to consider the matters raised in each docket.
2. Pursuant to 39 U.S.C. 505, Kenneth R. Moeller is appointed to serve as an officer of the Commission (Public Representative) to represent the interests of the general public in these proceedings.
3. Comments by interested persons in these proceedings are due no later than January 31, 2013.
4. The Postal Service's response to the request for supplemental information is due no later than January 29, 2013.
5. The Secretary shall arrange for publication of this order in the **Federal Register**.

By the Commission.

Shoshana M. Grove,

Secretary.

[FR Doc. 2013–01905 Filed 1–29–13; 8:45 am]

BILLING CODE 7710–FW–P

POSTAL SERVICE

Product Change—Express Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Effective date:* January 30, 2013.

FOR FURTHER INFORMATION CONTACT: Elizabeth A. Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on August 3, 2012,

[1] Request of the United States Postal Service to Add Express Mail & Priority Mail Contract 12 to Competitive Product List and Notice of Filing (Under Seal) of Unredacted Governors' Decision, Contract, and Supporting Data, January 23, 2013 (Request).

it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add Express Mail Contract 12 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2012–36, CP2012–44.

Stanley F. Mires,

Attorney, Legal Policy & Legislative Advice.

[FR Doc. 2013–01900 Filed 1–29–13; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Effective date:* January 30, 2013.

FOR FURTHER INFORMATION CONTACT: Elizabeth A. Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on January 23, 2013, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add Priority Mail Contract 52 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2013–35, CP2013–46.

Stanley F. Mires,

Attorney, Legal Policy & Legislative Advice.

[FR Doc. 2013–01899 Filed 1–29–13; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Express Mail and Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Effective date:* January 30, 2013.

FOR FURTHER INFORMATION CONTACT: Elizabeth A. Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on January 23, 2013, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add Express Mail & Priority Mail Contract 13 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2013–34, CP2013–45.

Stanley F. Mires,

Attorney, Legal Policy & Legislative Advice.

[FR Doc. 2013–01902 Filed 1–29–13; 8:45 am]

BILLING CODE 7710–12–P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Rule 248.30; OMB Control No. 3235–0610, SEC File No. 270–549.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (the ''Commission'') is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval.

Rule 248.30 (17 CFR 248.30), under Regulation S–P is titled ''Procedures to Safeguard Customer Records and Information; Disposal of Consumer Report Information.'' Rule 248.30 (the ''safeguard rule'') requires brokers, dealers, investment companies, and investment advisers registered with the Commission (''registered investment advisers'') (collectively ''covered institutions'') to adopt written policies and procedures for administrative, technical, and physical safeguards to protect customer records and information. The safeguards must be reasonably designed to ''insure the security and confidentiality of customer records and information,'' ''protect against any anticipated threats or hazards to the security and integrity'' of those records, and protect against unauthorized access to or use of those records or information, which ''could result in substantial harm or inconvenience to any customer.'' The safeguard rule's requirement that covered institutions' policies and procedures be documented in writing constitutes a collection of information and must be maintained on an ongoing basis. This requirement eliminates uncertainty as to required employee actions to protect customer records and information and promotes more systematic and organized reviews of safeguard policies and procedures by institutions. The information collection also assists the Commission's examination staff in assessing the existence and adequacy of covered institutions' safeguard policies and procedures.

We estimate that as of the end of 2011, there are 4,695 broker-dealers, 4,203 investment companies, and 11,658 investment advisers currently registered with the Commission, for a total of 20,556 covered institutions. We believe that all of these covered institutions have already documented their safeguard policies and procedures in writing and therefore will incur no hourly burdens related to the initial documentation of policies and procedures.

Although existing covered institutions would not incur any initial hourly burden in complying with the safeguards rule, we expect that newly registered institutions would incur some hourly burdens associated with documenting their safeguard policies and procedures. We estimate that approximately 1,500 broker-dealers, investment companies, or investment advisers register with the Commission annually. However, we also expect that approximately 70% of these newly registered covered institutions (1,050) are affiliated with an existing covered institution, and will rely on an organization-wide set of previously documented safeguard policies and procedures created by their affiliates. We estimate that these affiliated newly registered covered institutions will incur a significantly reduced hourly burden in complying with the safeguards rule, as they will need only to review their affiliate's existing policies and procedures, and identify and adopt the relevant policies for their business. Therefore, we expect that newly registered covered institutions with existing affiliates will incur an hourly burden of approximately 15 hours in identifying and adopting safeguard policies and procedures for their business, for a total hourly burden for all affiliated new institutions of 15,750 hours.

Finally, we expect that the 450 newly registered entities that are not affiliated with an existing institution will incur a significantly higher hourly burden in reviewing and documenting their safeguard policies and procedures. We expect that virtually all of the newly registered covered entities that do not have an affiliate are likely to be small entities and are likely to have smaller and less complex operations, with a correspondingly smaller set of safeguard policies and procedures to document, compared to other larger existing institutions with multiple affiliates. We estimate that it will take a typical newly registered unaffiliated institution approximately 60 hours to review, identify, and document their safeguard policies and procedures, for a total of 27,000 hours for all newly registered unaffiliated entities.

Therefore, we estimate that the total annual hourly burden associated with the safeguards rule is 42,750 hours. We also estimate that all covered institutions will be respondents each year, for a total of 20,556 respondents.

These estimates of average burden hours are made solely for the purposes of the Paperwork Reduction Act. An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid control number. The safeguard rule does not require the reporting of any information or the filing of any documents with the Commission. The collection of information required by the safeguard rule is mandatory.

Written comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comments to Thomas Bayer, Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 6432 General Green Way, Alexandria, VA 22312; or send an email to: *PRA_Mailbox@sec.gov.*

Dated: January 24, 2013.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–01936 Filed 1–29–13; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Form N–8F; OMB Control No. 3235–0157, SEC File No. 270–136.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (the ''Commission'') is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval.

Form N–8F (17 CFR 274.218) is the form prescribed for use by registered investment companies in certain circumstances to request orders of the Commission declaring that the registration of that investment company cease to be in effect. The form requests information about: (i) The investment company's identity, (ii) the investment company's distributions, (iii) the investment company's assets and liabilities, (iv) the events leading to the request to deregister, and (v) the conclusion of the investment company's business. The information is needed by the Commission to determine whether an order of deregistration is appropriate.

The Form takes approximately 5.5 hours on average to complete. It is estimated that approximately 142 investment companies file Form N–8F annually, so the total annual burden for the form is estimated to be approximately 781 hours. The estimate of average burden hours is made solely for the purposes of the Paperwork Reduction Act and is not derived from a comprehensive or even a representative survey or study.

The collection of information on Form N–8F is not mandatory. The information provided on Form N–8F is not kept confidential. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently-valid OMB control number.

Written comments are requested on: (i) Whether the collections of information are necessary for the proper performance of the functions of the Commission, including whether the information has practical utility; (ii) the accuracy of the Commission's estimate of the burdens of the collection of information; (iii) ways to enhance the quality, utility, and clarity of the information collected; and (iv) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comments to Thomas Bayer, Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 6432 General Green Way, Alexandria, VA 22312, or send an email to: *PRA_Mailbox@sec.gov.*

Dated: January 24, 2013.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–01938 Filed 1–29–13; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Rule 17j–1; OMB Control No. 3235–0224, SEC File No. 270–239.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 350l–3520), the Securities and Exchange Commission (the ''Commission'') has submitted to the Office of Management and Budget a request for extension of the previously approved collection of information discussed below.

Conflicts of interest between investment company personnel (such as portfolio managers) and their funds can arise when these persons buy and sell securities for their own accounts (''personal investment activities''). These conflicts arise because fund personnel have the opportunity to profit from information about fund transactions, often to the detriment of fund investors. Beginning in the early 1960s, Congress and the Securities and Exchange Commission (''Commission'') sought to devise a regulatory scheme to effectively address these potential conflicts. These efforts culminated in the addition of section 17(j) to the Investment Company Act of 1940 (the ''Investment Company Act'') (15 U.S.C. 80a–17(j)) in 1970 and the adoption by the Commission of rule 17j–1 (17 CFR 270.17j–1) in 1980.[1] The

[1] Prevention of Certain Unlawful Activities with Respect to Registered Investment Companies,

Commission proposed amendments to rule 17j–1 in 1995 in response to recommendations made in the first detailed study of fund policies concerning personal investment activities by the Commission's Division of Investment Management since rule 17j–1 was adopted. Amendments to rule 17j–1, which were adopted in 1999, enhanced fund oversight of personal investment activities and the board's role in carrying out that oversight.[2] Additional amendments to rule 17j–1 were made in 2004, conforming rule 17j–1 to rule 204A–1 under the Investment Advisers Act of 1940 (15 U.S.C. 80b), avoiding duplicative reporting, and modifying certain definitions and time restrictions.[3]

Section 17(j) makes it unlawful for persons affiliated with a registered investment company (''fund'') or with the fund's investment adviser or principal underwriter (each a ''17j–1 organization''), in connection with the purchase or sale of securities held or to be acquired by the investment company, to engage in any fraudulent, deceptive, or manipulative act or practice in contravention of the Commission's rules and regulations. Section 17(j) also authorizes the Commission to promulgate rules requiring 17j–1 organizations to adopt codes of ethics.

In order to implement section 17(j), rule 17j–1 imposes certain requirements on 17j–1 organizations and ''Access Persons''[4] of those organizations. The rule prohibits fraudulent, deceptive or manipulative acts by persons affiliated with a 17j–1 organization in connection with their personal securities transactions in securities held or to be acquired by the fund. The rule requires each 17j–1 organization, unless it is a money market fund or a fund that does not invest in Covered Securities,[5] to: (i) Adopt a written codes of ethics, (ii) submit the code and any material changes to the code, along with a certification that it has adopted procedures reasonably necessary to prevent Access Persons from violating the code of ethics, to the fund board for approval, (iii) use reasonable diligence and institute procedures reasonably necessary to prevent violations of the code, (iv) submit a written report to the fund describing any issues arising under the code and procedures and certifying that the 17j–1 entity has adopted procedures reasonably necessary to prevent Access Persons from violating the code, (v) identify Access Persons and notify them of their reporting obligations, and (vi) maintain and make available to the Commission for review certain records related to the code of ethics and transaction reporting by Access Persons.

The rule requires each Access Person of a fund (other than a money market fund or a fund that does not invest in Covered Securities) and of an investment adviser or principal underwriter of the fund, who is not subject to an exception,[6] to file: (i) Within 10 days of becoming an Access Person, a dated initial holdings report that sets forth certain information with respect to the Access Person's securities and accounts; (ii) dated quarterly transaction reports within 30 days of the end of each calendar quarter providing certain information with respect to any securities transactions during the quarter and any account established by the Access Person in which any securities were held during the quarter; and (iii) dated annual holding reports providing information with respect to each Covered Security the Access Person beneficially owns and accounts in which securities are held for his or her benefit. In addition, rule 17j–1 requires investment personnel of a fund or its investment adviser, before acquiring beneficial ownership in securities through an initial public offering (IPO) or in a private placement, to obtain approval from the fund or the fund's investment adviser.

The requirements that the management of a rule 17j–1 organization provide the fund's board with new and amended codes of ethics and an annual issues and certification report are intended to enhance board oversight of personal investment policies applicable to the fund and the personal investment activities of Access Persons. The requirements that Access Persons provide initial holdings reports, quarterly transaction reports, and annual holdings reports and request approval for purchases of securities through IPOs and private placements are intended to help fund compliance personnel and the Commission's examinations staff monitor potential conflicts of interest and detect potentially abusive activities. The requirement that each rule 17j–1 organization maintain certain records is intended to assist the organization and the Commission's examinations staff in determining if there have been violations of rule 17j–1.

We estimate that annually there are approximately 75,496 respondents under rule 17j–1, of which 5,496 are rule 17j–1 organizations and 70,000 are Access Persons. In the aggregate, these respondents make approximately 107,780 responses annually. We estimate that the total annual burden of complying with the information collection requirements in rule 17j–1 is approximately 387,599 hours. This hour burden represents time spent by Access Persons that must file initial and annual holdings reports and quarterly transaction reports, investment personnel that must obtain approval before acquiring beneficial ownership in any securities through an IPO or private placement, and the responsibilities of Rule 17j–1 organizations arising from information collection requirements under rule 17j–1. These include notifying Access Persons of their reporting obligations, preparing an annual rule 17j–1 report and certification for the board, documenting their approval or rejection of IPO and private placement requests, maintaining annual rule 17j–1 records, maintaining electronic reporting and recordkeeping systems, amending their codes of ethics as necessary, and, for new fund complexes, adopting a code of ethics.

We estimate that there is an annual cost burden of approximately $5,000 per fund complex, for a total of $4,160,000, associated with complying with the information collection requirements in rule 17j–1. This represents the costs of purchasing and maintaining computers and software to assist funds in carrying out rule 17j–1 recordkeeping.

These burden hour and cost estimates are based upon the Commission staff's experience and discussions with the fund industry. The estimates of average burden hours and costs are made solely for the purposes of the Paperwork Reduction Act. These estimates are not derived from a comprehensive or even a representative survey or study of the costs of Commission rules.

Compliance with the collection of information requirements of the rule is mandatory and is necessary to comply with the requirements of the rule in general. An

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Investment Company Act Release No. 11421 (Oct. 31, 1980) (45 FR 73915 (Nov. 7, 1980)).

[2] Personal Investment Activities of Investment Company Personnel, Investment Company Act Release No. 23958 (Aug. 20, 1999) (64 FR 46821 (Aug. 27, 1999)).

[3] Investment Adviser Codes of Ethics, Investment Advisers Act Release No. 2256 (Jul. 2, 2004) (69 FR 41696 (Jul. 9, 2004)).

[4] Rule 17j–1(a)(1) defines an ''access person'' as ''Any Advisory Person of a Fund or of a Fund's investment adviser. If an investment adviser's primary business is advising Funds or other advisory clients, all of the investment adviser's directors, officers, and general partners are presumed to be Access Persons of any Fund advised by the investment adviser. All of a Fund's directors, officers, and general partners are presumed to be Access Persons of the Fund.'' The definition of Access Person also includes ''Any director, officer or general partner of a principal underwriter who, in the ordinary course of business, makes, participates in or obtains information regarding, the purchase or sale of Covered Securities by the Fund for which the principal underwriter acts, or whose functions or duties in the ordinary course of business relate to the making of any recommendation to the Fund regarding the purchase or sale of Covered Securities.'' Rule 17j–1(a)(1).

[5] A ''Covered Security'' is any security that falls within the definition in section 2(a)(36) of the Act, except for direct obligations of the U.S. Government, bankers' acceptances, bank certificates of deposit, commercial paper and high quality short-term debt instruments, including repurchase agreements, and shares issued by open-end funds. Rule 17j–1(a)(4).

[6] Rule 17j–1(d)(2) contains the following exceptions: (i) An Access Person need not file a report for transactions effected for, and securities held in, any account over which the Access Person does not have control; (ii) an independent director of the fund, who would otherwise be required to report solely by reason of being a fund director and who does not have information with respect to the fund's transactions in a particular security, does not have to file an initial holdings report or a quarterly transaction report,; (iii) an Access Person of a principal underwriter of the fund does not have to file reports if the principal underwriter is not affiliated with the fund (unless the fund is a unit investment trust) or any investment adviser of the fund and the principal underwriter of the fund does not have any officer, director, or general partner who serves in one of those capacities for the fund or any investment adviser of the fund; (iv) an Access Person to an investment adviser need not make quarterly reports if the report would duplicate information provided under the reporting provisions of the Investment Adviser's Act of 1940; (v) an Access Person need not make quarterly transaction reports if the information provided in the report would duplicate information received by the 17j–1 organization in the form of broker trade confirmations or account statements or information otherwise in the records of the 17j–1 organization; and (vi) an Access Person need not make quarterly transaction reports with respect to transactions effected pursuant to an Automatic Investment Plan.

agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number. Rule 17j–1 requires that records be maintained for at least five years in an easily accessible place.[7]

Please direct general comments regarding the above information to the following persons: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503 or by sending an email to *Shagufta_Ahmed@omb.eop.gov;* and (ii) Thomas Bayer, Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 6432 General Green Way, Alexandria, VA 22312; or send an email to: *PRA_Mailbox@sec.gov*. Comments must be submitted to OMB within 30 days of this notice.

Dated: January 24, 2013.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–01935 Filed 1–29–13; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:
Rule 607, OMB Control No. 3235–0634, SEC File No. 270–561.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (the ''Commission'') is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval.

Regulation E (17 CFR 230.601 to 230.610a) exempts from registration under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) (''Securities Act'') securities issued by a small business investment company (''SBIC'') which is registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) (''Investment Company Act'') or a closed-end investment company that has elected to be regulated as a business development company (''BDC'') under the Investment Company Act, so long as the aggregate offering price of all securities of the issuer that may be sold within a 12-month period does not exceed $5,000,000 and certain other conditions are met. Rule 607 under Regulation E (17 CFR 230.607) entitled, ''Sales material to be filed,'' requires sales material used in connection with securities offerings under Regulation E to be filed with the Commission at least five days (excluding weekends and holidays) prior to its use.[1] Commission staff reviews sales material filed under rule 607 for materially misleading statements and omissions. The requirements of rule 607 are designed to protect investors from the use of false or misleading sales material in connection with Regulation E offerings.

Respondents to this collection of information include SBICs and BDCs making an offering of securities under Regulation E. Each respondent's reporting burden under rule 607 relates to the burden associated with filing its sales material electronically. The burden of filing electronically, however, is negligible and there have been no filings made under this rule, so this collection of information does not impose any burden on the industry. However, we are requesting one annual response and an annual burden of one hour for administrative purposes. The estimate of average burden hours is made solely for purposes of the Paperwork Reduction Act and is not derived from a quantitative, comprehensive, or even representative survey or study of the burdens associated with Commission rules and forms.

The requirements of this collection of information are mandatory. Responses will not be kept confidential. An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid control number.

Written comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comments to Thomas Bayer, Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 6432 General Green Way, Alexandria, VA 22312; or send an email to: *PRA_Mailbox@sec.gov.*

Dated: January 24, 2013.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–01937 Filed 1–29–13; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:
Rule 17a–8; OMB Control No. 3235–0235, SEC File No. 270–225.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), the Securities and Exchange Commission (the ''Commission'') is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval.

Rule 17a–8 (17 CFR 270.17a–8) under the Investment Company Act of 1940 (the ''Act'') (15 U.S.C. 80a) is entitled ''Mergers of affiliated companies.'' Rule 17a–8 exempts certain mergers and similar business combinations (''mergers'') of affiliated registered investment companies (''funds'') from prohibitions under section 17(a) of the Act (15 U.S.C. 80a–17(a)) on purchases and sales between a fund and its affiliates. The rule requires fund directors to consider certain issues and to record their findings in board minutes. The rule requires the directors of any fund merging with an unregistered entity to approve procedures for the valuation of assets received from that entity. These

[7] If information collected pursuant to the rule is reviewed by the Commission's examination staff, it will be accorded the same level of confidentiality accorded to other responses provided to the Commission in the context of its examination and oversight program. See section 31(c) of the Investment Company Act (15 U.S.C. 80a–30(c)).

[1] Sales material includes advertisements, articles or other communications to be published in newspapers, magazines, or other periodicals; radio and television scripts; and letters, circulars or other written communications proposed to be sent given or otherwise communicated to more than ten persons.

procedures must provide for the preparation of a report by an independent evaluator that sets forth the fair value of each such asset for which market quotations are not readily available. The rule also requires a fund being acquired to obtain approval of the merger transaction by a majority of its outstanding voting securities, except in certain situations, and requires any surviving fund to preserve written records describing the merger and its terms for six years after the merger (the first two in an easily accessible place).

The average annual burden of meeting the requirements of rule 17a–8 is estimated to be 7 hours for each fund. The Commission staff estimates that each year approximately 736 funds rely on the rule. The estimated total average annual burden for all respondents therefore is 5,152 hours.

This estimate represents an increase of 882 hours from the prior estimate of 4,270 hours. This increase reflects a change in the estimated number of funds relying on rule 17a–8.

The average cost burden of preparing a report by an independent evaluator in a merger with an unregistered entity is estimated to be $15,000. The average net cost burden of obtaining approval of a merger transaction by a majority of a fund's outstanding voting securities is estimated to be $100,000. The Commission staff estimates that each year approximately 0 mergers with unregistered entities occur and approximately 15 funds hold shareholder votes that would not otherwise have held a shareholder vote. The total annual cost burden of meeting these requirements is estimated to be $1,500,000.

The estimates of average burden hours and average cost burdens are made solely for the purposes of the Paperwork Reduction Act, and are not derived from a comprehensive or even a representative survey or study. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

Written comments are requested on: (a) Whether the collection of information is necessary for the proper performance of the functions of the Commission, including whether the information has practical utility; (b) the accuracy of the Commission's estimate of the burdens of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comments to Thomas Bayer, Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 6432 General Green Way, Alexandria, VA 22312; or send an email to: *PRA_Mailbox@sec.gov.*

Dated: January 24, 2013.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–01934 Filed 1–29–13; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68723; File No. SR–MIAX–2013–02]

Self-Regulatory Organizations: Miami International Securities Exchange LLC; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change To Adopt MIAX Rule 319 Relating to Proxy Voting

January 24, 2013.

Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on January 16, 2013, Miami International Securities Exchange LLC (''MIAX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons, and is approving the proposed rule change on an accelerated basis.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to adopt Rule 319 (Proxy Voting) in accordance with the provisions of Section 957 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the ''Dodd-Frank Act'').

The text of the proposed rule change is provided in *Exhibit 5.* The text of the proposed rule change is also available on the Exchange's Web site at *http://www.miaxoptions.com/filter/wotitle/rule_filing,* at MIAX's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange is proposing to adopt MIAX Rule 319 (Proxy Voting), in accordance with the provisions of Section 957 of the Dodd-Frank Act, to prohibit Members from voting uninstructed shares if the matter voted on relates to (i) the election of a member of the board of directors of an issuer (other than an uncontested election of a director of an investment company registered under the Investment Company Act of 1940 (the ''Investment Company Act'')), (ii) executive compensation, or (iii) any other significant matter, as determined by the Commission, by rule.

Section 957 of the Dodd-Frank Act amends Section 6(b) [3] of the Act to require the rules of each national securities exchange to prohibit any member organization that is not the beneficial owner of a security registered under Section 12 [4] of the Act from granting a proxy to vote the security in connection with certain stockholder votes, unless the beneficial owner of the security has instructed the member organization to vote the proxy in accordance with the voting instructions of the beneficial owner. The stockholder votes covered by Section 957 include any vote with respect to (i) the election of a member of the board of directors of an issuer (other than an uncontested election of a director of an investment company registered under the Investment Company Act), (ii) executive compensation, or (iii) any other significant matter, as determined by the Commission, by rule.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78(f)(b).

[4] 15 U.S.C. 78l.

Accordingly, in order to carry out the requirements of Section 957 of the Dodd-Frank Act, the Exchange proposes to adopt proposed MIAX Rule 319 to prohibit any Member from giving a proxy to vote stock that is registered in its name, unless: (i) Such Member is the beneficial owner of such stock; (ii) pursuant to the written instructions of the beneficial owner; or (iii) pursuant to the rules of any national securities exchange or association of which it is a member provided that the records of the Member clearly indicate the procedure it is following. The Exchange is proposing to adopt these rules because other national securities exchanges and associations do allow proxy voting under certain limited circumstances while the current Exchange Rules are silent on such matters. Therefore, a Member that is also a member of another national securities exchange or association may vote the shares held for a customer when allowed under its membership at another national securities exchange or association, provided that the records of the Member clearly indicate the procedure it is following.

Notwithstanding the forgoing, a Member that is not the beneficial owner of a security registered under Section 12 of the Act is prohibited from granting a proxy to vote the security in connection with a shareholder vote with respect to the election of a member of the board of directors of an issuer (except for a vote with respect to uncontested election of a member of the board of directors of any investment company registered under the Investment Company Act), executive compensation, or any other significant matter, as determined by the Commission, by rule, unless the beneficial owner of the security has instructed the Member to vote the proxy in accordance with the voting instructions of the beneficial owner.

The Exchange notes that proposed MIAX Rule 319 is identical to International Securities Exchange (''ISE'') Rule 421; and proposed MIAX Rule 319(a) is based on NYSE Arca, Inc. (''NYSE Arca'') Rule 9.4, Financial Industry Regulatory Authority (''FINRA'') Rule 2251; and proposed MIAX Rule 319(b) is based on Nasdaq Rule 2251(d).

2. Statutory Basis

MIAX believes that its proposed rule change is consistent with Section 6(b) of the Act [5] in general, and furthers the objectives of Section 6(b)(5) of the Act [6] in particular. The Exchange believes that proposed Rule 319(a) will provide clarity to MIAX members going forward on whether broker discretionary voting is permitted by MIAX members under limited circumstances when the MIAX member is also a member of another national securities exchange that permits broker discretionary voting.

The Exchange believes that proposed Rule 319(b) is consistent with Section 6(b)(10) [7] of the Act, which requires that national securities exchanges adopt rules prohibiting members that are not beneficial holders of a security from voting uninstructed proxies with respect to the election of a member of the board of directors of an issuer (except for uncontested elections of directors for companies registered under the Investment Company Act), executive compensation, or any other significant matter, as determined by the Commission by rule. The Exchange believes that proposed Rule 319(b) is consistent with Section 6(b)(10) of the Act because it adopts provisions that comply with that section.

The Exchange also believes that proposed Rule 319(b) is consistent with Section 6(b)(5) [8] of the Act, which provides, among other things, that the rules of the Exchange must be designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest, and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange is adopting this proposed rule to comply with the requirements of Section 957 of the Dodd-Frank Act, and therefore believes the proposed rule to be consistent with the Exchange Act, particularly with respect to the protection of investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The propose (sic) rule would allow the Exchange to implement Section 957 of the Dodd-Frank Act and adopt rules consistent with Section 6(b)(10) of the Act, which is applicable to all national securities exchanges and national securities association (sic).[9] The Exchange notes this proposed rule does not go outside of the scope of the rules of other national securities (sic). Additionally, consistency among the various proxy voting rules governing national securities exchanges reduces the possibility of any regulatory arbitrage on the part of a market participant seeking a forum with a lower regulatory requirement.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email *to rule-comments@sec.gov.* Please include File Number SR–MIAX–2013–02 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–MIAX–2013–02. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*).

Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(5).

[7] 15 U.S.C. 78f(b)(10)

[8] 15 U.S.C. 78f(b)(5).

[9] The Commission notes that Section 6(b)(10) of the Act, 15 U.S.C. 78f(b)(10), does not apply to national securities associations.

printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

All submissions should refer to File Number SR–MIAX–2013–02 and should be submitted on or before February 20, 2013.

IV. Commission's Findings and Order Granting Accelerated Approval of the Proposed Rule Change

In its filing, the Exchange requested that the Commission approve the proposal on an accelerated basis so that the Exchange could immediately comply with the requirements imposed by the Dodd-Frank Act, and because the proposed rule text is based upon, among others, ISE Rule 421.[10] After careful consideration, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[11]

The Commission believes that proposed Rule 319(a) is consistent with Section 6(b)(5) [12] of the Act, which provides, among other things, that the rules of the Exchange must be designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest, and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

Under proposed Rule 319(a), a Member shall be prohibited from voting uninstructed shares unless (1) that Member is the beneficial owner of the stock; (2) pursuant to the written instructions of the beneficial owner; or (3) pursuant to the rules of any national securities exchange or association of which it is also a member, provided that the Member's records clearly indicate the procedure it is following. This provision is based on ISE Rule 421, which was previously approved by the Commission.[13] The Commission notes that the proposed change will provide clarity to Exchange Members going forward on whether broker discretionary voting is permitted by Exchange Members under limited circumstances when the Member is also a member of another national securities exchange that permits broker discretionary voting. In approving this portion of the proposal, the Commission notes that Rule 319(a) is consistent with the approach taken under the rules of other national securities exchanges or national securities association, and for Exchange Members who are not also members of another national securities exchange prohibits broker discretionary voting on any matter, consistent with investor protection and the public interest under Section 6(b)(5) of the Act.[14]

The Commission believes that proposed Rule 319(b) is consistent with Section 6(b)(10) [15] of the Act, which requires that national securities exchanges adopt rules prohibiting members that are not beneficial holders of a security from voting uninstructed proxies with respect to the election of a member of the board of directors of an issuer (except for uncontested elections of directors for companies registered under the Investment Company Act), executive compensation, or any other significant matter, as determined by the Commission by rule.

The Commission believes that proposed Rule 319(b) is consistent with Section 6(b)(10) of the Act because it adopts new language that complies with that section. As noted in the accompanying Senate Report, Section 957, which enacted Section 6(b)(10), reflects the principle that ''final vote tallies should reflect the wishes of the beneficial owners of the stock and not be affected by the wishes of the broker that holds the shares.'' [16] The proposed rule change will make the Exchange compliant with the new requirements of Section 6(b)(10) by specifically prohibiting broker-dealers, who are not beneficial owners of a security, from voting uninstructed shares in connection with a shareholder vote on the election of a member of the board of directors of an issuer (except for a vote with respect to the uncontested election of a member of the board of directors of any investment company registered under the Investment Company Act of 1940), executive compensation, or any other significant matter, as determined by the Commission by rule, unless the member receives voting instructions from the beneficial owner of the shares.[17]

The Commission also believes that proposed Rule 319(b) is consistent with Section 6(b)(5) [18] of the Act, which provides, among other things, that the rules of the Exchange must be designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest, and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission believes that the rule assures that shareholder votes on the election of the board of directors of an issuer (except for a vote with respect to the uncontested election of a member of the board of directors of any investment company registered under the Investment Company Act of 1940) and on executive compensation matters are made by those with an economic interest in the company, rather than by a broker that has no such economic interest, which should enhance corporate governance and accountability to shareholders.[19]

Based on the above, the Commission finds that the Exchange's proposal will further the purposes of Sections 6(b)(5) and 6(b)(10) of the Act because it should enhance corporate accountability to shareholders while also serving to fulfill the Congressional intent in adopting Section 6(b)(10) of the Act.

The Commission also finds good cause, pursuant to Section 19(b)(2) of the Act,[20] for approving the proposed rule change prior to the 30th day after the date of publication of notice in the **Federal Register**. The Commission believes that good cause exists to grant accelerated approval to proposed Rule 319(a), because this proposed rule will conform the Exchange rule to ISE Rule

[10] *See* Securities Exchange Act Release No. 63139 (October 20, 2010), 75 FR 65680 (October 26, 2010) (SR–ISE–2010–99).

[11] In approving this rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[12] 15 U.S.C. 78f(b)(5).

[13] *See supra* note 10.

[14] 15 U.S.C. 78f(b)(5).

[15] 15 U.S.C. 78f(b)(10).

[16] *See* S. Rep. No. 111–176, at 136 (2010).

[17] The Commission has not, to date, adopted rules concerning other significant matters where uninstructed broker votes should be prohibited, although it may do so in the future. Should the Commission adopt such rules, we would expect the Exchange to adopt coordinating rules promptly to comply with the statute.

[18] 15 U.S.C. 78f(b)(5).

[19] As the Commission stated in approving New York Stock Exchange (''NYSE'') rules prohibiting broker voting in the election of directors, having those with an economic interest in the company vote the shares, rather than the broker who has no such economic interest, furthers the goal of enfranchising shareholders. *See* Securities Exchange Act Release No. 60215 (July 1, 2009), 74 FR 33293 (July 10, 2009) (SR–NYSE–2006–92).

[20] 15 U.S.C. 78s(b)(2).

421, which was published for public comment in the **Federal Register** and approved by the Commission, and for which no comments were received.[21] Because proposed Rule 319(a) is identical to the ISE rule, it raises no new regulatory issues.

The Commission also believes that good cause exists to grant accelerated approval to proposed Rule 319(b), which conforms the Exchange's rules to the requirements of Section 6(b)(10) of the Act. Section 6(b)(10) of the Act, enacted under Section 957 of the Dodd-Frank Act, does not provide for a transition phase, and requires rules of national securities exchanges to prohibit broker voting on the election of a member of the board of directors of an issuer (except for a vote with respect to the uncontested election of a member of the board of directors of any investment company registered under the Investment Company Act of 1940), executive compensation, or any other significant matter, as determined by the Commission by rule. The Commission believes that good cause exists to grant accelerated approval to proposed Rule 3.22(b), because it will conform the Exchange rule to the requirements of Section 6(b)(10) of the Act. Moreover, proposed Rule 319(b) is identical to ISE Rule 421.[22]

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[23] that the proposed rule change (SR–MIAX–2013–02) be, and it hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[24]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–01970 Filed 1–29–13; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68717; File No. SR–BX–2013–005]

Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating To Routing Fees

January 24, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on January 16, 2013, NASDAQ OMX BX, Inc. (''BX'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Chapter XV, Section 2 entitled ''BX Options Market—Fees and Rebates'' to amend various fees for routing options to away markets.

While these amendments are effective upon filing, the Exchange has designated the proposed amendments to be operative on February 1, 2013.

The text of the proposed rule change is provided in *Exhibit 5.* The text of the proposed rule change is also available on the Exchange's Web site at *http://nasdaqomxbx.cchwallstreet.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this filing is to amend the Routing Fees in Section 2(4) of Chapter XV in order to recoup costs the Exchange incurs for routing and executing certain orders in equity options to away markets.

Currently, the fees for routing Customer, Firm, Market Maker, Broker-Dealer and Professional orders are as follows:

Exchange	Customer	Firm/market maker/broker-dealer	Professional
BATS (Penny Pilot)	$0.55	$0.55	$0.55
BATS (Non-Penny Pilot)	0.86	0.94	0.94
BOX	0.11	0.55	0.31
CBOE	0.11	0.55	0.41
CBOE orders greater than 99 contracts in ETFs and ETNs)	0.29	N/A	N/A
C2	0.55	0.55	0.55
ISE (Standard)	0.11	0.55	0.31
ISE (Select Symbols)*	0.35	0.55	0.44
MIAX	0.11	0.55	0.36
NOM (Penny Pilot)	0.55	0.55	0.55
NOM (Non-Penny Pilot)	0.93	0.94	0.94
NYSE Arca (Penny Pilot)	0.55	0.55	0.55
NYSE Arca (Non-Penny Pilot)	0.90	0.94	0.90
NYSE Amex	0.11	0.55	0.31
PHLX (for all options other than PHLX Select Symbols)	0.11	0.55	0.36
PHLX Select Symbols **	0.11	0.55	0.55

[21] *See supra* note 10.

[22] *See supra* note 10.

[23] 15 U.S.C. 78s(b)(2).

[24] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

The Exchange proposes to adopt new Routing Fees when routing and executing orders in equity options to BATS Exchange, Inc. (''BATS''), BOX Options Exchange LLC (''BOX''), the Chicago Board Options Exchange, Incorporated (''CBOE''), C2 Options Exchange, Incorporated (''C2''), International Securities Exchange, LLC (''ISE''), the Miami International Securities Exchange, LLC (''MIAX''), NASDAQ Options Market (''NOM''), NYSE Arca, Inc. (''NYSE Arca''), NYSE MKT (''NYSE Amex'') and NASDAQ OMX PHLX LLC (''Phlx''). The Exchange is proposing to eliminate the current Routing Fees located in Section 2(4) of Chapter XV and instead assess BX Options Participants a fixed fee plus the away market transaction fee as noted below.

Today, the Exchange calculates Routing Fees by assessing a fixed Routing Fee of $0.11 per contract, which is comprised of certain Exchange costs related to routing orders to away markets plus the away market's transaction fee. With respect to the fixed costs, the Exchange incurs a fee when it utilizes Nasdaq Options Services LLC (''NOS''), a member of the Exchange and the Exchange's exclusive order router.[3] Each time NOS routes an order to an away market, NOS is charged a clearing fee[4] and, in the case of certain exchanges, a transaction fee is also charged in certain symbols, which fees are passed through to the Exchange. The Exchange currently recoups clearing and transaction charges incurred by the Exchange as well as certain other costs incurred by the Exchange when routing to away markets, such as administrative and technical costs associated with operating NOS, membership fees at away markets, Options Regulatory Fees (''ORFs'') and technical costs associated with routing options. With respect to away market transaction fees, the Exchange does not assess actual transaction fees in all cases today, but rather has limited fees in certain circumstances. In those cases the Exchange does not recover all of its costs for routing to the away market.[5]

Today, the Exchange amends its Routing Fees to reflect amendments to away market transaction fees by filing proposed rule changes. The Exchange proposes to eliminate the current Routing Fees and instead assess the actual away market fee assessed by the away exchange at the time that the order was entered into the Exchange's trading system. This transaction fee would be calculated on an order-by-order basis since different away markets charge different amounts.[6] The Exchange analyzed its clearing costs,[7] administrative and technical costs associated with operating NOS, membership fees at away markets and regulatory costs in determining the fixed fee for routing. With respect to BATS, BOX, C2, CBOE, ISE, MIAX, NYSE Amex and NYSE Arca the Exchange proposes to continue to assess $0.11 per contract in addition to the away market's transaction fee.[8] While this proposal does not change the fixed cost assessed to away markets other than Phlx and NOM, the Exchange would assess the actual transaction fees that are in place at the various away markets and will no longer limit those transaction fees as it does today in certain circumstances.[9] While clearing costs have recently decreased,[10] the Exchange would continue to assess $0.11 per contract because of other increased costs. Specifically, several exchanges have increased ORFs or adopted ORFs and the Exchange proposes to assess the same fixed costs Routing Fee for non-NASDAQ OMX exchanges despite the decreased clearing fee.[11]

The Exchange also analyzed costs related to routing to Phlx and NOM and determined to assess a lower fee of $0.05 per contract as compared to other away markets because NOS is utilized by all three exchanges to route orders.[12] Phlx, BX and NOM all utilize NOS which lowers the cost of routing to those markets as compared to other away markets. In addition the fixed costs are reduced because NOS is owned and operated by NASDAQ OMX and the three exchanges and NOS share common technology and related operational functions. The Exchange proposes to assess a $0.05 per contract fixed fee in addition to the away market's transaction fee to route to Phlx and NOM. This proposal would reduce the fixed fees assessed today on average to route to Phlx and NOM from $0.11 to $0.05 per contract.

For all Routing Fees, the transaction fee is based on the away market's transaction fee or rebate for particular market participants and in the case that there is no transaction fee or rebate assessed by the away market, the only fee assessed would be the $0.05 or $0.11 per contract fixed fee assessed by the Exchange to recoup its costs. The Exchange proposes to pass along any rebate paid by the away market where there is such a rebate. Today, the Exchange does not pass along rebates. Any rebate available would be netted against a fee assessed by the Exchange. For example, if a Customer order is routed to BOX, and BOX offers a customer rebate of $0.20 per contract, the Exchange would assess a $0.11 per contract fixed fee which would net against the rebate ($0.20 per contract in this example). The market participant for whom the Customer contract was routed would receive a $0.09 per contract rebate. Today the market participant does not receive a rebate and only pays the current Routing Fees.

As with all fees, the Exchange may adjust these Routing Fees in response to competitive conditions by filing a new proposed rule change.

2. Statutory Basis

BX believes that the proposed rule changes are consistent with the provisions of Section 6 of the Act,[13] in general, and with Section 6(b)(4) of the

[3] *See* BX Rules at Chapter VI, Section 11(e) (Order Routing).

[4] The Options Clearing Corporation (''OCC'') assesses $0.01 per contract side.

[5] In some cases the Exchange filed a rule change which noted that the Exchange would not assess the actual transaction charge, but a lower amount where the transaction fees at an away market were higher than other markets.

[6] This is similar to the methodology utilized by ISE in assessing Routing Fees. *See* ISE's Fee Schedule.

[7] OCC recently amended its clearing fee from $0.03 per contract side to $0.01 percontract side. *See* Securities Exchange Act Release No. 68025 (October 10, 2012), 77 FR 63398 (October 16, 2012) (SR–OCC–2012–18).

[8] The $0.11 per contract fixed fee would apply to all options exchanges other than Phlx and NOM. The Exchange anticipates that if other options exchanges are approved by the Commission after the filing of this proposal, those exchanges would be assessed the $0.11 per contract fee applicable to ''all other options exchanges.'' The Exchange currently assesses $0.11 per contract for costs incurred by the Exchange.

[9] Today, the Exchange caps certain Routing Fees at certain levels. For example, the Exchange caps BATS, NYSE Arca and BX Options Routing Fees at $0.94 per contract.

[10] *See* note 7.

[11] CBOE recently increased its ORF from $.0065 to $.0085 per contract. *See* Securities Exchange Act Release No. 68480 (December 19, 2012), 77 FR 76119 (December 26, 2012) (SR–CBOE–2012–118). C2 recently increased its ORF from $.0015 to $.002 per contract. *See* Securities Exchange Act Release No. 68479 (December 19, 2012), 77 FR 76131 (December 26, 2012) (SR–C2–2012–040). NYSE Amex recently increased its ORF from $0.004 to $0.005 per contract. *See* Securities Exchange Act Release No. 68183 (November 8, 2012), 77 FR 68186 (November 15, 2012) (SR–NYSEMKT–2012–54). NYSE Arca recently increased its ORF from $0.004 to $0.005 per contract. *See* Securities Exchange Act Release No. 68174 (November 7, 2012), 77 FR 67845 (November 14, 2012) (SR–NYSEArca-2012–118). MIAX recently adopted an ORF of $0.0040 per contract side. *See* SR–MIAX–2012–06 (not yet published).

[12] *See* BX Rules at Chapter VI, Section 11 of the NASDAQ and BX Rules and Phlx Rule 1080(m)(iii)(A).

[13] 15 U.S.C. 78f.

Act,[14] in particular, in that they provide for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which BX operates or controls.

The Exchange believes that the proposed Routing Fees are reasonable because they seek to recoup costs that are incurred by the Exchange when routing Customer, Firm, Market Maker, Broker-Dealer and Professional orders to away markets on behalf of members. Each destination market's transaction charge varies and there is a cost incurred by the Exchange when routing orders to away markets. The costs to the Exchange include clearing costs, administrative and technical costs associated with operating NOS, membership fees at away markets, ORFs and technical costs associated with routing options. The Exchange believes that the proposed Routing Fees would enable the Exchange to recover the costs it incurs to route orders to away markets in addition to transaction fees assessed to market participants for the execution of Customer, Firm, Market Maker, Broker-Dealer and Professional orders by the away market. Specifically, other options exchanges have increased ORFs that are assessed per transaction.[15] The Exchange believes that it is reasonable to recoup these costs borne by the Exchange on each transaction.

In addition, the Exchange notes that it would assess a fixed fee of $0.11 per contract, as it does today, for costs incurred by the Exchange with respect to non-NASDAQ OMX exchanges. The Exchange believes that the proposed fee is reasonable because while the clearing fee itself was lowered by OCC (from $0.03 to $0.01 per contract side), other fees, such as ORFs, have increased in recent months. The Exchange, in analyzing its actual costs, has determined to continue to assess a $0.11 per contract fee to represent the overall cost to the Exchange for technical, administrative, clearing, regulatory, compliance and other costs, in addition to the transaction fee assessed by the away market. Also, the Exchange will assess the actual transaction fees that are in place at the various away markets and will no longer limit those transaction fees as it does today in certain circumstances. The Exchange believes that it is reasonable for it to recoup its actual costs associated with routing orders to away markets. BX Options Participants would be entitled to receive rebates offered by away markets with this proposal, which rebates would net against fees assessed by the Exchange for routing orders. The Exchange believes that the opportunity to collect a rebate will reduce Routing Fees.

In addition, the Exchange believes that it is equitable and not unfairly discriminatory to assess a fixed cost of $0.11 per contract, which is mostly comprised of technology, infrastructure and away market non-transaction fee costs, to route orders to non-NASDAQ OMX away markets because the Exchange would be assessing an overall lower fixed fee. While the clearing cost was reduced, other fees have increased and therefore the Exchange believes that a $0.11 per contract fee continues to be reasonable because it represents the costs to route to non-NASDAQ OMX away markets. The proposed $0.11 per contract fixed fee would be assessed uniformly on all market participants in addition to the actual transaction fees on all orders routed to non-NASDAQ OMX markets.

The Exchange believes that it is equitable and not unfairly discriminatory to assess a fixed cost of $0.05 per contract to route orders to NASDAQ OMX away markets (Phlx and NOM) because the cost, in terms of actual cash outlays, to the Exchange to route to those markets is lower. For example, costs related to routing to Phlx and NOM are lower as compared to other away markets because NOS is utilized by all three exchanges to route orders.[16] NOS and the three NASDAQ OMX options markets have a common data center and staff that are responsible for the day-to-day operations of NOS. Because the three exchanges are in a common data center, Routing Fees are reduced because costly expenses related to, for example, telecommunication lines to obtain connectivity are avoided when routing orders in this instance. The costs related to connectivity to route orders to other NASDAQ OMX exchanges are de minimis. When routing orders to non-NASDAQ OMX exchanges, the Exchange incurs costly connectivity charges related to telecommunication lines and other related costs. The proposed fixed fee for routing orders to non-NASDAQ OMX exchanges is therefore increased as compared to the fees for routing orders to NASDAQ OMX exchanges (Phlx and NOM), $0.11 per contract versus $0.05 per contract, respectively. The proposed $0.05 per contract fixed fee would be assessed uniformly on all orders routed to NASDAQ OMX markets in addition to the actual away market transaction fee assessed by the destination market. The Exchange also believes that it is equitable and not unfairly discriminatory for market participants to receive rebates on orders routed to away markets that pay rebates. Today, the Exchange does not pay such rebates when routing orders. The Exchange would pay rebates offered by away markets uniformly to market participants when their orders are routed to a destination market that offers a rebate.

The Exchange believes it is reasonable, equitable and not unfairly discriminatory to pass along savings realized by leveraging NASDAQ OMX's infrastructure and scale to market participants when those orders are routed to Phlx and NOM.[17] Orders are routed to away markets in accordance with Exchange rules based on price.[18] Market participants may submit orders to the Exchange as ineligible for routing or ''DNR'' to avoid incurring the Routing Fees proposed herein.[19]

B. Self-Regulatory Organization's Statement on Burden on Competition

BX does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes that the rule change would allow the Exchange to recoup its costs when routing orders designated as available for routing by the market participant. BX Options Participants may choose to mark the order as ineligible for routing to avoid incurring these fees.[20] Today, other options

[14] 15 U.S.C. 78f(b)(4).

[15] CBOE recently increased its ORF from $.0065 to $.0085 per contract. *See* Securities Exchange Act Release No. 68480 (December 19, 2012), 77 FR 76119 (December 26, 2012) (SR–CBOE–2012–118). C2 recently increased its ORF from $.0015 to $.002 per contract. *See* Securities Exchange Act Release No. 68479 (December 19, 2012), 77 FR 76131 (December 26, 2012) (SR–C2–2012–040). NYSE Amex recently increased its ORF from $0.004 to $0.005 per contract. *See* Securities Exchange Act Release No. 68183 (November 8, 2012), 77 FR 68186 (November 15, 2012) (SR–NYSEMKT–2012–54). NYSE Arca recently increased its ORF from $0.004 to $0.005 per contract. *See* Securities Exchange Act Release No. 68174 (November 7, 2012), 77 FR 67845 (November 14, 2012) (SR–NYSEArca-2012–118). MIAX recently adopted an ORF of $0.0040 per contract side. *See* SR–MIAX–2012–06 (not yet published).

[16] *See* BX Rules at Chapter VI, Section 11 of the NASDAQ and BX Options Rules and Phlx Rule 1080(m)(iii)(A).

[17] Today, the Exchange assesses a $0.11 per contract fixed fee for routing orders to Phlx and NOM. That fee is proposed to be reduced to a $0.05 per contract fixed fee, which would be in addition to the actual transaction fee assessed by the away market.

[18] *See* BX Rules at Chapter XII (Options Order Protection and Locked and Crossed Market Rules).

[19] *See* BX Rules at Chapter VI, Section 11(e) (Order Routing).

[20] *See* BX Rules at Chapter VI, Section 11(e) (Order Routing).

exchanges also assess similar fees to recoup costs to route orders to away markets. With respect to routing to Phlx and NOM at a lower cost as compared to other away markets, the Exchange does not believe that the proposed amendments to increase those fees, while maintaining the same fee differential imposes a burden because all market participants would be assessed the same fees depending on the away market. Also, the Exchange is proposing to recoup costs incurred only when members request the Exchange route their orders to an away market. The Exchange is passing along savings realized by leveraging NASDAQ OMX's infrastructure and scale to market participants when those orders are routed to Phlx and NOM and is providing those saving to all market participants. Finally, the Exchange routes orders to away markets where the Exchange's disseminated bid or offer is inferior to the national best bid (best offer) (''NBBO'') price and based on price first.[21]

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[22] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–BX–2013–005 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–BX–2013–005. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at BX's principal office. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–BX–2013–005, and should be submitted on or before February 20, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[23]

Kevin M. O'Neill,

Deputy Secretary.

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[21] *See* BX Rules at Chapter XII (Options Order Protection and Locked and Crossed Market Rules).

[22] 15 U.S.C. 78s(b)(3)(A)(ii).

[23] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68734; File No. SR–ICEEU–2013–01]

Self-Regulatory Organizations; ICE Clear Europe Limited; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change To Extend Member Liability for Payment Obligations to the Clearing House

January 25, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on January 10, 2013, ICE Clear Europe Limited (''ICE Clear Europe'' or the ''Clearing House'') filed with the Securities and Exchange Commission (''Commission'' or ''SEC'') the proposed rule change described in Items I and II below, which Items have been substantially prepared by ICE Clear Europe. The Commission is publishing this Notice and Order to solicit comments on the proposed rule change from interested persons and to approve the proposed rule change on an accelerated basis.

I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

ICE Clear Europe submits proposed amendments to Parts 2 and 3 of its Rules and CDS Procedures to clarify a Clearing Member's ongoing payment obligation to ICE Clear Europe with respect to electronic payment transfers. ICE Clear Europe proposes to amend Part 3 of the ICE Clear Europe Rules to state when a Clearing Member's payment obligation has been satisfied or discharged. Part 2 would be revised to further clarify the application of the amendments to Part 3. The other proposed changes in the ICE Clear Europe CDS Procedures reflect drafting clarifications in Section 8.8(a), and do not affect the substance of the ICE Clear Europe CDS Procedures. All capitalized terms not defined herein are defined in the Rules or CDS Procedures.

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, ICE Clear Europe included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item III below. ICE Clear Europe has prepared summaries,

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

set forth in sections A, B, and C below, of the most significant aspects of such statements.[3]

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In response to issues raised by the Bank of England as overseer of its payment arrangements, ICE Clear Europe is submitting proposed amendments that are intended to reduce the unsecured credit risk to ICE Clear Europe in its payment system. The proposed amendments re-allocate this unsecured credit risk by, among other things, stating the conditions under which Clearing Members' payment obligations are deemed to have been satisfied or discharged and clarifying the liability with respect to payments not meeting those conditions.

ICE Clear Europe proposes to revise Rule 301(f) in its Rulebook so Clearing Members are deemed to have satisfied or discharged payment obligations when three conditions are met. First, Rule 301(f)(i) would require that the relevant electronic transfer of funds is actually received by the Clearing House in unencumbered, fully cleared and fully available funds in ICE Clear Europe's Clearing House Account at an Approved Financial Institution (''AFI''), provided that the AFI is not subject to an Insolvency. Second, Rule 301(f)(ii) would provide that if the AFI is not a Concentration Bank, the AFI must have fully performed its concentration function in respect of the payment in question, by completing the transfer of funds from ICE Clear Europe's account at the AFI to ICE Clear Europe's concentration account at a Concentration Bank (which Concentration Bank is not subject to an Insolvency). Payments transferred to ICE Clear Europe's concentration account at a Concentration Bank must be in the form of unencumbered, fully cleared and fully available funds, representing (a) in the case of a payment under ICE Clear Europe Rule 302(a), a net amount reflecting all payments processed through that AFI in respect of all calls on or payments to all Clearing Members using that AFI under Rule 302(a) in respect of the Business Day in question; or (b) in the case of a payment not under ICE Clear Europe Rule 302(a) (for example, a payment for an intra-day margin call or an ad hoc transfer of additional cash Permitted Cover to ICE Clear Europe), the amount received from the Clearing Member that is seeking to make the payment in question. Third, Rule 301(f)(iii) would provide that, for payments under Rule 302(a) only, the AFI (including if it is a Concentration Bank) has made all relevant payments under Rule 302(a) due to the Clearing Member and other Clearing Members (in its capacity as an AFI or Concentration Bank) in respect of the Business Day in question.

ICE Clear Europe also proposes to revise Rule 301(f) to clarify ICE Clear Europe's, its Clearing Members', and an AFI's rights or liabilities in the event the AFI fails to make a payment referred to under Rule 301(f). Specifically, Rule 301(f) would provide that nothing in Rule 301(f) restricts or prevents ICE Clear Europe or any Clearing Member from making any claim against an AFI which has failed to make a payment under Rule 301(f). In particular, the Clearing House will not be deemed to have had any loss, liability or shortfall made good or whole vis-à-vis an AFI by virtue of any further payment by a Clearing Member in addition to an attempted payment not credited to its account as a result of Rule 301(f). Additionally, an AFI which has failed to make any payment under Rule 301(f) will remain fully liable to the Clearing House or relevant Clearing Member for any such failed payment or account balance notwithstanding a reimbursement or additional payment as between a Clearing Member and the Clearing House.

Further, ICE Clear Europe proposes to revise Rule 301(f) to clarify ICE Clear Europe's procedures in the event a payment fails to meet the requirements of Rule 301(f)(i)–(iii). In essence, ICE Clear Europe must first notify the Clearing Member of the failed payment and request that it make the payment using alternative means before ICE Clear Europe may declare that the Clearing Member is subject to an Event of Default. ICE Clear Europe would not declare an Event of Default unless and until the Clearing Member failed to make the latter payment (other than solely due to the operation of either Rule 301(f)(ii) or Rule 301(f)(iii). In addition, Rule 301(f) would provide that ICE Clear Europe will return any funds recovered from the AFI if the Clearing Member satisfied its payment obligations through an additional payment that complies with the Rule.

In particular, Rule 301(f) would provide that, in the event that (a) a payment is received into an ICE Clear Europe Account at an AFI but the requirements of Rule 301(f)(ii) or Rule 301(f)(iii) are not satisfied; (b) an affected Clearing Member has satisfied its payment obligations through an additional payment which complies with the requirements of Rule 301(f); and (c) ICE Clear Europe makes a recovery or irrevocably receives any part or full payment from the AFI into one of its accounts at a Concentration Bank (which Concentration Bank is not subject to an Insolvency), then ICE Clear Europe will make payment to affected Clearing Members in respect of the recovery or receipt actually made by ICE Clear Europe, net of ICE Clear Europe's costs and expenses, pro rata in proportion to the amounts of the original missed payments of each affected Clearing Member.

ICE Clear Europe also proposes to add new Rule 301(l) to provide clarification regarding the satisfaction of ICE Clear Europe's obligations to its Clearing Members, providing that ICE Clear Europe's obligations have been satisfied or discharged when the relevant Credit/Debit Payment Transfer Order arises. Specifically, new Rule 301(l) provides that ''[a]ny payment due to a Clearing Member from ICE Clear Europe will be recognized as having been duly made, and ICE Clear Europe's obligations in respect thereof shall be treated as having been satisfied and discharged, at the time that the relevant Credit/Debit Payment Transfer Order arises relating to such payment (or, if the Clearing Member or AFI is not a Participant, would have arisen were the Clearing Member or AFI to have been a Participant), provided that ICE Clear Europe has reason to believe that the Clearing House Account from which payment is to be made has sufficient funds or credit on Account.'' This provision, like the proposed amendments to Rule 301(f), is intended to re-allocate the risk of unsecured credit losses, rather than concentrating it with ICE Clear Europe.

Finally, Rule 209(c) would be revised to state that neither Rules 301(f)(ii)–(iii) nor Rule 301(l) shall apply to payments made or received after the Insolvency or an Event of Default as aforementioned in respect of ICE Clear Europe.

ICE Clear Europe believes that the proposed rule change is consistent with the requirements of Section 17A of the Act and the regulations thereunder applicable to it. Specifically, ICE Clear Europe believes that the proposed rule change will improve the finality and accuracy of its daily settlement process and reduce the risk to Clearing House of settlement failures, thereby permitting

[3] The Commission has modified the text of the summaries prepared by ICE Clear Europe pursuant to discussions with ICE Clear Europe by telephone on January 22, 2013 (among Patrick Davis, Head of Legal and Company Secretary, ICE Clear Europe; Gena Lai, Senior Special Counsel, SEC; and Zachary Hunter, Attorney-Advisor, SEC) and on January 24, 2013 (among the same parties, with the addition of Geoffrey B. Goldman, Partner, Shearman & Sterling LLP).

the accurate clearing and settlement of cleared transactions.

(B) Clearing Agency's Statement on Burden on Competition

ICE Clear Europe does not believe the proposed rule change would have any impact, or impose any burden, on competition.

(C) Clearing Agency's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

ICE Clear Europe has solicited written comments relating to the proposed rule change, but has not received any written comments to date. ICE Clear Europe will notify the Commission of any written comments received by ICE Clear Europe.

III. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–ICEEU–2013–01 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549.

All submissions should refer to File Number SR–ICEEU–2013–01. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filings will also be available for inspection and copying at the principal office of ICE Clear Europe and on ICE Clear Europe's Web site (*https://www.theice.com/publicdocs/regulatory_filings/011013_ICEU_SEC.pdf*). All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–ICEEU–2013–01 and should be submitted on or before February 20, 2013.

IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

Section 19(b) of the Act [4] directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to such organization. The Commission finds that the proposed rule change is consistent with the requirements of the Act, in particular the requirements of Section 17A of the Act,[5] and the rules and regulations thereunder applicable to ICE Clear Europe. Specifically, the Commission finds that the proposed rule change is consistent with Section 17A(b)(3)(F) of the Act, which requires, among other things, that the rules of a registered clearing agency be designed to assure the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible.[6] As the proposed rule change is intended to reduce unsecured credit risk to ICE Clear Europe in its payment systems, by means of stating the conditions under which Clearing Members' payment obligations are deemed to have been satisfied or discharged and clarifying the liability with respect to payments not meeting those conditions, the proposed rule change is designed to assure the safeguarding of securities and funds which are in the custody or control of ICE Clear Europe.

ICE Clear Europe has requested that the Commission approve the proposed rule change on an accelerated basis. The Bank of England has indicated that implementation of the proposed rule change would mitigate to a significant extent the unsecured credit risk to which ICE Clear Europe is currently exposed.[7] Based on the foregoing, the Commission finds good cause for accelerating approval.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (SR–ICEEU–2013–01) is approved on an accelerated basis.

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.[8]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–01993 Filed 1–29–13; 8:45 am]

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[4] 15 U.S.C. 78s(b).

[5] 15 U.S.C. 78q–1. In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[6] 15 U.S.C. 78q–1(b)(3)(F).

[7] Teleconference on January 11, 2013, among Robleh Ali, FS–PID Oversight Team, Bank of England; Joseph Kamnik, Assistant Director, SEC; Gena Lai, Senior Special Counsel, SEC; and Zachary Hunter, Attorney-Advisor, SEC.

[8] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68713; File No. SR–EDGX–2013–01]

Self-Regulatory Organizations; EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Fees for EdgeBook Attributed℠

January 23, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on January 15, 2013 EDGX Exchange, Inc. (the "Exchange" or "EDGX") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to (i) charge Members [3] and non-Members fees for internal and external distribution of EdgeBook Attributed℠, the Exchange's attributed book feed, and (ii) offer a new incentive program for Members that choose to attribute orders on the Exchange (the "Edge Attribution

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] As defined in Rule 1.5(n).

Incentive Program''). All of the changes described herein are applicable to EDGX Members and non-Members, except for the Edge Attribution Incentive Program, which is applicable only to EDGX Members. The text of the proposed rule change is available on the Exchange's Internet Web site at *www.directedge.com*, at the Exchange's principal office, and at the Public Reference Room of the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

In SR–EDGX–2011–18,[4] the Exchange made available the EDGX Book Feed (''EdgeBook Depth X[SM]'') to Members and non-Members. EdgeBook Depth X[SM] is a data feed that contains all orders for securities trading on the Exchange, including all displayed orders for listed securities trading on EDGX, order executions, order cancellations, order modifications, order identification numbers and administrative messages. EdgeBook Depth X[SM] offers real-time data, thereby allowing Member firms to more accurately price their orders based on EDGX's view of the depth of book information. It also provides Members the ability to track their own orders from order entry to execution. It is available in both unicast and multicast formats.

In SR–EDGX–2012–14,[5] the Exchange modified the EDGX fee schedule by codifying the fees associated with the receipt of EdgeBook Depth X[SM]. In SR–EDGX–2012–32,[6] the Exchange amended Rule 11.5, entitled ''Orders and Modifiers'', to allow for the use of Attributable Orders[7] submitted to the Exchange on EdgeBook Depth X[SM], namely EdgeBook Attributed[SM], without charge. EdgeBook Attributed[SM] allows Members and non-Members of the Exchange (collectively referred to as ''Recipients'') the option to view the market participant identifier (''MPID'') of Members of the Exchange who choose to display their MPID(s) on EdgeBook Depth X[SM] on an order-by-order basis through the use of Attributable Orders.

Upon the Exchange's initial offering of EdgeBook Attributed[SM], such service was provided at no cost. In SR–EDGX–2012–32, the Exchange stated that ''[s]hould EDGX determine to charge fees associated with EdgeBook Attributed[SM], EDGX will submit a proposed rule change to the [Securities and Exchange] Commission in order to implement those fees.''[8] This proposal is designed to implement fees for the receipt of EdgeBook Attributed[SM] and introduce the Edge Attribution Incentive Program.

The proposed rule change to the EDGX fee schedule codifies such a fee associated with the receipt of EdgeBook Attributed[SM]. Such fees are in addition to the current fees assessed for EdgeBook Depth X[SM] for both Internal and External Distributors.[9] The amount of the monthly fees for EdgeBook Attributed[SM] would depend on whether the distributor is an ''Internal Distributor'' or ''External Distributor.'' Internal Distributors are proposed to be charged $2,500 per month for EdgeBook Attributed[SM] and External Distributors are proposed to be charged $5,000 per month for EdgeBook Attributed[SM]. The fee paid by an External Distributor includes the Internal Distributor Fee and thus allows an External Distributor to provide data both internally (i.e., to users within their own organization) and externally (to users outside their own organization). Additionally, Distributors will only pay one distributor fee, regardless of the number of locations or users to which the feed is received or distributed. Finally, Distributors will not be charged user fees for receiving EdgeBook Attributed[SM].

The Exchange also proposes to adopt an Edge Attribution Incentive Program to encourage Members to utilize Attributable Orders to convey their identity on EdgeBook Attributed[SM] by providing Members with an opportunity to be rewarded for providing their valuable data to the Exchange. In particular, the Edge Attribution Incentive Program would provide a payment to Members who enter Attributable Orders into the Exchange's System[10] in at least 100 symbols over 10 consecutive trading days over the course of a month. Each month the Exchange would set aside 25% of the revenue generated in connection with fees received from EdgeBook Attributed[SM], as described above (the ''Revenue Allotment''). From the Revenue Allotment, the Exchange would provide a payment to eligible Members who qualified for the Edge Attribution Incentive Program based on the percentage of executed share volume from their Attributable Orders entered into the Exchange's System. For example, if a Member qualifies for the Edge Attribution Incentive Program and that Member's Attributable Orders accounted for 10% of all executed shares from Attributable Orders entered into the Exchange's System for that month, such Member would receive 10% of the Revenue Allotment. The remaining 90% of the funds in the Revenue Allotment would be distributed as payments to other Members that met the requirements of the Edge Attribution Incentive Program based on their respective executed share of volume from Attributable Orders entered into the Exchange's System. In addition, a Member is not required to purchase EdgeBook Attributed[SM] in order to receive payment under the Edge Attribution Incentive Program.

The Exchange intends to implement the proposed rule change on or about February 1, 2013.

2. Statutory Basis

The Exchange believes that the proposed rule change to the EDGX fee schedule for EdgeBook Attributed[SM] is consistent with the objectives of Section 6 of the Securities Exchange Act of 1934 (the ''Act''),[11] in general, and furthers the objectives of Section 6(b)(4)[12] in particular, as it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its

[4] *See* Securities Exchange Act Release No. 64791 (July 1, 2011), 76 FR 39944 (July 7, 2011) (SR–EDGX–2011–18).

[5] *See* Securities and Exchange Release No. 66864 (Apr. 26, 2012), 77 FR 26064 (May 2, 2012) (SR–EDGX–2012–14). The current fees for EDGX Book Feed (now called EdgeBook Depth X[SM]) are $500/month for internal distribution and $2,500/month for external distribution. The proposed rule filing does not impact the current EdgeBook Depth X[SM] fees with regard to the non-attributed book feed.

[6] *See* Securities Exchange Act Release No. 67554 (Aug. 1, 2012), 77 FR 47152 (Aug. 7, 2012) (SR–EDGX–2012–32).

[7] *See* EDGX Rule 11.5(c)(18).

[8] *See* Securities Exchange Act Release No. 67554 (Aug. 1, 2012), 77 FR 47152, 47153 (Aug. 7, 2012) (SR–EDGX–2012–32).

[9] A ''Distributor'' of Exchange data is any entity that receives EdgeBook Depth X[SM] directly from the Exchange or indirectly through another entity and then distributes such data either internally (within that entity) (''Internal Distributor'') or externally (outside that entity) (''External Distributor'').

[10] As defined in Rule 1.5(cc).

[11] 15 U.S.C. 78s(b)(1)

[12] 15 U.S.C. 78f(b)(4).

members and issuers and other persons using any facility or system which the Exchange operates or controls. The fees are not unreasonably discriminatory and are equitably allocated. The fees for Members and non-Members are uniform except with respect to reasonable distinctions with respect to internal and external distribution.[13] The Exchange proposes charging External Distributors more than Internal Distributors because of higher administrative costs associated with monitoring External Distributors ongoing reporting, as provided in the Direct Edge Data Vendor Agreement and market data requirements referenced therein.

The fees are fair and reasonable because they compare favorably to fees that other markets charge for similar products.[14] For example, NASDAQ's depth of book data feed, the NASDAQ TotalView ITCH (''TotalView''), features all displayed quotes and orders attributed to specific market participants.[15] TotalView provides market participants with multiple and varied services in a single feed.[16] While the cost of TotalView varies by number of subscribers and the specific type of access, each fee provides the entire TotalView book feed, inclusive of all services and features, including attribution of orders. Conversely, EdgeBook Attributed℠ is unlike other market data products such as TotalView. Members and non-Members who subscribe to EdgeBook Attributed℠ must also subscribe to EdgeBook Depth. However, Members and non-Members who subscribe to EdgeBook Depth X℠ are not obligated to purchase or subscribe to EdgeBook Attributed℠. Thus, the Exchange differentiates its pricing accordingly. The Exchange intends to charge a single, flat rate for EdgeBook Attributed℠ as it views it as an optional, a la carte feature which enhances the value and scope of information on EdgeBook Depth X℠. Therefore, the pricing of EdgeBook Attributed℠ will necessarily and understandably differ from market data products such as TotalView, which offer bundled pricing for the entire book feed, instead of a la carte pricing for specific features.[17] In addition, the fees are fair and reasonable because competition provides an effective constraint on the market data fees that the Exchange has the ability and incentive to charge for its market data products.

The revenue generated from purchases of EdgeBook Attributed℠ will pay for the development, marketing, technical infrastructure and operating costs of an important tool for Recipients to use for purposes such as analysis and intake of additional information to assist them in their ultimate trading decisions. Profits generated above these costs will help offset the costs that the Exchange incurs in operating and regulating a highly efficient and reliable platform for the trading of U.S. equities. Furthermore, the increased revenue stream from EdgeBook Attributed℠ will allow the Exchange to continue to offer it at a reasonable rate, consistent with fees that other markets charge for similar products.

The Exchange believes that Members will recognize the value of EdgeBook Attributed℠ and that the increased transparency of liquidity on EdgeBook Attributed℠ will beget additional liquidity. As a result, the Exchange believes that increased value in the data disseminated helps Exchange members hone in on trading opportunities by better understanding the quality and transparency of the Exchange's quote quality. This will, in turn, help to enhance the overall execution quality on the Exchange.

The Exchange also believes that the proposed fees for EdgeBook Attributed℠ are consistent with Section 6(b)(5) of the Act,[18] which requires, among other things, that the Exchange's rules not be designed to unfairly discriminate between customers, issuers, brokers or dealers. The Exchange makes all services and products subject to these fees available on a non-discriminatory basis to similarly situated Recipients because the service is purely optional and fees charged for EdgeBook Attributed℠ will apply uniformly to all Recipients, irrespective of whether the Recipient is a Member of the Exchange. Purchase of the Service is not a prerequisite for participation on the Exchange, nor is membership to the Exchange a prerequisite to purchase the Service. Only those Recipients that deem the product to be of sufficient overall value and usefulness will purchase it.

In addition, the proposed fees are also consistent with Section 6(b)(5) of the Act [19] as it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. EDGX believes that this proposal is in keeping with those principles as it will benefit all Recipients by: (i) Promoting transparency through the codification of uniform fees for EdgeBook Attributed℠; and (ii) providing additional information regarding quotations displayed on the Exchange by various Members, which may aid Recipients in their trading decisions. Specifically, any Member that wishes to publicly disclose their identity (through their MPID) by using Attributable Orders will be permitted to do so, and such Attributable Orders will be analogous to the orders or quotations that these same Members provide in other contexts (e.g., on the floor of a floor-based stock exchange or in the over-the-counter market through direct interaction). In addition, the Exchange

[13] The Exchange notes that distinctions based on external versus internal distribution have been previously filed with the Commission by the Exchange, NASDAQ Exchange, NASDAQ OMX BX, and NASDAQ OMX PSX. *See* Securities and Exchange Act Release No. 66864 (Apr. 26, 2012), 77 FR 26064 (May 2, 2012) (SR–EDGX–2012–14). *See* also Nasdaq Rule 7019(b). *See also* Securities Exchange Act Release No. 62876 (September 9, 2010), 75 FR 56624 (September 16, 2010) (SR–Phlx–2010–120). *See also* Securities Exchange Act Release No. 62907 (September 14, 2010), 75 FR 57314 (September 20, 2010) (SR–NASDAQ–2010–110). *See also* Securities Exchange Act Release No. 63442 (December 6, 2010), 75 FR 77029 (December 10, 2010) (SR–BX–2010–081).

[14] Other exchanges offer a version of their book feed with member order attribution. *See, e.g.,* BATS, Market Data Products, Multicast PITCH, *http://www.batstrading.com/market_data/products/ (describing* BATS Multicast PITCH, which provides depth of book quotations and execution information while providing optional attribution functionality); Securities Exchange Act Release No. 63291 (Nov. 9, 2010), 75 FR 70311 (Nov. 17, 2010) (SR–NYSEArca–2010–97) (describing NYSE Arcabook, which includes, among other things, displays of attributed orders by market makers and ETP holders); Securities Exchange Act Release No. 46521 (Sept. 20, 2002), 76 FR 61179 (Sept. 27, 2002) (SR–NASD–2002–33) (describing NASDAQ TotalView data feed, which includes, among other things, displays of attributed quotes and orders).

[15] TotalView features both attributed and non-attributed feeds. *See* Securities Exchange Act Release No. 46521 (Sept. 20, 2002), 76 FR 61179 (Sept. 27, 2002) (SR–NASD–2002–33). NYSE ArcaBook features an attributed feed at a fee of $750 per month, in addition to separate fees for professional and non-professional subscribers ranging from $0–15 per month. *See* NYSE Technologies, Market Data, NYSE ArcaBook, *http://www.nyxdata.com/arcabook.*

[16] *See* NASDAQ, NASDAQ TotalView-ITCH, *http://www.nasdaqtrader.com/trader.aspx?id=totalview* (describing services and fees for TotalView).

[17] For example, TotalView is priced at a monthly fee of $70 per professional or corporate subscriber and $14 per non-professional subscriber for coverage of NASDAQ issued securities, and $6 per professional or corporate subscriber and $1 per non-professional subscriber for coverage of NYSE and Amex issued securities. *See* NASDAQ, NASDAQ TotalView-ITCH, *http://www.nasdaqtrader.com/trader.aspx?id=totalview.*

[18] 15 U.S.C. 78f(b)(5).

[19] 15 U.S.C. 78f(b)(5).

believes that EdgeBook Attributed℠ furthers the objectives of Section 6(b)(5) of the Act [20] by promoting increased quote transparency as Members are encouraged to utilize Attributable Orders through the Edge Attribution Incentive Program. The increased use of Attributable Orders by Members would provide additional, useful information regarding orders/quotations displayed on the Exchange, including information on the identity of contra-parties to transactions. The Exchange believes that this enhanced information would aid Recipients of EdgeBook Attributed℠ in their trading decisions. In addition, EDGX has made a voluntary decision to make EdgeBook Attributed℠ available. EDGX is not required by the Act in the first instance to make the data available. EDGX has chosen to make EdgeBook Attributed℠ available to improve market quality, attract order flow, and increase transparency. It will continue to make such data available until such time as it changes its rule.

The Exchange also believes that the proposal is consistent with the goals of Regulation NMS.[21] In adopting Regulation NMS, the Commission granted self-regulatory organizations and broker-dealers increased authority and flexibility to offer new and unique market data services to the public. The Commission believed this authority would expand the amount of data available to market participants, and also spur innovation and competition for the provision of market data. EdgeBook Attributed℠ appears to be precisely the sort of market data service that the Commission envisioned when it adopted Regulation NMS.[22] EdgeBook Attributed℠ will allow Recipients to purchase a service that will provide them a means to view the MPID of certain Members who choose to use Attributable Orders while at the same time enabling the Exchange to better cover its infrastructure costs and to improve its market technology and services. Efficiency is promoted when Members who do not need the EDGX Book Feed data are not required to receive (and pay for) such data. The Exchange also believes that efficiency is promoted when Members may choose to receive (and pay for) additional market data based on their own internal analysis of the need for such data. Competition is promoted as the Exchange cannot set unreasonable fees without losing business to its competitors.[23]

Additionally, the Exchange believes that the Edge Attribution Incentive Program furthers the objectives of Section 6(b)(4) [24] in particular, as it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which the Exchange operates or controls. The Edge Attribution Incentive Program encourages Members to utilize Attributable Orders to convey their identity on EdgeBook Attributed℠. It represents a reasonable and equitable approach in that it financially rewards those Members that provide their valuable data to the Exchange and thereby help to contribute to the overall quality of EdgeBook Attributed℠ as a data feed.

The Exchange believes that the Edge Attribution Incentive Program is also equitable and reasonable because it will attract additional order flow from Members motivated to receive the incentive offered, thereby enhancing the quality of the data on EdgeBook Depth X℠. Attributable Orders, similar to all market data, provide Members with valuable trading information and provide increased transparency to investors. The Exchange believes that such increased transparency will lead to additional order flow and increased opportunities for price discovery by Members. Specifically, the Exchange believes that the Edge Attribution Incentive Program will also increase order flow as Members will be motivated to receive the incentive offered under the Edge Attribution Incentive Program, and contra-side parties will look to execute against Members that are attributing their orders. For example, Market Makers [25] may want to utilize Attributable Orders to advertise the names of the securities they trade in to attract potential issuers or to advertise to the market that they maintain an inventory in particular securities. Similarly, retail brokerage firms may desire to utilize Attributable Orders to advertise their firm names with the intent to draw in contra-parties to trade against and thus bolster execution quality, price discovery, and resulting speed of execution for their clients. The associated potential rise in order volume would increase the potential revenue to the Exchange, allowing the Exchange to spread its administrative and infrastructure costs over a greater number of shares. These lower per share costs in turn would allow the Exchange to pass on such savings to Members in the form of such an incentive. The increased liquidity would also benefit investors by deepening EDGX's liquidity pool, allowing investors to enjoy cost savings as a result of obtaining better execution quality, supporting the quality of price discovery, promoting market transparency and improving investor protection.

The incentive is similar to other volume-based rebates on the Exchange, which have been widely adopted in the cash equities markets.[26] The Exchange believes the Edge Attribution Incentive Program, which is similar to other volume-based rebates on the Exchange's fee schedule, is equitable because it is available and uniformly applied to all Members. The Edge Attribution Incentive Program also provides discounts that are reasonably related to the value of an exchange's market quality associated with higher levels of market activity, such as higher levels of liquidity provision and introduction of higher volumes of orders into the price and volume discovery processes.

The Exchange believes that the Edge Attribution Incentive Program is consistent with Section 6(b)(5) of the Act,[27] which requires, among other things, that the Exchange's rules not be designed to unfairly discriminate between customers, issuers, brokers or dealers. The Exchange believes that the Edge Attribution Incentive Program is equitable because participation in the Edge Attribution Incentive Program is purely optional. Only those Members that deem the Edge Attribution Incentive Program to be of sufficient overall value and usefulness will participate. Moreover, the requirements necessary to qualify for payments received under the Edge Attribution Incentive Program (at least 100 symbols over 10 consecutive trading days over the course of a month) are equitable and do not unfairly discriminate between Members who choose to attribute, as the

[20] 15 U.S.C. 78f(b)(5).

[21] *See* Securities Exchange Act Release No. 51808 (June 9, 2006), 70 FR 37496 (June 29, 2005) (sic).

[22] *See* Securities and Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37597 (June 29, 2005) (''[E]fficiency is promoted when broker-dealers who do not need the data beyond the prices, sizes, market center identifications of the NBBO and consolidated last sale information are not required to receive (and pay for) such data. The Commission also believes that efficiency is promoted when broker-dealers may choose to receive (and pay for) additional market data based on their own internal analysis of the need for such data.'').

[23] *See infra* discussion in section on ''Self-Regulatory Organization's Statement on Burden on Competition.''

[24] 15 U.S.C. 78f(b)(4).

[25] As defined in Rule 1.5(l).

[26] EDGX allows Members to utilize volume-based tiers, as described in Footnotes 1 and 2, among others, to the EDGX Fee Schedule. *See, e.g.,* EDGX Fee Schedule, *http://www.directedge.com/Membership/FeeSchedule/EDGXFeeSchedule.aspx.*

[27] 15 U.S.C. 78f(b)(5).

payments will be offered uniformly to all Members who meet such requirements. Such requirements provide a clear benchmark by identifying a threshold that is not unreasonably difficult for a meaningful and consistent attributor to achieve. As Attributable Orders contain valuable trading information to the Exchange, the Edge Attribution Incentive Program is not unfairly discriminatory in its design to allocate the Revenue Allotment to Members who attribute in proportion to the executed share volume from such Member's Attributable Orders entered into the Exchange's System. Such data is also valuable to Members and non-Members who use the additional information for various purposes. For example, certain Recipient broker-dealers may use the data to aid their trading decisions, while Recipient smart routers may use the data to aid in building their own consolidated ticker plant. Such information enhances a Recipient's trading decisions as the transparency of knowing the identity of the potential counterparty may provide a Recipient with additional information regarding the reliability and quality of the attributed quote.

Lastly, the Exchange believes that the Edge Attribution Incentive Program furthers the objectives of Section 6(b)(5) of the Act [28] by promoting increased quote transparency on EdgeBook Attributed℠ as Members are encouraged to utilize Attributable Orders. The increased use of Attributable Orders by Members would increase transparency by providing additional, useful information regarding orders/quotations displayed on the Exchange, including information on the identity of contra-parties to transactions. The Exchange believes that this enhanced information would aid Recipients of EdgeBook Attributed℠ in their trading decisions.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

There is significant competition for the provision of market data to market participants, as well as competition for the orders that generate that data. In introducing the proposed fees for EdgeBook Attributed℠, the Exchange would be providing a service similar to those already offered by other market centers.[29] The existence of such alternatives ensures that the Exchange cannot set unreasonable fees, or fees that are unreasonably discriminatory, without losing business to these alternatives. Thus, as the fees are consistent with those charged by the Exchange's competitors, EdgeBook Attributed℠ would promote competition if it succeeds in providing market participants with viable and cost-effective alternatives which drive the market to continually improve products and services to cater to customers' data needs. Accordingly, the Exchange does not believe that the fees for EdgeBook Attributed℠ will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from its Members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [30] and paragraph (f) of Rule 19b–4 thereunder.[31] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–EDGX–2013–01 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–EDGX–2013–01. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–EDGX–2013–01 and should be submitted on or before February 20, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[32]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–01982 Filed 1–29–13; 8:45 am]

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[28] 15 U.S.C. 78f(b)(5).

[29] *See, e.g.,* BATS, Market Data Products, Multicast PITCH, *http://www.batstrading.com/market_data/products/;* Securities Exchange Act Release No. 63291 (Nov. 9, 2010), 75 FR 70311 (Nov. 17, 2010) (SR–NYSEArca–2010–97) (describing NYSE Arcabook); Securities Exchange Act Release No. 46521 (Sept. 20, 2002), 76 FR 61179 (Sept. 27, 2002) (SR–NASD–2002–33) (describing NASDAQ TotalView).

[30] 15 U.S.C. 78s(b)(3)(A).

[31] 17 CFR 240.19b–4(f).

[32] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68712; File No. SR–OCC–2012–23]

Self-Regulatory Organizations; The Options Clearing Corporation; Order Approving Proposed Rule Change To Accommodate Certain Physically-Settled Options on U.S. Treasury Securities

January 23, 2013.

I. Introduction

On November 30, 2012, The Options Clearing Corporation (''OCC'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change SR–OCC–2012–23 pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder.[2] The proposed rule change was published for comment in the **Federal Register** on December 17, 2012.[3] The Commission received no comment letters. This order approves the proposed rule change.

II. Description of the Proposed Rule Change

The purpose of this proposed rule change is to accommodate the clearing of physically-settled options on certain U.S. Treasury notes and U.S. Treasury bonds (''Treasury Options'') traded by NASDAQ OMX PHLX, LLC (''PHLX'').[4] OCC's current By-Laws and Rules (collectively, ''Rules'') accommodate options on Treasury securities, but the options on Treasury securities contemplated by the Rules are no longer traded and are different from the Treasury Options that PHLX intends to trade in certain respects. Accordingly, OCC is amending the Rules, as described below, to accommodate such Treasury Options as well as to streamline Chapter XIV of its rulebook by re-numbering certain rules and deleting unused and ''reserved'' rules.

Since PHLX Treasury Options are limited to European-style options on Treasury notes and bonds with a unit of trading of $10,000, OCC is removing provisions and references within Chapter XIV of the Rules to American-style options on Treasury securities, Treasury bills as an eligible underlying interest for options on Treasury securities, and ''mini options'' on Treasury securities. In addition, OCC is removing from the Rules the defined term ''adjusted exercise price,'' which related only to options on Treasury bills and consequently is no longer needed, and is updating other definitions within the Rules to reflect the limiting of the underlying interests for Treasury Options to Treasury bonds and notes. Furthermore, since OCC is not currently permitting escrow deposits to be made in connection with the clearing of Treasury Options, it is removing related provisions in Section 2 of Article XIII.

OCC generally will apply current expiration date exercise procedures to Treasury Options, and will require delivery settlement for exercised and assigned Treasury Options to be effected on a broker-to-broker basis through the Fixed Income Clearing Corporation (''FICC'').[5] As not all OCC clearing members are participants of the Government Securities Division (''GSD'') of FICC, OCC is permitting clearing members to designate, with proper advance notice to OCC, a representative that is a GSD participant who would be responsible for inputting trade information into FICC's systems for delivery settlement purposes.[6]

On the expiration date for a Treasury Option, OCC will produce an exercise and assignment report identifying the delivering and receiving clearing members and other relevant delivery information. Clearing members that are obligated to purchase or sell Treasury securities as a result of the exercise or assignment of positions in Treasury Options will be required to submit the terms of such trades to FICC's real time trade matching system. If the trade information submitted by the delivering and receiving clearing member matches within FICC's system, FICC becomes obligated to guarantee settlement of the trade pursuant to FICC's rules, at the point in time at which FICC makes available to the delivering and receiving clearing members a report indicating the trade has been compared. At that time, OCC's obligation to guarantee delivery settlement will be terminated. Delivery settlement through FICC includes delivery of the underlying securities against payment of the aggregate purchase price increased by the amount of accrued interest. If a trade does not match, the delivering and receiving OCC clearing members will be required to notify OCC within such time as OCC may specify of such failure on the first business day after the expiration date. If no such notification is made within the deadline, pursuant to proposed Rule 1403(d), OCC's obligation to guarantee settlement will be extinguished as of such deadline, regardless of whether settlement was actually completed.

In the event OCC is given timely notification of a failure to match on the first business day after the expiration date, the clearing members would be required to attempt to resolve the failure such that settlement could occur through FICC by a deadline specified by OCC on the second business day following the expiration date. If the failure is not resolved and the trade has not matched by the deadline on the second business day after the expiration date, the delivering and receiving OCC clearing members will be required to notify OCC within such time as OCC may specify of such failure. If no such notification is made within the deadline, pursuant to proposed Rule 1404(a), OCC's obligation to guarantee settlement will be extinguished as of such deadline, regardless of whether settlement was actually completed.

If OCC receives timely notification, pursuant to proposed Rule 1404(a), that the second submission attempt at FICC failed to result in a match, OCC will assess and pay damages, if any, incurred by the delivering or receiving clearing member, as applicable, in connection with the failure to match. OCC will also be authorized to debit the amount of such damages from the account of the delivering or receiving clearing member, as applicable.

Under Rule 1404, in the event the non-defaulting clearing member buys or sells the underlying Treasury security, the non-defaulting clearing member will be required to promptly notify OCC of the price paid or received, as applicable, and OCC will take this information into account in assessing damages. However, OCC will not be bound to accept these prices in assessing damages, and will be able to make an independent determination of damages. Proposed Rule 1404 provides that OCC's determination of damages is at OCC's sole discretion, final, and binding on all parties. Such ''failure to match'' procedures will limit OCC's liability in the event of a default by one of its clearing members.

OCC will collect and hold margin from clearing members with Treasury Option delivery or receipt obligations until the exercise settlement date, unless OCC receives notification of a failure to match, in which case OCC will

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[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 68403 (December 11, 2012), 77 FR 74705 (December 17, 2012).

[4] *See* Securities Exchange Act Release No. 67976 (October 4, 2012), 77 FR 61794 (October 11, 2012) (SR–Phlx–2012–105)

[5] Clearing members interested in Treasury Options have advised OCC that it would be operationally more efficient for them if delivery settlement were effected in this manner.

[6] OCC has no obligation to such designated representative and is harmless against any claims based on the designated representative's actions or delays in acting or failures to act.

continue to hold margin until either the trade is deemed settled or damages have been assessed and paid to the non-defaulting clearing member.

Rule 1405 clarifies that OCC may pursue disciplinary action against clearing members who fail to discharge the delivery, payment, and notification obligations as set forth in Rules 1403 and 1404.

In addition to the above changes relating to the terms of and settlement process for Treasury Options, OCC is revising Section 5 of Article XIII of the By-Laws regarding the handling of shortages of Treasury Securities. These revisions provide OCC with broader discretion in determining whether a shortage exists and simplify the procedures to be used in this situation.

III. Discussion

Section 17A(b)(3) (F) of the Act [7] requires that, among other things, that the rules of a clearing agency are designed to promote the prompt and accurate clearance and settlement of securities transactions, and to the extent applicable derivative agreements, contracts, and transactions, to safeguard securities and funds in its custody or control or for which it is responsible, and to protect investors and the public interest. The proposed rule change accomplishes these purposes, by among other things, updating OCC's existing rule provisions to accommodate Treasury Options, as proposed for trading by PHLX, and implementing a settlement process designed to minimize the risks of settlement failures for investors. Furthermore, Section17A(a)(2)(A)(ii) of the Act [8] directs the Commission to facilitate the establishment of linked and coordinated facilities for clearance and settlement of transactions in securities and securities options. The proposed rule change accomplishes this end by utilizing the existing infrastructure of two clearing agencies (OCC and FICC) to create a more operationally efficient exercise settlement process for Treasury Options, traded by PHLX.

IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposal is consistent with the requirements of the Act and in particular with the requirements of Section 17A of the Act [9] and the rules and regulations thereunder.

[7] 15 U.S.C. 78q–1(b)(3)(F)

[8] 15 U.S.C. 78q–1(a)(2)(ii)).

[9] 15 U.S.C. 78q–1.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[10] that the proposed rule change (File No. SR–OCC–2012–23) be and hereby is approved.[11]

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.[12]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–01929 Filed 1–29–13; 8:45 am]

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[10] 15 U.S.C. 78s(b)(2).

[11] In approving the proposed rule change, the Commission considered the proposal's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68721; File No. SR–NASDAQ–2013–008]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Rule 5710

January 24, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on January 10, 2013, The NASDAQ Stock Market LLC (''NASDAQ'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange proposes to amend Rule 5710 so that the Exchange may list Linked Securities [3] that provide for three times accelerated payment at maturity. The Exchange requests that the Commission waive the 30-day operative delay period contained in Exchange Act Rule 19b–4(f)(6)(iii).[4] The text of the proposed rule change is available at *http://nasdaq.cchwallstreet.com/,* at the Exchange's principal office, and at the Commission's Public Reference Room.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] For a discussion of Linked Securities, *see* Rule 5710.

[4] 17 CFR 240.19b–4(f)(6)(iii).

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this proposed rule change is to amend Rule 5710(d) so that the Exchange may list Linked Securities that provide for three times accelerated payment at maturity.[5] In changing one word in Rule 5710, the Exchange is conforming its rule to the established listing rules of other exchanges.

This proposed amendment to Rule 5710(d) is based, word-for-word, on NYSE Arca (''Arca'') Equities Rule 5.2(j)(6)(A)(d) and NYSE Section 703.22(B)(6) of the Listed Company Manual. NASDAQ, Arca, and NYSE all have rule provisions stating that pursuant to Rule 19b–4(e) under the Act [6] a loss or negative payment at maturity of a Linked Security [7] may be accelerated by a multiple of the performance of an underlying asset (known as the ''acceleration provision''). However, in Rule 5710 NASDAQ sets the multiple for the acceleration provision at ''twice''; [8] whereas Arca and NYSE both set the acceleration

[5] The proposal is applicable only to non-option products.

[6] 17 CFR 240.19b–4(e).

[7] Where NASDAQ refers to ''Linked Securities'' in its Rule 5710, NYSE and Arca refer to these products as ''Index-Linked Securities.'' On all exchanges, Linked Securities are based on the performance of various Reference Assets. For a more detailed discussion of Reference Assets, *see* Rule 5710.

[8] *See* Rule 5710(d). *See also* Securities Exchange Act Release Nos. 59663 (March 31, 2009), 74 FR 15552 (April 6, 2009) (SR–NASDAQ–2009–018) (notice of filing and immediate effectiveness relating to revisions and restructuring of the NASDAQ listing rules, and transference of Rule 5710(d) from Rule 4420(m)); and 57269 (February 5, 2008), 73 FR 8092 (February 12, 2008) (SR–NASDAQ–2008–08) (order approving listing standards in Rule 4420(m) to allow *twice* (*2x*) the performance of the underlying index, indexes, or Reference Asset).

provision multiple at ''three times''.[9] Other than changing one word—from ''twice'' to ''three times''—in the Exchange's acceleration provision in Rule 5710(d), no other change is proposed or made by this filing.[10]

The current requirements for listing Linked Securities, which include Multifactor Index-Linked Securities, Equity Index-Linked Securities, Commodity-Linked Securities, Fixed Income Index-Linked Securities and Futures-Linked Securities, are set forth in Rule 5710. This rule states that NASDAQ will consider Linked Securities for listing and trading pursuant to Rule 19b–4(e) under the Act, provided the following requirements are met: [11]

(a) Both the issue and the issuer of such security meet the criteria for other securities set forth in Rule 5730(a), except that if the security is traded in $1,000 denominations or is redeemable at the option of holders thereof on at least a weekly basis, then no minimum number of holders and no minimum public distribution of trading units shall be required;

(b) The issue has a term of not less than one (1) year and not greater than thirty (30) years;

(c) The issue must be the non-convertible debt of the Company;

(d) The payment at maturity may or may not provide for a multiple of the direct or inverse performance of an underlying index, indexes or Reference Asset; however, in no event will a loss (negative payment) at maturity be accelerated by a multiple that exceeds twice the performance of an underlying index, indexes or Reference Asset;

(e) The Company will be expected to have a minimum tangible net worth in excess of $250,000,000 and to exceed by at least 20% the earnings requirements set forth in Rule 5405(b)(1)(A); [12]

(f) The Company is in compliance with Rule 10A–3 under the Act;

(g) Certain Maintenance and Dissemination standards must be satisfied.[13]

Of the seven specific and extensive requirements in Rule 5710 for listing Linked Securities pursuant to Rule 19b–4(e), the Exchange proposes to change only the multiple by which a Linked Security payment can be accelerated from twice to three times. Each of the other listing requirements remains unchanged.

The principal reason for the proposed amendment is demand for accelerated Linked Securities. There is continuing customer demand for having the ability to list and trade these Linked Securities products on the Exchange, particularly as the strategies and components of these products continue to evolve and offer access to a broader range of asset classes.

Prior to the commencement of trading of three times accelerated Linked Securities, NASDAQ will inform its members in an Information Circular of the special characteristics and risks associated with trading such leveraged securities. In particular, the Information Circular will discuss that leveraged Linked Securities seek returns on a periodic basis (*e.g.* daily or monthly), and do not seek to achieve their stated investment objective over a period of time greater than one period because compounding prevents these securities from perfectly achieving such results. Accordingly, results for leveraged Linked Securities over periods of time greater than one period (*e.g.* daily or monthly) typically will not reflect exactly the leveraged multiple of the period return of the applicable Reference Asset benchmark, and may differ from the multiple.[14] NASDAQ will also inform its members of NASDAQ Rule 2310, Recommendations to Customers (Suitability), and the requirement that, if members recommend transactions in these leveraged securities, they must have a reasonable basis to believe that (1) the recommendation is suitable for a customer given reasonable inquiry concerning the customer's investment objectives, financial situation, needs, and any other information known by such Member, and (2) the customer can evaluate the special characteristics, and is able to bear the financial risks, of an investment in the securities. In addition, FINRA has implemented increased sales practice and customer margin requirements for FINRA members applicable to inverse, leveraged, and inverse leveraged securities and options on such securities, as described in FINRA Regulatory Notices 09–31 (June 2009), 09–53 (August 2009) and 09–65 (November 2009) (''FINRA Regulatory Notices''). Members that carry customer accounts will be required to follow the FINRA guidance set forth in the FINRA Regulatory Notices. The Information Circular will reference the FINRA Regulatory Notices.

The Exchange believes that its surveillance procedures are adequate to address any concerns about the trading of the securities on NASDAQ. Trading of the securities on NASDAQ will be subject to FINRA's surveillance procedures for derivative products.[15] NASDAQ may obtain information via the Intermarket Surveillance Group

[9] *See* Arca Equities Rule 5.2(j)(6) and NYSE Section 703.22(B)(6) of the Listed Company Manual. *See also* Securities Exchange Act Release Nos. 59332 (January 30, 2009), 74 FR 6338 (February 6, 2009) (SR–NYSEArca–2008–136) (order approving listing standards in NYSE Arca Equities Rule 5.2(j)(6) to allow *three times* (*3x*) the performance of the underlying Reference Asset); and 61230 (December 23, 2009), 74 FR 69163 (December 30, 2009) (SR–NYSE–2009–124) (order approving *three times* (*3x*) the performance in NYSE Section 703.22 of the Listed Company Manual, similarly to Arca Equities Rule 5.2(j)(6)).

[10] In recently approving rule changes to allow listings on NASDAQ that are allowed on Arca by rule, the Commission noted that it ''has previously approved substantively identical listing standards for the listing and trading of the Subject Securities on NYSE Arca.'' *See* Securities Exchange Act Release No. 66648 (March 23, 2012), 77 FR 19428 (March 30, 2012) (SR–NASDAQ–2012–013).

[11] However, Rule 5710 provides that if Linked Securities do not otherwise meet the Rule 19b-4(e) standards set forth in the rule, NASDAQ may submit a rule filing pursuant to Section 19 of the Act to permit the listing and trading of Linked Securities.

[12] Subsection (e) states also, in relevant part, regarding minimum tangible net worth: ''In the alternative, the Company will be expected: (i) To have a minimum tangible net worth of $150,000,000 and to exceed by at least 20% the earnings requirement set forth in Rule 5405(b)(1)(A), and (ii) not to have issued securities where the original issue price of all the Company's other index-linked note offerings (combined with index-linked note offerings of the Company's affiliates) listed on a national securities exchange exceeds 25% of the Company's net worth. Rule 5710(e).'' [sic]

[13] Subsection (g) states, regarding Maintenance and Dissemination: ''(i) If the index is maintained by a broker-dealer, the broker-dealer shall erect a ''firewall'' around the personnel who have access to information concerning changes and adjustments to the index and the index shall be calculated by a third party who is not a broker-dealer. (ii) Unless the Commission order applicable under paragraph (k) hereof provides otherwise, the current value of the index or the Reference Asset (as applicable) will be widely disseminated at least every 15 seconds during Nasdaq's regular market session, except as provided in the next clause (iii). (iii) The values of the following indexes need not be calculated and widely disseminated at least every 15 seconds if, after the close of trading, the indicative value of the Equity Index-Linked Security based on one or more of such indexes is calculated and disseminated to provide an updated value: CBOE S&P 500 BuyWrite Index(sm), CBOE DJIA Buy Write Index(sm), CBOE Nasdaq-100 BuyWrite Index(sm). (iv) If the value of a Linked Security is based on more than one index, then the dissemination requirement of this paragraph (g) applies to the composite value of such indexes. (v) In the case of a Commodity-Linked Security that is periodically redeemable, the indicative value of the subject Commodity-Linked Security must be calculated and widely disseminated by one or more major market data vendors on at least a 15-second basis during Nasdaq's regular market session.''

[14] The Exchange notes that leveraged exchange trade products are not new to the market; these products trade on NASDAQ, NASDAQ Options Market, and various other equity, options, and futures exchanges. Moreover, as noted 3x leveraged exchange products have been trading on Arca for years. As such, while the concept of leverage is not novel to the markets, the Information Circular will be distributed to provide additional information to market participants.

[15] FINRA surveils trading on NASDAQ pursuant to a regulatory services agreement. NASDAQ is responsible for FINRA's performance under this regulatory services agreement.

(''ISG'') from other exchanges who are members or affiliates of the ISG.[16]

The Exchange believes that by conforming Rule 5710 to the rules of other exchanges (*e.g.* Arca and NYSE) and allowing listing opportunities on the Exchange that are already allowed by rule on other exchanges, the proposal would offer another venue for listing and trading the Linked Securities products and thereby promote competition. For the noted reasons, the Exchange proposes to change the acceleration provision in its Rule 5710 to exactly match, as described above, what is available on other exchanges.[17]

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act [18] in general, and furthers the objectives of Section 6(b)(5) of the Act [19] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest. For the reasons noted in the filing, the Exchange proposes to change the acceleration provision in its Rule 5710 from a two times to a three times multiple of the performance of the underlying asset. This exactly matches what is available on other exchanges. The Exchange believes that by conforming Rule 5710 to the rules of other exchanges (*e.g.* Arca and NYSE) and allowing listing opportunities on the Exchange that are already allowed by rule on other exchanges, the proposal would offer another venue for listing and trading the Linked Securities products and thereby promote broader competition among exchanges.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. To the contrary, where the current variance in the rules of the exchanges limits competition, the proposal will allow listing additional Linked Securities on the Exchange, thereby promoting increased competition across markets and liquidity on the Exchange.

[16] For a list of the current members and affiliate members of ISG, see *www.isgportal.com.*

[17] No other changes are made or intended by this filing and existing listing and trading rules continue to be applicable to leveraged Linked Securities.

[18] 15 U.S.C. 78f(b).

[19] 15 U.S.C. 78f(b)(5).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing proposed rule change may take effect upon filing with the Commission pursuant to Section 19(b)(3)(A) [20] of the Act and Rule 19b–4(f)(6)(iii) thereunder [21] because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate.

The Exchange has requested the Commission to waive the 30-day operative delay period to allow the proposed rule change to become operative upon filing.[22] The Commission believes it is consistent with the public interest to waive the 30-day operative delay. The proposed rule change is substantially similar in all material respects to Section 703.22(B)(6) of the NYSE Listed Company Manual and Arca Equities Rule 5.2(j)(6)(A)(d), and each policy issue raised by the proposed rule change (i) has been considered by the Commission in approving the other exchanges' rules and (ii) is resolved in a manner generally consistent with the approved rules. As such, the Commission believes that the proposal presents no novel regulatory issues. Waiver of the operative delay will allow the Exchange to list certain securities that can already be listed and traded on other exchanges without undue delay. Therefore, the Commission grants such waiver and designates the proposal operative upon filing.[23]

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

[20] 15 U.S.C. 78s(b)(3)(A).

[21] 17 CFR 240.19b–4(f)(6)(iii).

[22] As required under Rule 19b–4(f)(6)(iii), the Exchange provided the Commission with written notice of its intent to file the proposed rule change along with a brief description and the text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission.

[23] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

• Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or

• Send an email to *rule-comments@sec.gov.* Please include File No. SR–NASDAQ–2013–008 on the subject line.

Paper Comments

• Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File No. SR–NASDAQ–2013–008. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of NASDAQ. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR–NASDAQ–2013–008 and should be submitted on or before February 20, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[24]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–01932 Filed 1–29–13; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68720; File No. SR–NASDAQ–2013–011]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Mini Options

January 24, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'' or ''Exchange Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on January 16, 2013, The NASDAQ Stock Market LLC (''NASDAQ'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

NASDAQ proposes to list and trade option contracts overlying 10 shares of a security (''Mini Options'') applicable to NASDAQ members using The NASDAQ Options Market (''NOM''), NASDAQ's facility for executing and routing standardized equity and index options.

The text of the proposed rule change is available on the Exchange's Web site at *http://www.nasdaq.cchwallstreet.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to amend Chapter IV, Section 6 (Series of Options Contracts Open for Trading) and Chapter VI, Section 4 (Meaning of Premium Quotes and Orders) to list and trade Mini Options overlying five (5) high-priced securities for which the standard contract overlying the same security exhibits significant liquidity. Specifically, the Exchange proposes to list Mini Options on SPDR S&P 500 (''SPY''), Apple, Inc. (''AAPL''), SPDR Gold Trust (''GLD''), Google Inc. (''GOOG'') and Amazon.com Inc. (''AMZN'').[3] The Exchange believes that this proposal would allow investors to select among options on various high-priced and actively traded securities, each with a unit of trading ten times lower than that of the regular-sized options contracts, or 10 shares, similar to other options exchanges. In addition, the Exchange proposes a technical amendment to Chapter III, Section 7 (Position Limits) to make the rule text consistent.

For example, with Apple Inc. (''AAPL'') trading at $605.85 on March 21, 2012, ($60,585 for 100 shares underlying a standard contract), the 605 level call expiring on March 23 was trading at $7.65. The cost of the standard contract overlying 100 shares would be $765, which is substantially higher in notional terms than the average equity option price of $250.89.[4] Proportionately equivalent mini-options contracts on AAPL would provide investors with the ability to manage and hedge their portfolio risk on their underlying investment, at a price of $76.50 per contract. In addition, investors who hold a position in AAPL at less than the round lot size would still be able to avail themselves of options to manage their portfolio risk. For example, the holder of 50 shares of AAPL could write covered calls for five mini-options contracts. The table below demonstrates the proposed differences between a mini-options contract and a standard contract with a strike price of $125 per share and a bid or offer of $3.20 per share:

	Standard	Mini
Share Deliverable Upon Exercise	100 shares	10 shares
Strike Price	125	125
Bid/Offer	3.20	3.20
Premium Multiplier	$100	$10
Total Value of Deliverable	$12,500	$1,250
Total Value of Contract	$320	$32

The Exchange currently lists and trades standardized option contracts on a number of equities and Exchange-Traded Funds (''ETFs'') each with a unit of trading of 100 shares. Except for the difference in the deliverable of shares, the proposed Mini Options would have the same terms and contract characteristics as regular-sized equity and ETF options, including exercise style. All existing Exchange rules applicable to options on equities and ETFs would apply to Mini Options. With respect to position[5] and exercise limits, the applicable position and

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[24] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] These issues were selected because they are priced greater than $100 and are among the most actively traded issues, in that the standard contract exhibits average daily volume (''ADV'') over the previous three calendar months of at least 45,000 contracts, excluding LEAPS and FLEX series. The Exchange notes that any expansion of the program would require that a subsequent proposed rule change be submitted to the Commission.

[4] A high priced underlying security may have relatively expensive options, because a low percentage move in the share price may mean a large movement in the options in terms of absolute dollars. Average non-FLEX equity option premium per contract January 1–December 31, 2011. *See http://www.theocc.com/webapps/monthly-volume-reports?reportClass=equity.*

[5] Position limits applicable to a regular-sized option contract would also apply to the Mini Options on the same underlying security, with 10 Mini Option contracts counting as one regular-sized contract. Positions in both the regular-sized option contract and Mini Options on the same security will be combined for purposes of calculating positions.

exercise limits applicable to NOM Options Participants are those limits permitted by another options exchange.[6] Further, hedge exemptions will apply to NOM Option Participants if such exemption is permitted by another exchange and that exchange's rules apply to the NOM Option Participant pursuant to Chapter III, Section 8.[7]

Also, of note, NYSE Arca, Inc. (''NYSE Arca'') lists and trades option contracts overlying a number of shares other than 100.[8] Moreover, the concept of listing and trading parallel options products of reduced values and sizes on the same underlying security is not novel. For example, parallel product pairs on a full-value and reduced-value basis are currently listed on the S&P 500 Index (''SPX'' and ''XSP,'' respectively), the Nasdaq 100 Index (''NDX'' and ''MNX,'' respectively) and the Russell 2000 Index (''RUT'' and ''RMN,'' respectively).

The Exchange believes that the proposal to list Mini Options will not lead to investor confusion. There are two important distinctions between Mini Options and regular-sized options that are designed to ease the likelihood of any investor confusion. First, the premium multiplier for the proposed Mini Options will be 10, rather than 100, to reflect the smaller unit of trading. To reflect this change, the Exchange proposes to add language to Chapter VI, Section 4(a)(i) which notes that bids and offers for an option contract overlying 10 shares would be expressed in terms of dollars per 1/10th part of the total value of the contract. Thus, an offer of ''.50'' shall represent an offer of $5.00 on an option contract having a unit of trading consisting of 10 shares. Second, the Exchange intends to designate Mini Options with different trading symbols than those designated for the regular-sized contract. For example, while the trading symbol for regular option contracts for Apple, Inc. is AAPL, the Exchange proposes to adopt AAPL7 as the trading symbol for Mini Options on that same security.

The Exchange proposes to add rule text to Supplementary Material to Chapter IV, Section 6 to reflect that after an option class on a stock, Exchange-Traded Fund Share, Trust Issued Receipt, Exchange Traded Note, and other Index Linked Security with a 100 share deliverable has been approved for listing and trading on the Exchange, series of option contracts with a 10 share deliverable on that stock, Exchange-Traded Fund Share, Trust Issued Receipt, Exchange Traded Note, and other Index Linked Security may be listed for all expirations opened for trading on the Exchange. Also, the Exchange is amending Supplementary Material to Chapter IV, Section 6 to reflect that strike prices for Mini Options shall be set at the same level as for regular options. For example, a call series strike price to deliver 10 shares of stock at $125 per share has a total deliverable value of $1,250, and the strike price will be set at 125. Further, the Exchange proposes to add rule text to Supplementary Material to Chapter IV, Section 6 to not permit the listing of additional series of Mini Options if the underlying is trading at $90 or less to limit the number of strikes once the underlying is no longer a high priced security. The Exchange proposes a $90.01 minimum for continued qualification so that additional series of Mini Options that correspond to standard strikes may be added even though the underlying has fallen slightly below the initial qualification standard. In addition, the underlying security must be trading above $90 for five consecutive days before the listing of Mini Option contracts in a new expiration month. This restriction will allow the Exchange to list strikes in Mini Options without disruption when a new expiration month is added even if the underlying has had a minor decline in price. The same trading rules applicable to existing equity and ETF options would apply, including Market Maker obligations, to Mini Options.[9]

The Exchange notes that by listing the same strike price for Mini Options as for regular options, the Exchange seeks to keep intact the long-standing relationship between the underlying security and an option strike price thus allowing investors to intuitively grasp the option's value, *i.e.,* option is in the money, at the money or out of the money. The Exchange believes that by not changing anything but the multiplier and the option symbol, as discussed above, retail investors will be able to grasp the distinction between regular option contracts and Mini Options. The Exchange notes that The Options Clearing Corporation (''the OCC'') Symbology is structured for contracts that have a deliverable of other than 100 shares to be designated with a numeric added to the standard trading symbol. Further, the Exchange believes that the contract characteristics of Mini Options are consistent with the terms of the Options Disclosure Document.

With regard to the impact of this proposal on system capacity, the Exchange has analyzed its capacity and represents that it and the Options Price Reporting Authority (''OPRA'') have the necessary systems capacity to handle the potential additional traffic associated with the listing and trading of Mini Options. The Exchange has further discussed the proposed listing and trading of Mini Options with the OCC, which has represented that it is able to accommodate the proposal. In addition, the Exchange would file a proposed rule change to adopt transaction fees specific to Mini Options for listing and trading Mini Options. The current options pricing in Chapter XV would not apply to Mini Options.

The Exchange is also proposing to amend Chapter III, Section 7 (Position Limits) to add parentheses to certain subsections for consistency with other NASDAQ Rules. These filings are [sic] similar to filings by NYSE Arca, Inc. (''NYSE Arca'') and the International Securities Exchange LLC (''ISE'') to list and trade options contracts overlying 10 shares of certain securities.[10]

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of [sic] Act,[11] in general, and with Section 6(b)(5) of the Exchange Act,[12] in particular, in that the proposal is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

The Exchange believes that investors would benefit from the introduction and availability of Mini Options by making options on high priced securities more readily available as an investing tool at more affordable prices, particularly for average retail investors, who otherwise may not be able to participate in trading options on high priced securities. The Exchange intends to adopt a different trading symbol to distinguish Mini Options from its currently listed option contracts and therefore, eliminate investor confusion with respect to

[6] *See* Chapter III, Sections 7 (Position Limits) and 9 (Exercise Limits).

[7] *See* Chapter III, Section 8 (Exemptions from Position Limits).

[8] *See* Securities Exchange Act Release No. 44025 (February 28, 2001) 66 FR 13986 (March 8, 2001) (approving SR–PCX–01–12).

[9] *See* Chapter VII, Section 6(d).

[10] *See* Securities Exchange Act Release No. 67948 (September 28, 2012), 77 FR 60735 (October 4, 2012) (SR–NYSEArca–2012–64) (SR–ISE–2012–58). NYSE Arca and ISE received approval to list and trade options contracts overlying 10 shares of certain securities.

[11] 15 U.S.C. 78f.

[12] 15 U.S.C. 78f(b)(5).

product distinction. Moreover, the proposed rule change is designed to protect investors and the public interest by providing investors with an enhanced tool to reduce risk in high priced securities. In particular, Mini Options would provide retail customers who invest in SPY, AAPL, GLD, GOOG and AMZN in lots of less than 100 shares with a means of protecting their investments that is currently only available to those who have positions of 100 shares or more. Further, the proposed rule change is limited to just five high priced securities to ensure that only securities that have significant options liquidity and therefore, customer demand, are selected to have Mini Options listed on them.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. In this regard and as indicated above, the Exchange notes that the rule change is being proposed as a competitive response to recently approved NYSE Arca and ISE filings. The Exchange believes this proposed rule change is necessary to permit fair competition among the options exchanges.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) by its terms does not become operative for 30 days after the date of this filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [13] and Rule 19b–4(f)(6) thereunder.[14]

A proposed rule change filed under Rule 19b–4(f)(6) normally does not become operative for 30 days after the date of filing. However, Rule 19b–4(f)(6)(iii) permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange requests that the Commission waive the 30-day operative delay so that it can list and trade the proposed mini options as soon as it is able.[15] The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest.[16] The Commission notes the proposal is substantively identical to proposals that were recently approved by the Commission, and does not raise any new regulatory issues.[17] For these reasons, the Commission designates the proposed rule change as operative upon filing.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

• Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or

• Send an email to *rule-comments@sec.gov*. Please include File Number SR–NASDAQ–2013–011 on the subject line.

Paper Comments

• Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2013–011. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2013–011 and should be submitted on or before February 20, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–01931 Filed 1–29–13; 8:45 am]

BILLING CODE 8011–01–P

[13] 15 U.S.C. 78s(b)(3)(A).

[14] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to provide the Commission with written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has fulfilled this requirement.

[15] The Commission notes that the Exchange's current options pricing will not apply to the trading of Mini Options, and the Exchange will not commence trading of Mini Options until transaction fees specific to Mini Options have been filed with the Commission.

[16] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[17] *See* Securities Exchange Act Release No. 67948 (September 28, 2012), 77 FR 60735 (October 4, 2012) (SR–NYSEArca–2012–64 and SR–ISE–2012–58).

[18] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68725; File No. SR–NYSEARCA–2012–133]

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Approving a Proposed Rule Change Amending NYSE Arca Equities Rule 7.31(h)(7) To Permit PL Select Orders To Interact With Incoming Orders Larger Than the Size of the PL Select Order

January 24, 2013.

I. Introduction

On November 27, 2012, NYSE Arca, Inc. (''Exchange'' or ''NYSE Arca'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend NYSE Arca Equities Rule 7.31(h)(7) to permit PL Select Orders to interact with incoming orders larger than the size of the PL Select Order. The proposed rule change was published for comment in the **Federal Register** on December 14, 2012.[3] The Commission received no comment letters regarding the proposed rule change. This order approves the proposed rule change.

II. Description of the Proposal

The Exchange proposes to amend NYSE Arca Equities Rule 7.31(h)(7) to permit PL Select Orders to interact with incoming orders larger than the size of the PL Select Order. Currently the PL Select Order type does not interact with incoming orders that: (i) Have an immediate-or-cancel (''IOC'') time in force condition,[4] (ii) is an ISO,[5] or (iii) is larger than the size of the PL Select Order.[6]

The Exchange has identified an unintended consequence related to the implementation of PL Select Orders. Specifically, as described in greater detail in the Notice,[7] in certain instances an incoming Adding Liquidity Only Order (''ALO Order'') is unable to post to the NYSE Arca Book as required by NYSE Arca Equities Rule 7.31(nn) [8] if there is a resident, contra-side PL Select Order.[9] For example, if an ETP Holder has entered a PL Select Order to sell shares and the Exchange receives a larger incoming buy order at the same price, because the arriving buy order is larger than the resting PL Select Order, the PL Select Order (unlike a regular PL order) would not execute against the arriving buy order and would remain undisplayed on the Arca Book. Further, an incoming ALO Order to buy at the same price, which is seeking to add to the existing bid would be rejected. In such scenario, an ETP Holder seeking to add liquidity to the Arca Book with an ALO order would be unable to do so, even though there is resting interest posted at the same price.

The Exchange proposes to amend NYSE Arca Equities Rule 7.31(h)(7) to delete the requirement that prohibits PL Select Order interaction with larger-sized, incoming orders.

III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[10] In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,[11] which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers or dealers.

The Commission finds the proposed rule change to be consistent with the Act. The Commission notes that the Exchange continues to believe that its rationale for preventing PL Select Orders from interacting with incoming orders larger in size remains valid. In this regard, the Exchange continues to believe that preventing executions with larger-sized incoming interest would incentivize Users to route PL Select Orders to the Exchange because such orders would remain available to provide price improvement and would not be ''swept'' by such larger-sized incoming orders. In addition, the Exchange believes that because such PL Select Orders would remain available to provide price improvement, it could similarly incentivize Users to route displayable interest to the Exchange because the likelihood of receiving price improvement could increase.

The Commission notes that the Exchange believes, however, that the potential for liquidity-posting interest to be rejected, albeit rare, outweighs the Exchange's stated benefit of allowing the PL Select Order not interact with incoming orders that are larger in size than the PL Select Order. In addition, the Commission notes that the Exchange has represented that institutional investors have raised concerns to the Exchange that PL Select Orders currently may bypass trading interest entered on behalf of institutional investors by not executing against larger-sized orders. In this regard, the Commission notes that the Exchange states that its goal is not to prevent the interaction of legitimate trading interest, and to the extent there is a perception that this may be the case, the Exchange believes that the restriction on PL Select Orders should be lifted.

Based on the Exchange's statements, the Commission believes that removing the restriction on PL Select Order as proposed and thereby allowing ALO Orders to post to the Arca Book, as intended, NYSE Arca should help to ensure that trading interest is able to interact on its market in an efficient manner.

Accordingly, the Commission believes that the proposed rule change is consistent with Section 6(b)(5) of the Act.[12]

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[13] that the proposed rule change (SR–NYSEARCA–2012–133) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–01971 Filed 1–29–13; 8:45 am]

BILLING CODE 8011–01–P

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 68385 (December 7, 2012), 77 FR 74528 (December 14, 2012) (SR–NYSEARCA–2012–133) (''Notice'').

[4] *See* NYSE Arca Equities Rule 7.31(e).

[5] *See* NYSE Arca Equities Rule 7.31(jj).

[6] *See* Securities Exchange Act Release No. 67785 (Sept. 5, 2012), 77 FR 55888 (September 11, 2012) (SR–NYSEArca–2012–48) (''Approval Order'').

[7] *See* Notice, *supra* note 3.

[8] *See* NYSE Arca Equities Rule 7.31(nn).

[9] *See* Notice, 77 FR at 74528.

[10] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[11] 15 U.S.C. 78f(b)(5).

[12] 15 U.S.C. 78f(b)(5).

[13] 15 U.S.C. 78s(b)(2).

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68718; File No. SR–NASDAQ–2013–010]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Routing Fees

January 24, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 [2] thereunder, notice is hereby given that on January 18, 2013, The NASDAQ Stock Market LLC (''NASDAQ'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by NASDAQ. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

NASDAQ proposes to modify Chapter XV, Section 2, entitled ''NASDAQ Options Market—Fees and Rebates,'' which governs pricing for NASDAQ members using the NASDAQ Options Market (''NOM''), NASDAQ's facility for executing and routing standardized equity and index options, to amend Routing Fees.

While these amendments are effective upon filing, the Exchange has designated the proposed amendments to be operative on February 1, 2013.

The text of the proposed rule change is provided in *Exhibit 5.* The text of the proposed rule change is also available on the Exchange's Web site at *http://www.nasdaq.cchwallstreet.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this filing is to amend the Routing Fees in Section 2(4) of Chapter XV in order to recoup costs the Exchange incurs for routing and executing certain orders in equity options to away markets.

Currently, the fees for routing Customer, Firm, Market Maker and Professional orders are as follows:

Exchange	Customer	Firm	MM	Professional
BATS Penny Pilot	$0.55	$0.55	$0.55	$0.55
BATS Non-Penny Pilot	0.86	0.94	0.94	0.94
BOX	0.11	0.55	0.55	0.31
BX Options Penny Pilot	0.11	0.54	0.54	0.54
BX Options Non-Penny Pilot	0.11	0.94	0.94	0.94
CBOE	0.11	0.55	0.55	0.41
CBOE orders greater than 99 contracts in NDX, MNX ETFs and ETNs	0.29	0.55	0.55	N/A
C2	0.55	0.55	0.55	0.55
ISE (Standard)	0.11	0.55	0.55	0.31
ISE Select Symbols *	0.35	0.55	0.55	0.44
MIAX	0.11	0.55	0.55	0.36
NYSE Arca Penny Pilot	0.55	0.55	0.55	0.55
NYSE Arca Non-Penny Pilot	0.90	0.94	0.94	0.90
NYSE AMEX	0.11	0.55	0.55	0.31
PHLX (for all options other than PHLX Select Symbols)	0.11	0.55	0.55	0.31
PHLX Select Symbols **	0.11	0.55	0.55	0.55

The Exchange proposes to adopt new Routing Fees when routing and executing orders in equity options to BATS Exchange, Inc. (''BATS''), BOX Options Exchange LLC (''BOX''), the Chicago Board Options Exchange, Incorporated (''CBOE''), C2 Options Exchange, Incorporated (''C2''), International Securities Exchange, LLC (''ISE''), the Miami International Securities Exchange, LLC (''MIAX''), NASDAQ Options Market (''NOM''), NYSE Arca, Inc. (''NYSE Arca''), NYSE MKT LLC (''NYSE Amex'') and NASDAQ OMX PHLX LLC (''Phlx''). The Exchange is proposing to eliminate the current Routing Fees located in Section 2(4) of Chapter XV and instead assess NOM Participants a fixed fee plus the away market transaction fee as noted below.

Today, the Exchange calculates Routing Fees by assessing a fixed Routing Fee of $0.11 per contract, which is comprised of certain Exchange costs related to routing orders to away markets plus the away market's transaction fee. With respect to the fixed costs, the Exchange incurs a fee when it utilizes Nasdaq Options Services LLC (''NOS''), a member of the Exchange and the Exchange's exclusive order router.[3] Each time NOS routes an order to an away market, NOS is charged a clearing fee [4] and, in the case of certain exchanges, a transaction fee is also charged in certain symbols, which fees are passed through to the Exchange. The Exchange currently recoups clearing and transaction charges incurred by the Exchange as well as certain other costs incurred by the Exchange when routing to away markets, such as administrative and technical costs associated with operating NOS, membership fees at away markets, Options Regulatory Fees (''ORFs'') and technical costs associated with routing options. With respect to

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* NASDAQ Rules at Chapter VI, Section 11(e) (Order Routing).

[4] The Options Clearing Corporation (''OCC'') assesses $0.01 per contract side.

away market transaction fees, the Exchange does not assess actual transaction fees in all cases today, but rather has limited fees in certain circumstances. In those cases the Exchange does not recover all of its costs for routing to the away market.[5]

Today, the Exchange amends its Routing Fees to reflect amendments to away market transaction fees by filing proposed rule changes. The Exchange proposes to eliminate the current Routing Fees and instead assess the actual away market fee assessed by the away exchange at the time that the order was entered into the Exchange's trading system. This transaction fee would be calculated on an order-by-order basis since different away markets charge different amounts.[6] The Exchange analyzed its clearing costs,[7] administrative and technical costs associated with operating NOS, membership fees at away markets and regulatory costs in determining the fixed fee for routing. With respect to BATS, BOX, C2, CBOE, ISE, MIAX, NYSE Amex and NYSE Arca the Exchange proposes to continue to assess $0.11 per contract in addition to the away market's transaction fee.[8] While this proposal does not change the fixed cost assessed to away markets other than Phlx and BX Options, the Exchange would assess the actual transaction fees that are in place at the various away markets and will no longer limit those transaction fees as it does today in certain circumstances.[9] While clearing costs have recently decreased,[10] the Exchange would continue to assess $0.11 per contract because of other increased costs. Specifically, several exchanges have increased ORFs or adopted ORFs and the Exchange proposes to assess the same fixed cost Routing Fee for non-NASDAQ OMX exchanges despite the lower clearing fee.[11]

The Exchange also analyzed costs related to routing to Phlx and BX Options and determined to assess a lower fee of $0.05 per contract as compared to other away markets because NOS is utilized by all three exchanges to route orders.[12] Phlx, BX Options and NOM all utilize NOS which lowers the cost of routing to those markets as compared to other away markets. In addition the fixed costs are reduced because NOS is owned and operated by NASDAQ OMX and the three exchanges and NOS share common technology and related operational functions. The Exchange proposes to assess a $0.05 per contract fixed fee in addition to the away market's transaction fee to route to Phlx and BX Options. This proposal would reduce the fixed fees assessed today on average to route to Phlx and BX Options from $0.11 to $0.05 per contract.

For all Routing Fees, the transaction fee is based on the away market's transaction fee or rebate for particular market participants and in the case that there is no transaction fee or rebate assessed by the away market, the only fee assessed would be the $0.05 or $0.11 per contract fixed fee assessed by the Exchange to recoup its costs. The Exchange proposes to pass along any rebate paid by the away market where there is such a rebate. Today, the Exchange does not pass along rebates. Any rebate available would be netted against a fee assessed by the Exchange. For example, if a Customer order is routed to BOX, and BOX offers a customer rebate of $0.20 per contract, the Exchange would assess a $0.11 per contract fixed fee which would net against the rebate ($0.20 per contract in this example). The market participant for whom the Customer contract was routed would receive a $0.09 per contract rebate. Today the market participant does not receive a rebate and only pays the current Routing Fees.

As with all fees, the Exchange may adjust these Routing Fees in response to competitive conditions by filing a new proposed rule change.

2. Statutory Basis

NASDAQ believes that the proposed rule changes are consistent with the provisions of Section 6 of the Act,[13] in general, and with Section 6(b)(4) of the Act,[14] in particular, in that they provide for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which NOM operates or controls.

The Exchange believes that the proposed Routing Fees are reasonable because they seek to recoup costs that are incurred by the Exchange when routing Customer, Firm, Market Maker and Professional orders to away markets on behalf of members. Each destination market's transaction charge varies and there is a cost incurred by the Exchange when routing orders to away markets. The costs to the Exchange include clearing costs, administrative and technical costs associated with operating NOS, membership fees at away markets, ORFs and technical costs associated with routing options. The Exchange believes that the proposed Routing Fees would enable the Exchange to recover the costs it incurs to route orders to away markets in addition to transaction fees assessed to market participants for the execution of Customer, Firm, Market Maker and Professional orders by the away market. Specifically, other options exchanges have increased ORFs that are assessed per transaction.[15] The Exchange believes that it is reasonable to recoup these costs borne by the Exchange on each transaction.

[5] In some cases the Exchange filed a rule change which noted that the Exchange would not assess the actual transaction charge, but a lower amount where the transaction fees at an away market were higher than other markets.

[6] This is similar to the methodology utilized by ISE in assessing Routing Fees. *See* ISE's Fee Schedule.

[7] OCC recently amended its clearing fee from $0.03 per contract side to $0.01 per contract side. *See* Securities Exchange Act Release No. 68025 (October 10, 2012), 77 FR 63398 (October 16, 2012) (SR–OCC–2012–18).

[8] The $0.11 per contract fixed fee would apply to all options exchanges other than Phlx and BX. The Exchange anticipates that if other options exchanges are approved by the Commission after the filing of this proposal, those exchanges would be assessed the $0.11 per contract fee applicable to ''all other options exchanges.'' The Exchange currently assesses $0.11 per contract for costs incurred by the Exchange.

[9] Today, the Exchange caps certain Routing Fees at certain levels. For example, the Exchange caps BATS, NYSE Arca and BX Options Routing Fees at $0.94 per contract.

[10] *See* note 7.

[11] CBOE recently increased its ORF from $.0065 to $.0085 per contract. *See* Securities Exchange Act Release No. 68480 (December 19, 2012), 77 FR 76119 (December 26, 2012) (SR–CBOE–2012–118). C2 recently increased its ORF from $.0015 to $.002 per contract. *See* Securities Exchange Act Release No. 68479 (December 19, 2012), 77 FR 76131 (December 26, 2012) (SR–C2–2012–040). NYSE MKT LLC (''NYSE Amex'') recently increased its ORF from $0.004 to $0.005 per contract. *See* Securities Exchange Act Release No. 68183 (November 8, 2012), 77 FR 68186 (November 15, 2012) (SR–NYSEMKT–2012–54). NYSE Arca recently increased its ORF from $0.004 to $0.005 per contract. *See* Securities Exchange Act Release No. 68174 (November 7, 2012), 77 FR 67845 (November 14, 2012) (SR–NYSEArca–2012–118). MIAX recently adopted an ORF of $0.0040 per contract side. *See* SR–MIAX–2012–06 (not yet published).

[12] *See* Chapter VI, Section 11 of the NASDAQ and BX Options Rules and Phlx Rule 1080(m)(iii)(A).

[13] 15 U.S.C. 78f.

[14] 15 U.S.C. 78f(b)(4).

[15] CBOE recently increased its ORF from $.0065 to $.0085 per contract. *See* Securities Exchange Act Release No. 68480 (December 19, 2012), 77 FR 76119 (December 26, 2012) (SR–CBOE–2012–118). C2 recently increased its ORF from $.0015 to $.002 per contract. *See* Securities Exchange Act Release No. 68479 (December 19, 2012), 77 FR 76131 (December 26, 2012) (SR–C2–2012–040). NYSE Amex recently increased its ORF from $0.004 to $0.005 per contract. *See* Securities Exchange Act Release No. 68183 (November 8, 2012), 77 FR 68186 (November 15, 2012) (SR–NYSEMKT–2012–54). NYSE Arca recently increased its ORF from $0.004 to $0.005 per contract. *See* Securities Exchange Act Release No. 68174 (November 7, 2012), 77 FR 67845 (November 14, 2012) (SR–NYSEArca–2012–118). MIAX recently adopted an ORF of $0.0040 per contract side. *See* SR–MIAX–2012–06 (not yet published).

In addition, the Exchange notes that it would assess a fixed fee of $0.11 per contract, as it does today, for costs incurred by the Exchange with respect to non-NASDAQ OMX exchanges. The Exchange believes that the proposed fee is reasonable because while the clearing fee itself was lowered by OCC (from $0.03 to $0.01 per contract side), other fees, such as ORFs, have increased in recent months. The Exchange, in analyzing its actual costs, has determined to continue to assess a $0.11 per contract fee to represent the overall cost to the Exchange for technical, administrative, clearing, regulatory, compliance and other costs, in addition to the transaction fee assessed by the away market. Also, the Exchange will assess the actual transaction fees that are in place at the various away markets and will no longer limit those transaction fees as it does today in certain circumstances. The Exchange believes that it is reasonable for it to recoup its actual costs associated with routing orders to away markets. NOM Participants would be entitled to receive rebates offered by away markets with this proposal, which rebates would net against fees assessed by the Exchange for routing orders. The Exchange believes that the opportunity to collect a rebate will reduce Routing Fees.

In addition, the Exchange believes that it is equitable and not unfairly discriminatory to assess a fixed cost of $0.11 per contract, which is mostly comprised of technology, infrastructure and away market non-transaction fee costs, to route orders to non-NASDAQ OMX away markets because the Exchange would be assessing an overall lower fixed fee. While the clearing cost was reduced, other fees have increased and therefore the Exchange believes that a $0.11 per contract fee continues to be reasonable because it represents the cost to route to non-NASDAQ OMX away markets. The proposed $0.11 per contract fixed fee would be assessed uniformly on all market participants in addition to the actual transaction fees on all orders routed to non-NASDAQ OMX markets.

The Exchange believes that it is equitable and not unfairly discriminatory to assess a fixed cost of $0.05 per contract to route orders to NASDAQ OMX away markets (Phlx and BX Options) because the cost, in terms of actual cash outlays, to the Exchange to route to those markets is lower. For example, costs related to routing to Phlx and BX Options are lower as compared to other away markets because NOS is utilized by all three exchanges to route orders.[16] NOS and the three NASDAQ OMX options markets have a common data center and staff that are responsible for the day-to-day operations of NOS. Because the three exchanges are in a common data center, Routing Fees are reduced because costly expenses related to, for example, telecommunication lines to obtain connectivity are avoided when routing orders in this instance. The costs related to connectivity to route orders to other NASDAQ OMX exchanges are de minimis. When routing orders to non-NASDAQ OMX exchanges, the Exchange incurs costly connectivity charges related to telecommunication lines and other related costs. The proposed fixed fee for routing orders to non-NASDAQ OMX exchanges is therefore increased as compared to the fees for routing orders to NASDAQ OMX exchanges (Phlx and BX Options), $0.11 per contract versus $0.05 per contract, respectively. The proposed $0.05 per contract fixed fee would be assessed uniformly on all orders routed to NASDAQ OMX markets in addition to the actual away market transaction fee assessed by the destination market. The Exchange also believes that it is equitable and not unfairly discriminatory for market participants to receive rebates on orders routed to away markets that pay rebates. Today, the Exchange does not pay such rebates when routing orders. The Exchange would pay rebates offered by away markets uniformly to market participants when their orders are routed to a destination market that offers a rebate.

The Exchange believes it is reasonable, equitable and not unfairly discriminatory to pass along savings realized by leveraging NASDAQ OMX's infrastructure and scale to market participants when those orders are routed to Phlx and BX Options.[17] Orders are routed to away markets in accordance with Exchange rules based on price.[18] Market participants may submit orders to the Exchange as ineligible for routing or ''DNR'' to avoid incurring the Routing Fees proposed herein.[19]

[16] *See* Chapter VI, Section 11 of the NASDAQ and BX Options Rules and Phlx Rule 1080(m)(iii)(A).

[17] Today, the Exchange assesses a $0.11 per contract fixed fee for routing orders to Phlx and BX Options. That fee is proposed to be reduced to a $0.05 per contract fixed fee, which would be in addition to the actual transaction fee assessed by the away market.

[18] *See* NASDAQ Rules at Chapter XII (Options Order Protection and Locked and Crossed Market Rules).

[19] *See* NASDAQ Rules at Chapter VI, Section 11(e) (Order Routing).

B. Self-Regulatory Organization's Statement on Burden on Competition

NASDAQ does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes that the rule change would allow the Exchange to recoup its costs when routing orders designated as available for routing by the market participant. NOM Participants may choose to mark the order as ineligible for routing to avoid incurring these fees.[20] Today, other options exchanges also assess similar fees to recoup costs incurred when routing orders to away markets. With respect to routing to Phlx and BX Options at a lower cost as compared to other away markets, the Exchange does not believe that the proposed amendments to increase those fees, while maintaining the same fee differential imposes a burden because all market participants would be assessed the same fees depending on the away market. Also, the Exchange is proposing to recoup costs incurred only when members request the Exchange route their orders to an away market. The Exchange is passing along savings realized by leveraging NASDAQ OMX's infrastructure and scale to market participants when those orders are routed to Phlx and BX Options and is providing those saving to all market participants. Finally, the Exchange routes orders to away markets where the Exchange's disseminated bid or offer is inferior to the national best bid (best offer) price and based on price first.[21]

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[22] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors,

[20] *See* NASDAQ Rules at Chapter VI, Section 11(e) (Order Routing).

[21] *See* NASDAQ Rules at Chapter XII (Options Order Protection and Locked and Crossed Market Rules).

[22] 15 U.S.C. 78s(b)(3)(A)(ii).

or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

• Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or

• Send an email to *rule-comments@sec.gov.* Please include File Number SR–NASDAQ–2013–010 on the subject line.

Paper Comments

• Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2013–010. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml).* Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at NASDAQ's principal office. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2013–010, and should be submitted on or before February 20, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[23]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–01984 Filed 1–29–13; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68724; File No. SR–NYSE–2013–03]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Rule 440B To Provide How the Trigger Price Will Be Calculated if Trading Is Interrupted Because of a Systems or Technical Issue and Is Not Restored During the Trading Day

January 24, 2013.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the ''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that on January 10, 2013, New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Rule 440B to provide how the Trigger Price will be calculated if trading is interrupted because of a systems or technical issue and is not restored during the trading day. The text of the proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Rule 440B to provide how the Trigger Price[4] will be calculated if trading is interrupted because of a systems or technical issue and is not restored during the trading day. Specifically, the Exchange proposes to provide that if trading in a covered security is interrupted because of a systems or technical issue and is not restored during that trading day, the Exchange's determination of the Trigger Price shall be based on the consolidated last sale price for that security on the most recent day on which the security traded.

The Exchange recently filed an interim proposed rule change for Rule 440B(b) to provide that on November 12, 2012, the closing price for 216 Exchange-listed securities that did not have a closing transaction on the Exchange was the consolidated last sale price available as of the end of regular trading hours on November 12, 2012, and that such closing price shall be the Trigger Price for purposes of determining whether a Short Sale Price Test has been triggered pursuant to Rule 440B(c) on November 13, 2012.[5] The interim rule is in effect until the Exchange has an opportunity to amend its rules on a permanent basis. The Exchange now proposes to establish a rule provision that provides for how the Trigger Price is determined when a systems or technical issue prevents the closing of the security at the end of regular trading hours.

Rule 440B sets forth how the Exchange implements the provisions of Rule 201 of Regulation SHO (''Rule 201'')[6] under the Act which, if triggered, imposes a restriction on the prices at which securities may be sold short (''Short Sale Price Test''). Among

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[23] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C.78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] Trigger Price is defined in Rule 440B(b). *See* Rule 440B(b). Determination of Trigger Price is set forth in Rule 440(c). *See* Rule 440B(c).

[5] *See* Securities Exchange Act Release No. 68220 (November 13, 2012), 77 FR 69528 (November 19, 2012) (SR–NYSE–2012–66).

[6] 17 CFR 242.201.

other things, Rule 201 requires trading centers to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the execution or display of a short sale order of a covered security at a price that is less than or equal to the current national best bid if the price of a covered security decreases by 10% or more from the covered security's closing price as determined by the listing market for the covered security as of the end of regular trading hours on the prior day. Accordingly, Rule 201(b)(1)(i) delegates to the listing market how to determine the closing price for a security.

The Exchange notes that market participants rely on the Exchange's official closing price for purposes of calculating the value of mutual funds, exchange traded funds, and various indices, among other things. Because securities listed on the Exchange may continue to trade on other markets while systems or technical issues prevent trading on the Exchange, the Exchange believes that, under these circumstances, the closing price for purposes of determining whether a Short Sale Price Test has been triggered pursuant to Rule 440B(b) should be the consolidated last sale price available as of the end of regular trading hours on that day. The Exchange believes that using the consolidated last sale price available as of the end of regular trading hours best approximates the market's determination of the appropriate price of such securities in the absence of a closing transaction on the listing market.

Rule 440B establishes procedures for the Exchange, as a listing market, to determine whether a Short Sale Price Test has been triggered for a covered security. Among other things, Rule 440B(b) defines the ''Trigger Price'' as the security's closing price on the listing market as of the end of regular trading hours on the prior day. Rule 440B(c)(2) provides that if a covered security did not trade on the Exchange on the prior trading day (due to a trading halt, trading suspension, or otherwise), the Exchange's determination of the Trigger Price shall be based on the last sale price on the Exchange for that security on the most recent day on which the security traded. The Exchange believes that Rule 440B(c)(2) does not contemplate how the Exchange should determine the closing price in the unique circumstance of a systems or technical failure similar to that which occurred on November 12, 2012. In particular, the reason why the Exchange did not trade the 216 securities was not because of a trading halt or trading suspension, and the Exchange does not believe the ''or otherwise'' language in Rule 440B(c)(2) was designed to address the unanticipated scenario on November 12, 2012 when due to a systems issue, the Exchange was unable to hold a closing transaction in those securities.

The Exchange believes that such consolidated last sale prices should be the closing price for purposes of determining the Trigger Price pursuant to Rule 440B(b) in the event that trading in a covered security is interrupted on the Exchange because of a systems or technical issue and is not restored during the trading day. Accordingly, the Exchange proposes to amend Rule 440B to provide that for circumstances when the Exchange does not have a closing transaction because of systems or technical issues, but securities are otherwise eligible to trade on other markets, the Exchange shall use the consolidated last sale price available as of the end of regular trading hours as the closing price for purposes of Rule 440B.[7] This proposed rule will replace the interim rule in regards to how the Trigger Price is calculated in these circumstances.[8]

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[9] in general, and furthers the objectives of Section 6(b)(5) of the Act,[10] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system.

The Exchange believes that the proposed rule change will promote just and equitable principles of trade because it provides clarity of how the Exchange, as a listing market, determines the Trigger Price for securities that do not have a closing transaction due to a systems or technical issue. In particular, the Exchange believes that using a Trigger Price based on the consolidated last sale price available as of the end of regular trading hours for purposes of determining whether a Short Sale Price Test has been triggered promotes just and equitable principles of trade because it provides transparency of how the Trigger Price will be determined for securities that do not have a closing transaction due to a systems or technical issue.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[11] and Rule 19b–4(f)(6) thereunder.[12] Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b-4(f)(6)(iii) thereunder.

A proposed rule change filed under Rule 19b–4(f)(6)[13] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[14] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon

[7] If there is no trading on any market on the day of the systems or technical issue, the consolidated last sale price available for a security may be the Exchange's closing price from the most recent day on which the security traded.

[8] *See supra* note 5. The interim rule provided an interpretive position, while the proposal seeks to amend the text of the Exchange Rules.

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(5).

[11] 15 U.S.C. 78s(b)(3)(A)(iii).

[12] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[13] 17 CFR 240.19b–4(f)(6).

[14] 17 CFR 240.19b–4(f)(6)(iii).

filing. The Exchange believes that a waiver of this period is appropriate as the proposal is designed to provide transparency of how the Trigger Price will be determined for Exchange listed securities that did not have a closing transaction at the Exchange due to a systems or technical issue. According to the Exchange, the waiver of the operative delay will allow the participants on the Exchange to benefit from a permanent rule to determine the Trigger Price in situations where a systems or technical issue prevents a closing price during regular trading.

The Commission hereby grants the 30-day operative delay request.[15] The Commission believes that waiver of the 30-day operative delay is appropriate as the proposal provides clarity of how the Exchange, as a listing market, determines how the Trigger Price will be calculated if trading is interrupted on the Exchange because of a systems or technical issue and is not restored during the trading day. The Commission also believes a waiver of the 30-day operative delay is consistent with the protection of investors and the public interest and, therefore, the Commission designates the proposal operative upon filing.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)[16] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSE–2013–03 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2013–03. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549–1090. Copies of the filing will also be available for Web site viewing and printing at the NYSE's principal office and on its Internet Web site at *www.nyse.com.* All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2013–03 and should be submitted on or before February 20, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Kevin M. O'Neill,

Deputy Secretary.

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[15] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule change's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[16] 15 U.S.C. 78s(b)(2)(B).

[17] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68719; File No. SR–BX–2013–006]

Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Mini Options

January 24, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'' or ''Exchange Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on January 16, 2013, NASDAQ OMX BX, Inc. (''BX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to list and trade option contracts overlying 10 shares of a security (''Mini Options'').

The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaqomxbx.cchwallstreet.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to amend Chapter IV, Section 6 (Series of Options Contracts Open for

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

Trading) and Chapter VI, Section 4 (Meaning of Premium Quotes and Orders) to list and trade Mini Options overlying five (5) high-priced securities for which the standard contract overlying the same security exhibits significant liquidity. Specifically, the Exchange proposes to list Mini Options on SPDR S&P 500 (''SPY''), Apple, Inc. (''AAPL''), SPDR Gold Trust (''GLD''), Google Inc. (''GOOG'') and Amazon.com Inc. (''AMZN'').[3] The Exchange believes that this proposal would allow investors to select among options on various high-priced and actively traded securities, each with a unit of trading ten times lower than that of the regular-sized options contracts, or 10 shares, similar to other options exchanges. In addition, the Exchange proposes a technical amendment to Chapter III, Section 7 (Position Limits) to make the rule text consistent.

For example, with Apple Inc. (''AAPL'') trading at $605.85 on March 21, 2012, ($60,585 for 100 shares underlying a standard contract), the 605 level call expiring on March 23 was trading at $7.65. The cost of the standard contract overlying 100 shares would be $765, which is substantially higher in notional terms than the average equity option price of $250.89.[4] Proportionately equivalent mini-options contracts on AAPL would provide investors with the ability to manage and hedge their portfolio risk on their underlying investment, at a price of $76.50 per contract. In addition, investors who hold a position in AAPL at less than the round lot size would still be able to avail themselves of options to manage their portfolio risk. For example, the holder of 50 shares of AAPL could write covered calls for five mini-options contracts. The table below demonstrates the proposed differences between a mini-options contract and a standard contract with a strike price of $125 per share and a bid or offer of $3.20 per share:

	Standard	Mini
Share Deliverable Upon Exercise	100 shares	10 shares.
Strike Price	125	125.
Bid/Offer	3.20	3.20.
Premium Multiplier	$100	$10.
Total Value of Deliverable	$12,500	$1,250.
Total Value of Contract	$320	$32.

The Exchange currently lists and trades standardized option contracts on a number of equities and Exchange-Traded Funds (''ETFs'') each with a unit of trading of 100 shares. Except for the difference in the deliverable of shares, the proposed Mini Options would have the same terms and contract characteristics as regular-sized equity and ETF options, including exercise style. All existing Exchange rules applicable to options on equities and ETFs would apply to Mini Options. With respect to position[5] and exercise limits, the applicable position and exercise limits applicable to BX Options Participants are those limits permitted by another options exchange.[6] Further, hedge exemptions will apply to BX Option Participants if such exemption is permitted by another exchange and that exchange's rules apply to the BX Option Participant pursuant to Chapter III, Section 8.[7]

Also, of note, NYSE Arca, Inc. (''NYSE Arca'') lists and trades option contracts overlying a number of shares other than 100.[8] Moreover, the concept of listing and trading parallel options products of reduced values and sizes on the same underlying security is not novel. For example, parallel product pairs on a full-value and reduced-value basis are currently listed on the S&P 500 Index (''SPX'' and ''XSP,'' respectively), the Nasdaq 100 Index (''NDX'' and ''MNX,'' respectively) and the Russell 2000 Index (''RUT'' and ''RMN,'' respectively).

The Exchange believes that the proposal to list Mini Options will not lead to investor confusion. There are two important distinctions between Mini Options and regular-sized options that are designed to ease the likelihood of any investor confusion. First, the premium multiplier for the proposed Mini Options will be 10, rather than 100, to reflect the smaller unit of trading. To reflect this change, the Exchange proposes to add language to Chapter VI, Section 4(a)(i) which notes that bids and offers for an option contract overlying 10 shares would be expressed in terms of dollars per 1/10th part of the total value of the contract. Thus, an offer of ''.50'' shall represent an offer of $5.00 on an option contract having a unit of trading consisting of 10 shares. Second, the Exchange intends to designate Mini Options with different trading symbols than those designated for the regular-sized contract. For example, while the trading symbol for regular option contracts for Apple, Inc. is AAPL, the Exchange proposes to adopt AAPL7 as the trading symbol for Mini Options on that same security.

The Exchange proposes to add rule text to Supplementary Material to Chapter IV, Section 6 to reflect that after an option class on a stock, Exchange-Traded Fund Share, Trust Issued Receipt, Exchange Traded Note, and other Index Linked Security with a 100 share deliverable has been approved for listing and trading on the Exchange, series of option contracts with a 10 share deliverable on that stock, Exchange-Traded Fund Share, Trust Issued Receipt, Exchange Traded Note, and other Index Linked Security may be listed for all expirations opened for trading on the Exchange. Also, the Exchange is amending Supplementary Material to Chapter IV, Section 6 to reflect that strike prices for Mini Options shall be set at the same level as for regular options. For example, a call series strike price to deliver 10 shares of stock at $125 per share has a total deliverable value of $1,250, and the strike price will be set at 125. Further,

[3] These issues were selected because they are priced greater than $100 and are among the most actively traded issues, in that the standard contract exhibits average daily volume (''ADV'') over the previous three calendar months of at least 45,000 contracts, excluding LEAPS and FLEX series. The Exchange notes that any expansion of the program would require that a subsequent proposed rule change be submitted to the Commission.

[4] A high priced underlying security may have relatively expensive options, because a low percentage move in the share price may mean a large movement in the options in terms of absolute dollars. Average non-FLEX equity option premium per contract January 1—December 31, 2011. *See http://www.theocc.com/webapps/monthly-volume-reports?reportClass=equity.*

[5] Position limits applicable to a regular-sized option contract would also apply to the Mini Options on the same underlying security, with 10 Mini Option contracts counting as one regular-sized contract. Positions in both the regular-sized option contract and Mini Options on the same security will be combined for purposes of calculating positions.

[6] *See* Chapter III, Sections 7 (Position Limits) and 9 (Exercise Limits).

[7] *See* Chapter III, Section 8 (Exemptions from Position Limits).

[8] *See* Securities Exchange Act Release No. 44025 (February 28, 2001) 66 FR 13986 (March 8, 2001) (approving SR–PCX–01–12).

the Exchange proposes to add rule text to Supplementary Material to Chapter IV, Section 6 to not permit the listing of additional series of Mini Options if the underlying is trading at $90 or less to limit the number of strikes once the underlying is no longer a high priced security. The Exchange proposes a $90.01 minimum for continued qualification so that additional series of Mini Options that correspond to standard strikes may be added even though the underlying has fallen slightly below the initial qualification standard. In addition, the underlying security must be trading above $90 for five consecutive days before the listing of Mini Option contracts in a new expiration month. This restriction will allow the Exchange to list strikes in Mini Options without disruption when a new expiration month is added even if the underlying has had a minor decline in price. The same trading rules applicable to existing equity and ETF options would apply, including Market Maker obligations, to Mini Options.[9]

The Exchange notes that by listing the same strike price for Mini Options as for regular options, the Exchange seeks to keep intact the long-standing relationship between the underlying security and an option strike price thus allowing investors to intuitively grasp the option's value, *i.e.,* option is in the money, at the money or out of the money. The Exchange believes that by not changing anything but the multiplier and the option symbol, as discussed above, retail investors will be able to grasp the distinction between regular option contracts and Mini Options. The Exchange notes that The Options Clearing Corporation (''the OCC'') Symbology is structured for contracts that have a deliverable of other than 100 shares to be designated with a numeric added to the standard trading symbol. Further, the Exchange believes that the contract characteristics of Mini Options are consistent with the terms of the Options Disclosure Document.

With regard to the impact of this proposal on system capacity, the Exchange has analyzed its capacity and represents that it and the Options Price Reporting Authority (''OPRA'') have the necessary systems capacity to handle the potential additional traffic associated with the listing and trading of Mini Options. The Exchange has further discussed the proposed listing and trading of Mini Options with the OCC, which has represented that it is able to accommodate the proposal. In addition, the Exchange would file a proposed rule change to adopt transaction fees specific to Mini Options for listing and trading Mini Options. The current options pricing in Chapter XV would not apply to Mini Options.

The Exchange is also proposing to amend Chapter III, Section 7 (Position Limits) to add parentheses to certain subsections for consistency with other NASDAQ [sic] Rules. These filings are [sic] similar to filings by NYSE Arca, Inc. (''NYSE Arca'') and the International Securities Exchange LLC (''ISE'') to list and trade options contracts overlying 10 shares of certain securities.[10]

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Exchange Act,[11] in general, and with Section 6(b)(5) of the Exchange Act,[12] in particular, in that the proposal is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

The Exchange believes that investors would benefit from the introduction and availability of Mini Options by making options on high priced securities more readily available as an investing tool at more affordable prices, particularly for average retail investors, who otherwise may not be able to participate in trading options on high priced securities. The Exchange intends to adopt a different trading symbol to distinguish Mini Options from its currently listed option contracts and therefore, eliminate investor confusion with respect to product distinction. Moreover, the proposed rule change is designed to protect investors and the public interest by providing investors with an enhanced tool to reduce risk in high priced securities. In particular, Mini Options would provide retail customers who invest in SPY, AAPL, GLD, GOOG and AMZN in lots of less than 100 shares with a means of protecting their investments that is currently only available to those who have positions of 100 shares or more. Further, the proposed rule change is limited to just five high priced securities to ensure that only securities that have significant options liquidity and therefore, customer demand, are selected to have Mini Options listed on them.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. In this regard and as indicated above, the Exchange notes that the rule change is being proposed as a competitive response to recently approved NYSE Arca and ISE filings. The Exchange believes this proposed rule change is necessary to permit fair competition among the options exchanges.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) by its terms does not become operative for 30 days after the date of this filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[13] and Rule 19b–4(f)(6) thereunder.[14]

A proposed rule change filed under Rule 19b–4(f)(6) normally does not become operative for 30 days after the date of filing. However, Rule 19b–4(f)(6)(iii) permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange requests that the Commission waive the 30-day operative delay so that it can list and trade the proposed mini options as soon as it is able.[15] The

[9] *See* Chapter VII, Section 6(d).

[10] *See* Securities Exchange Act Release No. 67948 (September 28, 2012), 77 FR 60735 (October 4, 2012) (SR–NYSEArca–2012–64) (SR–ISE–2012–58). NYSE Arca and ISE received approval to list and trade options contracts overlying 10 shares of certain securities.

[11] 15 U.S.C. 78f.

[12] 15 U.S.C. 78f(b)(5).

[13] 15 U.S.C. 78s(b)(3)(A).

[14] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to provide the Commission with written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has fulfilled this requirement.

[15] The Commission notes that the Exchange's current options pricing will not apply to the trading of Mini Options, and the Exchange will not

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Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest.[16] The Commission notes the proposal is substantively identical to proposals that were recently approved by the Commission, and does not raise any new regulatory issues.[17] For these reasons, the Commission designates the proposed rule change as operative upon filing.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–BX–2013–006 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number *SR–BX–2013–006.* This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number *SR–BX–2013–006* and should be submitted on or before February 20, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

Kevin M. O'Neill,

Deputy Secretary.

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commence trading of Mini Options until transaction fees specific to Mini Options have been filed with the Commission.

[16] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[17] *See* Securities Exchange Act Release No. 67948 (September 28, 2012), 77 FR 60735 (October 4, 2012) (SR–NYSEArca–2012–64 and SR–ISE–2012–58).

[18] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68714; File No. SR–EDGA–2013–01]

Self-Regulatory Organizations; EDGA Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Fees for EdgeBook Attributed℠

January 23, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),[1] and Rule 19b-4 thereunder,[2] notice is hereby given that on January 15, 2013 EDGA Exchange, Inc. (the "Exchange" or "EDGA") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to (i) charge Members [3] and non-Members fees for internal and external distribution of EdgeBook Attributed℠, the Exchange's attributed book feed, and (ii) offer a new incentive program for Members that choose to attribute orders on the Exchange (the "Edge Attribution Incentive Program"). All of the changes described herein are applicable to EDGA Members and non-Members, except for the Edge Attribution Incentive Program, which is applicable only to EDGA Members. The text of the proposed rule change is available on the Exchange's Internet Web site at *www.directedge.com,* at the Exchange's principal office, and at the Public Reference Room of the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

In SR–EDGA–2011–19,[4] the Exchange made available the EDGA Book Feed ("EdgeBook Depth A℠") to Members and non-Members. EdgeBook Depth A℠ is a data feed that contains all orders for securities trading on the Exchange, including all displayed orders for listed securities trading on EDGA, order executions, order cancellations, order modifications, order identification numbers and administrative messages. EdgeBook Depth A℠ offers real-time data, thereby allowing Member firms to more accurately price their orders based on EDGA's view of the depth of book information. It also provides Members the ability to track their own orders from order entry to execution. It is

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] As defined in Rule 1.5(n).

[4] *See* Securities Exchange Act Release No. 64792 (July 1, 2011), 76 FR 39959 (July 7, 2011) (SR–EDGA–2011–19).

available in both unicast and multicast formats.

In SR–EDGA–2012–15,[5] the Exchange modified the EDGA fee schedule by codifying the fees associated with the receipt of EdgeBook Depth A℠. In SR–EDGA–2012–34,[6] the Exchange amended Rule 11.5, entitled ''Orders and Modifiers'', to allow for the use of Attributable Orders [7] submitted to the Exchange on EdgeBook Depth A℠, namely EdgeBook Attributed℠, without charge. EdgeBook Attributed℠ allows Members and non-Members of the Exchange (collectively referred to as ''Recipients'') the option to view the market participant identifier (''MPID'') of Members of the Exchange who choose to display their MPID(s) on EdgeBook Depth A℠ on an order-by-order basis through the use of Attributable Orders.

Upon the Exchange's initial offering of EdgeBook Attributed℠, such service was provided at no cost. In SR–EDGA–2012–34, the Exchange stated that ''[s]hould EDGA determine to charge fees associated with EdgeBook Attributed℠, EDGA will submit a proposed rule change to the [Securities and Exchange] Commission in order to implement those fees.'' [8] This proposal is designed to implement fees for the receipt of EdgeBook Attributed℠ and introduce the Edge Attribution Incentive Program.

The proposed rule change to the EDGA fee schedule codifies such a fee associated with the receipt of EdgeBook Attributed℠. Such fees are in addition to the current fees assessed for EdgeBook Depth A℠ for both Internal and External Distributors.[9] The amount of the monthly fees for EdgeBook Attributed℠ would depend on whether the distributor is an ''Internal Distributor'' or ''External Distributor.'' Internal Distributors are proposed to be charged $2,500 per month for EdgeBook Attributed℠ and External Distributors are proposed to be charged $5,000 per month for EdgeBook Attributed℠. The fee paid by an External Distributor includes the Internal Distributor Fee and thus allows an External Distributor to provide data both internally (*i.e.,* to users within their own organization) and externally (to users outside their own organization). Additionally, Distributors will only pay one distributor fee, regardless of the number of locations or users to which the feed is received or distributed. Finally, Distributors will not be charged user fees for receiving EdgeBook Attributed℠.

The Exchange also proposes to adopt an Edge Attribution Incentive Program to encourage Members to utilize Attributable Orders to convey their identity on EdgeBook Attributed℠ by providing Members with an opportunity to be rewarded for providing their valuable data to the Exchange. In particular, the Edge Attribution Incentive Program would provide a payment to Members who enter Attributable Orders into the Exchange's System [10] in at least 100 symbols over 10 consecutive trading days over the course of a month. Each month the Exchange would set aside 25% of the revenue generated in connection with fees received from EdgeBook Attributed℠, as described above (the ''Revenue Allotment''). From the Revenue Allotment, the Exchange would provide a payment to eligible Members who qualified for the Edge Attribution Incentive Program based on the percentage of executed share volume from their Attributable Orders entered into the Exchange's System. For example, if a Member qualifies for the Edge Attribution Incentive Program and that Member's Attributable Orders accounted for 10% of all executed shares from Attributable Orders entered into the Exchange's System for that month, such Member would receive 10% of the Revenue Allotment. The remaining 90% of the funds in the Revenue Allotment would be distributed as payments to other Members that met the requirements of the Edge Attribution Incentive Program based on their respective executed share of volume from Attributable Orders entered into the Exchange's System. In addition, a Member is not required to purchase EdgeBook Attributed℠ in order to receive payment under the Edge Attribution Incentive Program.

The Exchange intends to implement the proposed rule change on or about February 1, 2013.

2. Statutory Basis

The Exchange believes that the proposed rule change to the EDGA fee schedule for EdgeBook Attributed℠ is consistent with the objectives of Section 6 of the Securities Exchange Act of 1934 (the ''Act''),[11] in general, and furthers the objectives of Section 6(b)(4) [12] in particular, as it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its members and issuers and other persons using any facility or system which the Exchange operates or controls. The fees are not unreasonably discriminatory and are equitably allocated. The fees for Members and non-Members are uniform except with respect to reasonable distinctions with respect to internal and external distribution.[13] The Exchange proposes charging External Distributors more than Internal Distributors because of higher administrative costs associated with monitoring External Distributors ongoing reporting, as provided in the Direct Edge Data Vendor Agreement and market data requirements referenced therein.

The fees are fair and reasonable because they compare favorably to fees that other markets charge for similar products.[14] For example, NASDAQ's depth of book data feed, the NASDAQ TotalView ITCH (''TotalView''), features all displayed quotes and orders attributed to specific market participants.[15] TotalView provides

[5] *See* Securities and Exchange Release No. 66863 (Apr. 26, 2012), 77 FR 26059 (May 2, 2012) (SR–EDGA–2012–15). The current fees for EDGA Book Feed (now called EdgeBook Depth A℠) are $500/month for internal distribution and $2,500/month for external distribution. The proposed rule filing does not impact the current EdgeBook Depth A℠ fees with regard to the non-attributed book feed.

[6] *See* Securities Exchange Act Release No. 67553 (Aug. 1, 2012), 77 FR 47150 (Aug. 7, 2012) (SR–EDGA–2012–34).

[7] *See* EDGA Rule 11.5(c)(18).

[8] *See* Securities Exchange Act Release No. 67553 (Aug. 1, 2012), 77 FR 47150, 47151 (Aug. 7, 2012) (SR–EDGA–2012–34).

[9] A ''Distributor'' of Exchange data is any entity that receives EdgeBook Depth A℠ directly from the Exchange or indirectly through another entity and then distributes such data either internally (within that entity) (''Internal Distributor'') or externally (outside that entity) (''External Distributor'').

[10] As defined in Rule 1.5(cc).

[11] 15 U.S.C. 78s(b)(1)

[12] 15 U.S.C. 78f(b)(4).

[13] The Exchange notes that distinctions based on external versus internal distribution have been previously filed with the Commission by the Exchange, NASDAQ Exchange, NASDAQ OMX BX, and NASDAQ OMX PSX. *See* Securities and Exchange Act Release No. 66863 (Apr. 26, 2012), 77 FR 26059 (May 2, 2012) (SR–EDGA–2012–15). See also Nasdaq Rule 7019(b). *See also* Securities Exchange Act Release No. 62876 (September 9, 2010), 75 FR 56624 (September 16, 2010) (SR-Phlx-2010–120). *See also* Securities Exchange Act Release No. 62907 (September 14, 2010), 75 FR 57314 (September 20, 2010) (SR–NASDAQ–2010–110). *See also* Securities Exchange Act Release No. 63442 (December 6, 2010), 75 FR 77029 (December 10, 2010) (SR–BX–2010–081).

[14] Other exchanges offer a version of their book feed with member order attribution. *See, e.g.,* BATS, Market Data Products, Multicast PITCH, *http://www.batstrading.com/market_data/products/* (describing BATS Multicast PITCH, which provides depth of book quotations and execution information while providing optional attribution functionality); Securities Exchange Act Release No. 63291 (Nov. 9, 2010), 75 FR 70311 (Nov. 17, 2010) (SR–NYSEArca-2010–97) (describing NYSE Arcabook, which includes, among other things, displays of attributed orders by market makers and ETP holders); Securities Exchange Act Release No. 46521 (Sept. 20, 2002), 76 FR 61179 (Sept. 27, 2002) (SR–NASD–2002–33) (describing NASDAQ TotalView data feed, which includes, among other things, displays of attributed quotes and orders).

[15] TotalView features both attributed and non-attributed feeds. *See* Securities Exchange Act

Continued

market participants with multiple and varied services in a single feed.[16] While the cost of TotalView varies by number of subscribers and the specific type of access, each fee provides the entire TotalView book feed, inclusive of all services and features, including attribution of orders. Conversely, EdgeBook Attributed℠ is unlike other market data products such as TotalView. Members and non-Members who subscribe to EdgeBook Attributed℠ must also subscribe to EdgeBook Depth. However, Members and non-Members who subscribe to EdgeBook Depth A℠ are not obligated to purchase or subscribe to EdgeBook Attributed℠. Thus, the Exchange differentiates its pricing accordingly. The Exchange intends to charge a single, flat rate for EdgeBook Attributed℠ as it views it as an optional, a la carte feature which enhances the value and scope of information on EdgeBook Depth A℠. Therefore, the pricing of EdgeBook Attributed℠ will necessarily and understandably differ from market data products such as TotalView, which offer bundled pricing for the entire book feed, instead of a la carte pricing for specific features.[17] In addition, the fees are fair and reasonable because competition provides an effective constraint on the market data fees that the Exchange has the ability and incentive to charge for its market data products.

The revenue generated from purchases of EdgeBook Attributed℠ will pay for the development, marketing, technical infrastructure and operating costs of an important tool for Recipients to use for purposes such as analysis and intake of additional information to assist them in their ultimate trading decisions. Profits generated above these costs will help offset the costs that the Exchange incurs in operating and regulating a highly efficient and reliable platform for the trading of U.S. equities. Furthermore, the increased revenue stream from EdgeBook Attributed℠ will allow the Exchange to continue to offer it at a reasonable rate, consistent with fees that other markets charge for similar products.

The Exchange believes that Members will recognize the value of EdgeBook Attributed℠ and that the increased transparency of liquidity on EdgeBook Attributed℠ will beget additional liquidity. As a result, the Exchange believes that increased value in the data disseminated helps Exchange members hone in on trading opportunities by better understanding the quality and transparency of the Exchange's quote quality. This will, in turn, help to enhance the overall execution quality on the Exchange.

The Exchange also believes that the proposed fees for EdgeBook Attributed℠ are consistent with Section 6(b)(5) of the Act,[18] which requires, among other things, that the Exchange's rules not be designed to unfairly discriminate between customers, issuers, brokers or dealers. The Exchange makes all services and products subject to these fees available on a non-discriminatory basis to similarly situated Recipients because the service is purely optional and fees charged for EdgeBook Attributed℠ will apply uniformly to all Recipients, irrespective of whether the Recipient is a Member of the Exchange. Purchase of the Service is not a prerequisite for participation on the Exchange, nor is membership to the Exchange a prerequisite to purchase the Service. Only those Recipients that deem the product to be of sufficient overall value and usefulness will purchase it.

In addition, the proposed fees are also consistent with Section 6(b)(5) of the Act [19] as it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. EDGA believes that this proposal is in keeping with those principles as it will benefit all Recipients by: (i) promoting transparency through the codification of uniform fees for EdgeBook Attributed℠; and (ii) providing additional information regarding quotations displayed on the Exchange by various Members, which may aid Recipients in their trading decisions. Specifically, any Member that wishes to publicly disclose their identity (through their MPID) by using Attributable Orders will be permitted to do so, and such Attributable Orders will be analogous to the orders or quotations that these same Members provide in other contexts (*e.g.,* on the floor of a floor-based stock exchange or in the over-the-counter market through direct interaction). In addition, the Exchange believes that EdgeBook Attributed℠ furthers the objectives of Section 6(b)(5) of the Act [20] by promoting increased quote transparency as Members are encouraged to utilize Attributable Orders through the Edge Attribution Incentive Program. The increased use of Attributable Orders by Members would provide additional, useful information regarding orders/quotations displayed on the Exchange, including information on the identity of contra-parties to transactions. The Exchange believes that this enhanced information would aid Recipients of EdgeBook Attributed℠ in their trading decisions. In addition, EDGA has made a voluntary decision to make EdgeBook Attributed℠ available. EDGA is not required by the Act in the first instance to make the data available. EDGA has chosen to make EdgeBook Attributed℠ available to improve market quality, attract order flow, and increase transparency. It will continue to make such data available until such time as it changes its rule.

The Exchange also believes that the proposal is consistent with the goals of Regulation NMS.[21] In adopting Regulation NMS, the Commission granted self-regulatory organizations and broker-dealers increased authority and flexibility to offer new and unique market data services to the public. The Commission believed this authority would expand the amount of data available to market participants, and also spur innovation and competition for the provision of market data. EdgeBook Attributed℠ appears to be precisely the sort of market data service that the Commission envisioned when it adopted Regulation NMS.[22] EdgeBook

Release No. 46521 (Sept. 20, 2002), 76 FR 61179 (Sept. 27, 2002) (SR–NASD–2002–33). NYSE ArcaBook features an attributed feed at a fee of $750 per month, in addition to separate fees for professional and non-professional subscribers ranging from $0–15 per month. *See* NYSE Technologies, Market Data, NYSE ArcaBook, *http://www.nyxdata.com/arcabook.*

[16] *See* NASDAQ, NASDAQ TotalView-ITCH, *http://www.nasdaqtrader.com/trader.aspx?id=totalview* (describing services and fees for TotalView).

[17] For example, TotalView is priced at a monthly fee of $70 per professional or corporate subscriber and $14 per non-professional subscriber for coverage of NASDAQ issued securities, and $6 per professional or corporate subscriber and $1 per non-professional subscriber for coverage of NYSE and Amex issued securities. *See* NASDAQ, NASDAQ TotalView-ITCH, *http://www.nasdaqtrader.com/trader.aspx?id=totalview.*

[18] 15 U.S.C. 78f(b)(5).

[19] 15 U.S.C. 78f(b)(5).

[20] 15 U.S.C. 78f(b)(5).

[21] *See* Securities Exchange Act Release No. 51808 (June 9, 2006), 70 FR 37496 (June 29, 2005) (sic).

[22] *See* Securities and Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37597 (June 29, 2005) (''[E]fficiency is promoted when broker-dealers who do not need the data beyond the prices, sizes, market center identifications of the NBBO and consolidated last sale information are not required to receive (and pay for) such data. The Commission also believes that efficiency is promoted when broker-dealers may choose to receive (and pay for) additional market data based

Attributed℠ will allow Recipients to purchase a service that will provide them a means to view the MPID of certain Members who choose to use Attributable Orders while at the same time enabling the Exchange to better cover its infrastructure costs and to improve its market technology and services. Efficiency is promoted when Members who do not need the EDGA Book Feed data are not required to receive (and pay for) such data. The Exchange also believes that efficiency is promoted when Members may choose to receive (and pay for) additional market data based on their own internal analysis of the need for such data. Competition is promoted as the Exchange cannot set unreasonable fees without losing business to its competitors.[23]

Additionally, the Exchange believes that the Edge Attribution Incentive Program furthers the objectives of Section 6(b)(4) [24] in particular, as it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which the Exchange operates or controls. The Edge Attribution Incentive Program encourages Members to utilize Attributable Orders to convey their identity on EdgeBook Attributed℠. It represents a reasonable and equitable approach in that it financially rewards those Members that provide their valuable data to the Exchange and thereby help to contribute to the overall quality of EdgeBook Attributed℠ as a data feed.

The Exchange believes that the Edge Attribution Incentive Program is also equitable and reasonable because it will attract additional order flow from Members motivated to receive the incentive offered, thereby enhancing the quality of the data on EdgeBook Depth A℠. Attributable Orders, similar to all market data, provide Members with valuable trading information and provide increased transparency to investors. The Exchange believes that such increased transparency will lead to additional order flow and increased opportunities for price discovery by Members. Specifically, the Exchange believes that the Edge Attribution Incentive Program will also increase order flow as Members will be motivated to receive the incentive offered under the Edge Attribution Incentive Program, and contra-side parties will look to execute against Members that are attributing their orders. For example, Market Makers [25] may want to utilize Attributable Orders to advertise the names of the securities they trade in to attract potential issuers or to advertise to the market that they maintain an inventory in particular securities. Similarly, retail brokerage firms may desire to utilize Attributable Orders to advertise their firm names with the intent to draw in contra-parties to trade against and thus bolster execution quality, price discovery, and resulting speed of execution for their clients. The associated potential rise in order volume would increase the potential revenue to the Exchange, allowing the Exchange to spread its administrative and infrastructure costs over a greater number of shares. These lower per share costs in turn would allow the Exchange to pass on such savings to Members in the form of such an incentive. The increased liquidity would also benefit investors by deepening EDGA's liquidity pool, allowing investors to enjoy cost savings as a result of obtaining better execution quality, supporting the quality of price discovery, promoting market transparency and improving investor protection.

The incentive is similar to other volume-based rebates on the Exchange, which have been widely adopted in the cash equities markets.[26] The Exchange believes the Edge Attribution Incentive Program, which is similar to other volume-based rebates on the Exchange's fee schedule, is equitable because it is available and uniformly applied to all Members. The Edge Attribution Incentive Program also provides discounts that are reasonably related to the value of an exchange's market quality associated with higher levels of market activity, such as higher levels of liquidity provision and introduction of higher volumes of orders into the price and volume discovery processes.

The Exchange believes that the Edge Attribution Incentive Program is consistent with Section 6(b)(5) of the Act,[27] which requires, among other things, that the Exchange's rules not be designed to unfairly discriminate between customers, issuers, brokers or dealers. The Exchange believes that the Edge Attribution Incentive Program is equitable because participation in the Edge Attribution Incentive Program is purely optional. Only those Members that deem the Edge Attribution Incentive Program to be of sufficient overall value and usefulness will participate. Moreover, the requirements necessary to qualify for payments received under the Edge Attribution Incentive Program (at least 100 symbols over 10 consecutive trading days over the course of a month) are equitable and do not unfairly discriminate between Members who choose to attribute, as the payments will be offered uniformly to all Members who meet such requirements. Such requirements provide a clear benchmark by identifying a threshold that is not unreasonably difficult for a meaningful and consistent attributor to achieve. As Attributable Orders contain valuable trading information to the Exchange, the Edge Attribution Incentive Program is not unfairly discriminatory in its design to allocate the Revenue Allotment to Members who attribute in proportion to the executed share volume from such Member's Attributable Orders entered into the Exchange's System. Such data is also valuable to Members and non-Members who use the additional information for various purposes. For example, certain Recipient broker-dealers may use the data to aid their trading decisions, while Recipient smart routers may use the data to aid in building their own consolidated ticker plant. Such information enhances a Recipient's trading decisions as the transparency of knowing the identity of the potential counterparty may provide a Recipient with additional information regarding the reliability and quality of the attributed quote.

Lastly, the Exchange believes that the Edge Attribution Incentive Program furthers the objectives of Section 6(b)(5) of the Act [28] by promoting increased quote transparency on EdgeBook Attributed℠ as Members are encouraged to utilize Attributable Orders. The increased use of Attributable Orders by Members would increase transparency by providing additional, useful information regarding orders/quotations displayed on the Exchange, including information on the identity of contra-parties to transactions. The Exchange believes that this enhanced information would aid Recipients of EdgeBook Attributed ℠ in their trading decisions.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in

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on their own internal analysis of the need for such data.'').

[23] *See infra* discussion in section on ''Self-Regulatory Organization's Statement on Burden on Competition.''

[24] 15 U.S.C. 78f(b)(4).

[25] As defined in Rule 1.5(l).

[26] EDGA allows Members to utilize volume-based tiers, as described in Footnotes 2 and 4, among others, to the EDGA Fee Schedule. *See, e.g.,* EDGA Fee Schedule, *https://www.directedge.com/Membership/FeeSchedule/EDGAFeeSchedule.aspx.*

[27] 15 U.S.C. 78f(b)(5).

[28] 15 U.S.C. 78f(b)(5).

any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

There is significant competition for the provision of market data to market participants, as well as competition for the orders that generate that data. In introducing the proposed fees for EdgeBook Attributed SM, the Exchange would be providing a service similar to those already offered by other market centers.[29] The existence of such alternatives ensures that the Exchange cannot set unreasonable fees, or fees that are unreasonably discriminatory, without losing business to these alternatives. Thus, as the fees are consistent with those charged by the Exchange's competitors, EdgeBook Attributed SM would promote competition if it succeeds in providing market participants with viable and cost-effective alternatives which drive the market to continually improve products and services to cater to customers' data needs. Accordingly, the Exchange does not believe that the fees for EdgeBook Attributed SM will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from its Members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [30] and paragraph (f) of Rule 19b–4 thereunder.[31] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

[29] *See, e.g.,* BATS, Market Data Products, Multicast PITCH, *http://www.batstrading.com/market_data/products/*; Securities Exchange Act Release No. 63291 (Nov. 9, 2010), 75 FR 70311 (Nov. 17, 2010) (SR–NYSEArca–2010–97) (describing NYSE Arcabook); Securities Exchange Act Release No. 46521 (Sept. 20, 2002), 76 FR 61179 (Sept. 27, 2002) (SR–NASD–2002–33) (describing NASDAQ TotalView).

[30] 15 U.S.C. 78s(b)(3)(A).

[31] 17 CFR 240.19b–4(f).

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–EDGA–2013–01 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–EDGA–2013–01. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–EDGA–2013–01 and should be submitted on or before February 20, 2013.

[32] 17 CFR 200.30–3(a)(12).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[32]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–01983 Filed 1–29–13; 8:45 am]

BILLING CODE 8011–01–P

DEPARTMENT OF STATE

[Public Notice 8170]

Culturally Significant Objects Imported for Exhibition Determinations: ''Picasso Black and White''

AGENCY: Department of State.

ACTION: Notice, correction.

SUMMARY: On September 12, 2012, notice was published on page 56251 of the **Federal Register** (volume 77, number 177) of determinations made by the Department of State pertaining to the exhibition ''Picasso Black and White.'' The referenced notice is corrected here to include additional objects as part of the exhibition. Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.;* 22 U.S.C. 6501 note, *et seq*.), Delegation of Authority No. 234 of October 1, 1999, and Delegation of Authority No. 236–3 of August 28, 2000 (and, as appropriate, Delegation of Authority No. 257 of April 15, 2003), I hereby determine that the additional objects to be included in the exhibition ''Picasso Black and White,'' imported from abroad for temporary exhibition within the United States, are of cultural significance. The additional objects are imported pursuant to loan agreements with the foreign owners or custodians. I also determine that the exhibition or display of the additional exhibit objects at the Museum of Fine Arts, Houston, Houston, Texas, from on or about February 24, 2013, until on or about May 27, 2013, and at possible additional exhibitions or venues yet to be determined, is in the national interest. I have ordered that Public Notice of these Determinations be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the additional exhibit objects, contact Paul W. Manning, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202–632–6469). The mailing address is U.S. Department of State, SA–5, L/PD, Fifth

Floor (Suite 5H03), Washington, DC 20522–0505.

Dated: January 17, 2013.

J. Adam Ereli,

Principal Deputy Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2013–01990 Filed 1–29–13; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice 8169]

Easing the Ban on Imports From Burma

SUMMARY: The Deputy Secretary of State has determined, pursuant to authority delegated by the Secretary of State, that it is in the national interests of the United States to waive the prohibitions described in section 3(a) of the Burmese Freedom and Democracy Act of 2003 (Pub. L. 108–61), as amended (''BFDA''), which requires the President to prohibit the importation of any article that is a product of Burma into the United States, and which the President implemented in section 3 of Executive Order 13310 (July 28, 2003). In conjunction with this waiver determination, the Department of the Treasury's Office of Foreign Assets Control issued General License (No. 18) on November 16, 2012 authorizing imports into the United States of any article that is a product of Burma, subject to limitations set forth therein.

This step is in the national interest of the United States because it supports those in the Burmese government that have instituted important reforms since early 2011 and encourages the government to make further progress. The waiver of the import ban responds to the Government of Burma's continued reforms and efforts to address U.S. core concerns, including the release of political prisoners, and other steps on human rights and national reconciliation.

DATES: *Effective Date:* November 15, 2012.

FOR FURTHER INFORMATION CONTACT: John Marshall Klein, Senior Sanctions Officer, Economic & Business Affairs, Office of Sanctions Policy and Implementation, 202–647–9452.

Dated: January 16, 2013.

Jose W. Fernandez,

Assistant Secretary for Economic and Business Affairs, Department of State.

[FR Doc. 2013–01991 Filed 1–29–13; 8:45 am]

BILLING CODE 4710–07–P

DEPARTMENT OF STATE

[Public Notice 8172]

Shipping Coordinating Committee; Notice of Committee Meeting

The Shipping Coordinating Committee (SHC) will conduct an open meeting at 9:30 a.m. on Tuesday, March 19, 2013, in Room 5–0624 of the United States Coast Guard Headquarters Building, 2100 2nd Street SW., Washington, DC 20593. The primary purpose of the meeting is to prepare for the thirty-eighth Session of the International Maritime Organization's (IMO) Facilitation Committee to be held at the IMO Headquarters, United Kingdom, April 8–12, 2013.

The agenda items to be considered include:

—Adoption of the agenda; report on credentials
—Decisions of other IMO bodies
—Consideration and adoption of proposed amendments to the Convention
—General review of the Convention, including harmonization with other international instruments:
  A. Comprehensive review of the Annex to the Convention, including: Intersessional Correspondence Group (ISCG) work
—E-business possibilities for the facilitation of maritime traffic
  A. Electronic means for the clearance of ships, cargo and passengers
  B. Electronic access to, or electronic versions of, certificates and documents required to be carried on ships, including ISCG work
—Formalities connected with the arrival, stay and departure of persons, including:
  A. Shipboard personnel
  B. Stowaways
  C. Illegal migrants
  D. Persons rescued at sea
—Ensuring security in and facilitating international trade, including:
  A. Shore leave and access to ships
  B. Trade recovery, including ISCG work
—Ship/port interface
—Technical co-operation and assistance
—Relations with other organizations
—Application of the Committee's Guidelines
—Work programme
—Election of Chairman and Vice-Chairman for 2013
—Any other business
—Consideration of the report of the Committee on its thirty-eighth session

Members of the public may attend this meeting up to the seating capacity of the room. To facilitate the building security process, and to request reasonable accommodation, those who plan to attend should contact the meeting coordinator, Mr. David Du Pont, by email at *David.A.DuPont@uscg.mil,* by phone at (202) 372–1497, by fax at (202) 372–1928, or in writing at Commandant (CG–REG), U.S. Coast Guard, 2100 2nd Street SW., Stop 7126, Washington, DC 20593–7126 not later than March 12, 2013, 7 days prior to the meeting. Requests made after March 12, 2013 might not be able to be accommodated. Please note that due to security considerations, two valid, government issued photo identifications must be presented to gain entrance to the Headquarters building. The Headquarters building is accessible by taxi and privately owned conveyance (public transportation is not generally available). However, parking in the vicinity of the building is extremely limited.

For members of the public that would like to participate, but are unable to attend this meeting the Coast Guard will provide a teleconference option. To participate by phone, contact the meeting coordinator (details above) to obtain teleconference information. Note the number of teleconference lines is limited and will be available on a first-come, first-served basis.

Additional information regarding this and other IMO SHC public meetings may be found at: *www.uscg.mil/imo.* Information specific to the Facilitation Committee may be found at *www.uscg.mil/imo/fal* and *www.uscg.mil/hq/cg5/cg523/imo.*

Dated: January 22, 2013.

Brian Robinson,

Executive Secretary, Shipping Coordinating Committee, Department of State.

[FR Doc. 2013–01986 Filed 1–29–13; 8:45 am]

BILLING CODE 4710–09–P

DEPARTMENT OF STATE

[Public Notice 8171]

Overseas Security Advisory Council (OSAC) Meeting Notice; Closed Meeting

The Department of State announces a meeting of the U.S. State Department—Overseas Security Advisory Council on February 19 and 20, 2013. Pursuant to Section 10(d) of the Federal Advisory Committee Act (5 U.S.C. Appendix), 5 U.S.C. 552b(c)(4), and 5 U.S.C. 552b(c)(7)(E), it has been determined that the meeting will be closed to the public. The meeting will focus on an examination of corporate security policies and procedures and will involve extensive discussion of trade secrets and proprietary commercial information that is privileged and confidential, and will discuss law enforcement investigative techniques and procedures. The agenda will include updated committee reports, a global threat overview, and other matters relating to private sector security policies and protective programs and the protection of U.S. business information overseas.

For more information, contact Marsha Thurman, Overseas Security Advisory Council, U.S. Department of State, Washington, DC 20522–2008, phone: 571–345–2214.

Dated: January 15, 2013.

Gentry O. Smith,

Director of the Diplomatic Security Service, Acting, U.S. Department of State.

[FR Doc. 2013–01987 Filed 1–29–13; 8:45 am]

BILLING CODE 4710–24–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Twenty Third Meeting: RTCA Special Committee 203, Unmanned Aircraft Systems

AGENCY: Federal Aviation Administration (FAA), U.S. Department of Transportation (DOT)

ACTION: Meeting Notice of RTCA Special Committee 203, Unmanned Aircraft Systems.

SUMMARY: The FAA is issuing this notice to advise the public of the twenty third meeting of RTCA Special Committee 203, Unmanned Aircraft Systems.

DATES: The meeting will be held February 12–15, 2013, from 9:00 a.m.to 5:00 p.m.

ADDRESSES: The meeting will be held at RTCA, Inc., 1150 18th St. NW., Suite 910, Washington, DC 20036.

FOR FURTHER INFORMATION CONTACT: The RTCA Secretariat, 1150 18th Street NW., Suite 910, Washington, DC 20036, or by telephone at (202) 833–9339, fax at (202) 833–9434, or Web site at *http://www.rtca.org.*

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., App.), notice is hereby given for a meeting of Special Committee 203. The agenda will include the following:

Tuesday, February 12, 2013

Opening Plenary Session

- Introductory Remarks and Introductions
- Approval of Twenty Second Plenary Summary
- Chair & Leadership Updates
- Designated Federal Official (DFO) Update
- Workgroup Updates
- Plenary Adjourns until Friday
- Information Briefings

Mid-Morning/Afternoon

Workgroup Breakout Sessions

- System Engineering Workgroup
  - Human Factors Subgroup
- C&C Workgroup
- S&A Workgroup
- Safety Workgroup

Wednesday, February 13 & Thursday, February 14

All Day—Workgroup Breakout Sessions

- System Engineering Workgroup
- C&C Workgroup
- S&A Workgroup
- Safety Workgroup

Friday, February 15

08:00–11:00 a.m.—Workgroup Breakout Sessions

- System Engineering Workgroup
  - Human Factors Subgroup
- C&C Workgroup
- S&A Workgroup
- Safety Workgroup

11:00 a.m.

Plenary Reconvenes

- Workgroup Back Briefs
- Other Business
- Date, Place, and Time for Plenary Twenty Four
- Plenary Adjourns

12:00 p.m.

- Workgroup Breakouts TBD by each Workgroup

Attendance is open to the interested public but limited to space availability. With the approval of the chairman, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. Members of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on January 16, 2013.

Richard F. Gonzalez,

Management Analyst, Business Operations Group, ANG–A12, Federal Aviation Administration.

[FR Doc. 2013–02030 Filed 1–29–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Results of FAA Nitrous Oxide BLEVE Characterization Testing

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of public teleconference.

SUMMARY: This notice announces a public teleconference to share with the public results of recent FAA sponsored testing of nitrous oxide (N_2O) characteristics. Nitrous oxide is an important oxidizer to developers of some commercial reusable launch vehicles. A potential hazard in nitrous oxide storage and handling is a Boiling Liquid Expanding Vapor Explosion (BLEVE), which results from a sudden loss of pressure in a tank containing nitrous oxide stored under pressure above its normal boiling point. The FAA's Office of Commercial Space Transportation sponsored tests of liquid-phase nitrous oxide at NASA's White Sands Test Facility to empirically determine the superheat limit temperature for nitrous oxide, and to demonstrate that a BLEVE would not occur if the liquid is maintained at temperatures below this superheat limit temperature.

Meeting Information: The teleconference is scheduled for Thursday, February 28, 2013, from 1:00–2:30 p.m. Eastern Standard Time. The presentation and call-in number will be posted one week in advance at *http://www.ast.faa.gov/.*

FOR FURTHER INFORMATION CONTACT: Stewart Jackson, Division Manager, Regulations and Analysis Division, AST–300, Office of Commercial Space Transportation, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591, Telephone (202) 267–7903, or email at *stewart.jackson@faa.gov.*

Issued in Washington, DC, on January 22, 2013.

George C. Nield,

Associate Administrator for Commercial Space Transportation.

[FR Doc. 2013–02046 Filed 1–29–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Seventy Fifth Meeting: RTCA Special Committee 147, Minimum Operational Performance Standards for Traffic Alert and Collision Avoidance Systems Airborne Equipment

AGENCY: Federal Aviation Administration (FAA), U.S. Department of Transportation (DOT).

ACTION: Meeting notice of RTCA Special Committee 147, Minimum Operational Performance Standards for Traffic Alert and Collision Avoidance Systems Airborne Equipment.

SUMMARY: The FAA is issuing this notice to advise the public of the Seventy Fifth meeting of RTCA Special Committee 147, Minimum Operational Performance Standards for Traffic Alert and Collision Avoidance Systems Airborne Equipment.

DATES: The meeting will be held February 7, 2013, from 8:30 a.m. to 3:00 p.m.

ADDRESSES: The meeting will be held at RTCA, Inc., 1150 18th Street, NW., Suite 910, Washington, DC 20036.

FOR FURTHER INFORMATION CONTACT: The RTCA Secretariat, 1150 18th Street NW., Suite 910, Washington, DC 20036, or by telephone at (202) 833–9339, fax at (202) 833–9434, or Web site at *http://www.rtca.org.*

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., App.), notice is hereby given for a meeting of Special Committee 147. The agenda will include the following:

February 7, 2013

- Opening Plenary Session
- SC–147 & WG–75 Co-Chairmen opening remarks
- Introductions
- Approval of Agenda & Summary from 74th meeting of SC–147
- Document Approvals
- Change 2 to DO–185B/ED–143
- Revision A to Hybrid Surveillance MOPS (DO–300)/Initial EUROCAE version (ED-xxx)
- EUROCAE WG–75: Status of current Activities
- Working Group Status Reports
- Requirement Working Group (no report expected)
- Surveillance Working Group (no report expected)
- TCAS Program Office Activities
- Future CAS development efforts
- Coordination with SESAR on ACAS X development
- MOPS development planning
- Updated SC–1747 TORs
- AVS and other FAA Activities
- Other Business
- Action Items
- Time and Place of Next Meeting
- Plenary Adjourn

Attendance is open to the interested public but limited to space availability. With the approval of the chairman, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. Members of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on January 16, 2013.

Richard F. Gonzalez,

Management Analyst, Business Operations Group, ANG–A12, Federal Aviation Administration.

[FR Doc. 2013–02003 Filed 1–29–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Public Notice for Release of Aeronautical Property at the Wilkes-Barre/Scranton International Airport (AVP), Avoca, PA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Request for public comment.

SUMMARY: The Federal Aviation Administration is requesting public comment on the Bi-County Board of Commissioners of Luzerne and Lackawanna Counties request to release airport property and granting right-of-way easements for use by the Pennsylvania Department of Transportation (PennDOT) to construct an access roadway and required drainage facilities. The request consists of a permanent release of land (16.037 acres) for the roadway construction, a right-of-way drainage easement (0.2 acre) for the highway, and a right-of-way easement (0.183 acre) for the substitute sewer (supersedes previous easement) for the Lower Lackawanna Valley Sanitary Authority.

The parcel is located in the Borough of DuPont and Pittstown Township, Luzerne County within the existing Wilkes-Barre/Scranton International Airport property and consists of three areas. The first area is located southeast of the northbound off ramp (exit 178A) of Interstate 81 near its intersection with Terminal Road (SR 2059) to Navy Way Road then along the Navy Way Road alignment south to the Lidy Road intersection with Gedrich Street containing approximately 8 +/− acres. The second area is located southeast of Laurel Lane and extends southeast under the Wilkes-Barre/Scranton International Airport approach light towers and the wooded area to the Pennsylvania Turnpike Northeast Extension containing approximately 8 +/− acres. The third area is located northwest of Campbell Street along Interstate 81 and the pedestrian bridge over Interstate 81 containing approximately 0.26 +/− acres. This release request is for the purpose of permitting the Airport Owner to sell and convey title of 16.037 acres for public roadway, 0.20 acres for a drainage easement associated with the highway and 0.183 acres for a substitute sewer easement displaced due to the public road for a total of 16.42 acres.

The Wilkes-Barre/Scranton International Airport will receive fair market value from the sale of the land. Areas impacted are not needed for aeronautical use for current or foreseeable future aeronautical activities.

Documents reflecting the Sponsor's request are available, by appointment only, for inspection at the Airport Managers office and the FAA Harrisburg Airport District Office.

DATES: Comments must be received on or before March 1, 2013.

ADDRESSES: Documents are available for review at the Airport Manager's office: Barry J. Centini, Airport Director, Wilkes-Barre/Scranton International Airport, 100 Terminal Drive, Avoca, PA, 570–602–2000; and at the FAA Harrisburg Airports District Office: Lori K. Pagnanelli, Manager, Harrisburg Airports District Office, 3905 Hartzdale Dr., Suite 508, Camp Hill, PA 17011, (717) 730–2830.

FOR FURTHER INFORMATION CONTACT: Brian J. Gearhart, Project Manager at the Harrisburg Airports District Office location listed above.

SUPPLEMENTARY INFORMATION: The FAA invites public comment on the release of land and right-of-way easements at the Wilkes-Barre/Scranton International Airport, Avoca, Pennsylvania at fair market value under the provisions of Section 47125(a) of Title 49 United States Code (U.S.C.).

Approximately 8+/− acres of the property is currently non-aeronautical use vacant land and access roadway and approximately 8+/− acres of the property is aeronautical use and is under the approach near the Approach

Lighting System for Runway 4. The requested release is for the purpose of permitting the Sponsor to sell and convey an easement for the subject 16.42 Acres to be used as a public road. The majority of the parcel was acquired with Federal participation through grant (9–36–034–C407) issued on September 25, 1963 for parcels 52A, 52B, and 52C; grant (6–42–0105–12) issued on September, 1980 for parcels 19, 20 and 27; and grant (3–42–0105–06–85) issued on December 13, 1984 for parcel 50. There are no known adverse impacts to the operation of the airport and the land is not needed for any foreseeable future aeronautical development as shown on the current approved Wilkes-Barre/Scranton International Airport Layout Plan (ALP). All sales proceeds are to remain on the airport for eligible Airport Improvement Program projects at the airport.

Any person may inspect the request by appointment at the FAA office address listed above. Interested persons are invited to comment on the proposed release from obligations. All comments will be considered by the FAA to the extent practicable.

Issued in Camp Hill, Pennsylvania, January 18, 2013.

Lori K. Pagnanelli,

Manager, Harrisburg Airports District Office.

[FR Doc. 2013–02040 Filed 1–29–13; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

[Docket No. PHMSA–2013–0015]

Pipeline Safety: Accident and Incident Notification Time Limit

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA); DOT.

ACTION: Notice; Issuance of Advisory Bulletin.

SUMMARY: Owners and operators of gas and hazardous liquid pipeline systems and liquefied natural gas (LNG) facilities are already required to provide telephonic reports of pipeline incidents and accidents to the National Response Center (NRC) promptly, accurately, and fully communicate the estimated extent of the damages. PHMSA is issuing this advisory bulletin to notify the owners and operators that, as required by the Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011, the agency will issue a proposed rule to revise telephonic reporting regulations to establish specific time limits for telephonic or electronic notice of accidents and incidents involving pipeline facilities to the NRC.

FOR FURTHER INFORMATION CONTACT: Cameron Satterthwaite by phone at 202–366–1319 or by email at *cameron.satterthwaite@dot.gov*. Information about PHMSA may be found at *http://phmsa.dot.gov*.

SUPPLEMENTARY INFORMATION:

Background

On January 3, 2012, President Obama signed into law the Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011 (Pub. L. 112–90). Section 9 of the Act requires PHMSA to require a specific time limit for telephonic or electronic reporting of pipeline accidents and incidents. Specifically, Section 9 of the Act states:

SEC. 9. ACCIDENT AND INCIDENT NOTIFICATION.

(a) REVISION OF REGULATIONS.—Not later than 18 months after the date of enactment of this Act, the Secretary of Transportation shall revise regulations issued under sections 191.5 and 195.52 of title 49, Code of Federal Regulations, to establish specific time limits for telephonic or electronic notice of accidents and incidents involving pipeline facilities to the Secretary and the National Response Center.

(b) MINIMUM REQUIREMENTS.—In revising the regulations, the Secretary, at a minimum, shall—

(1) Establish time limits for telephonic or electronic notification of an accident or incident to require such notification at the earliest practicable moment following confirmed discovery of an accident or incident and not later than 1 hour following the time of such confirmed discovery;

(2) Review procedures for owners and operators of pipeline facilities and the National Response Center to provide thorough and coordinated notification to all relevant State and local emergency response officials, including 911 emergency call centers, for the jurisdictions in which those pipeline facilities are located in the event of an accident or incident, and revise such procedures as appropriate; and

(3) Require such owners and operators to revise their initial telephonic or electronic notice to the Secretary and the National Response Center with an estimate of the amount of the product released, an estimate of the number of fatalities and injuries, if any, and any other information determined appropriate by the Secretary within 48 hours of the accident or incident, to the extent practicable.

(c) UPDATING OF REPORTS.—After receiving revisions described in subsection (b)(3), the National Response Center shall update the initial report on an accident or incident instead of generating a new report.

Currently, PHMSA requires pipeline owners and operators to notify the NRC by telephone or electronically at the earliest practicable moment following discovery (§§ 191.5 and 195.52). In a September 6, 2002, (67 FR 57060) advisory bulletin, PHMSA advised owners and operators of gas and hazardous liquids pipeline systems and LNG facilities that, ''at the earliest practicable opportunity,'' usually means one-to-two hours after discovery of the incident.

Advisory Bulletin (ADB–2013–01)

To: Owners and Operators of Gas and Hazardous Liquids Pipeline Systems and LNG Facilities

Subject: Telephonic Notification Time Limit to NRC.

Purpose: To advise owners and operators of gas and hazardous liquids pipeline systems and LNG facilities that they should contact the NRC within one hour of discovery of a pipeline incident and should also file additional telephonic reports if there are significant changes in the number of fatalities or injuries, product release estimates or the extent of damages.

Advisory: Owners and operators of gas and hazardous liquid pipelines and LNG facilities are reminded that the pipeline safety regulations already require operators to make a telephonic report of an incident to the NRC in Washington, DC at the earliest practicable opportunity (usually one-to-two hours after discovering the incident). However, under Section 9(b)(1) of the Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011, PHMSA is required to issue regulations requiring owners and operators to notify the NRC within one hour of discovery of a pipeline accident or incident. The 2011 Act requires PHMSA to establish a time limit for telephonic or electronic notification of an accident or incident to require such notification at the earliest practicable moment following confirmed discovery of an accident or incident that is not later than one hour following the time of such confirmed discovery. PHMSA will issue a proposed rule at a later date, but encourages owners and operators of the gas and hazardous liquids pipeline systems and LNG facilities, as a practice, to report such accidents and incidents within one hour of confirmed discovery. The information required to be reported includes the name of the operator, the name and telephone number of the person making the report, the location of the incident, the number of fatalities and injuries, and all other significant facts that are relevant to the cause of the incident or extent of the damages.

Issued in Washington, DC, on January 25, 2013.

Alan K. Mayberry,

Deputy Associate Administrator Field Operations.

[FR Doc. 2013–01958 Filed 1–29–13; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

January 24, 2013.

The Department of the Treasury will submit the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, Public Law 104–13, on or after the date of publication of this notice.

DATES: Comments should be received on or before March 1, 2013 to be assured of consideration.

ADDRESSES: Send comments regarding the burden estimate, or any other aspect of the information collection, including suggestion for reducing the burden, to (1) Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for Treasury, New Executive Office Building, Room 10235, Washington, DC 20503, or email at *OIRA_Submission@OMB.EOP.GOV* and (2) Treasury PRA Clearance Officer, 1750 Pennsylvania Ave. NW., Suite 8140, Washington, DC 20220, or email at *PRA@treasury.gov.*

FOR FURTHER INFORMATION CONTACT: Copies of the submission(s) may be obtained by calling (202) 927–5331, email at *PRA@treasury.gov,* or the entire information collection request may be found at *www.reginfo.gov.*

Internal Revenue Service (IRS)

OMB Number: 1545–0892.
Type of Review: Revision of a currently approved collection.
Title: Report of Cash Payments Over $10,000 Received in a Trade or Business.
Form: 8300.
Abstract: Anyone in a trade or business who, in the course of such trade or business, receives more than $10,000 in cash or foreign currency in one or more related transactions must report it to the IRS and provide a statement to the payer.
Affected Public: Private Sector: Businesses and other for-profits, farms; State, Local and Tribal Governments; Individuals or Households.
Estimated Total Burden Hours: 75,221.

OMB Number: 1545–0991.
Type of Review: Extension without change of a currently approved collection.
Title: Application to Participate in the IRS e-file Program.
Form: 8633.
Abstract: Form 8633 is used by tax preparers, electronic return collectors, software firms, service bureaus and electronic transmitters, as an application to participate in the electronic filing program covering individual income tax returns.
Affected Public: Private Sector: Businesses or other for-profits.
Estimated Total Burden Hours: 50,000.

OMB Number: 1545–1432.
Type of Review: Extension without change of a currently approved collection.
Title: Voluntary Customer Surveys to Implement E.O. 12862 Coordinated by the Corporate Planning and Performance Division on Behalf of All IRS Operations Functions.
Abstract: This is a generic clearance for an undefined number of customer satisfaction and opinion surveys and focus group interviews to be conducted over the next three years. Surveys and focus groups conducted under the generic clearance are used by the Internal Revenue Service to determine levels of customer satisfaction as well as determining issues that contribute to customer burden. This information will be used to make quality improvements to products and services.
Affected Public: Individuals or Households.
Estimated Total Burden Hours: 150,000.

OMB Number: 1545–1690.
Type of Review: Extension without change of a currently approved collection.
Title: Notice 2000–28—Coal Exports.
Abstract: Notice 2000–28 provides guidance relating to the coal excise tax imposed by section 4121 of the Internal Revenue Code. The notice provides rules under the Code for making a nontaxable sale of coal for export or for obtaining a credit or refund when tax has been paid with respect to a nontaxable sale or coal for export.
Affected Public: Private Sector: Businesses or other for-profits.
Estimated Total Burden Hours: 400.

OMB Number: 1545–1834.
Type of Review: Extension without change of a currently approved collection.
Title: Revenue Procedure 2003–39, Section 1031 LKE (Like-Kind Exchanges) Auto Leasing Programs.
Abstract: Revenue Procedure 2003–39 provides safe harbors for certain aspects of the qualification under Sec. 1031 of certain exchanges of property pursuant to LKE Programs for federal income tax purposes.
Affected Public: Private Sector: Businesses or other for-profits.
Estimated Total Burden Hours: 8,600.

OMB Number: 1545–1964.
Type of Review: Extension without change of a currently approved collection.
Title: Intake/Interview & Quality Review Sheet.
Form: 13614–C; 13614–C (SP).
Abstract: The SPEC function developed the Form 13614–C, Intake/Interview & Quality Review Sheet that contains a standardized list of required intake and quality review questions to guide volunteers in asking taxpayers basic questions about themselves and conducting a quality review of the completed return. The intake/interview and quality review sheet is an effective tool for ensuring critical taxpayer information is obtained and applied during the interview and completion of the tax return process.
Affected Public: Individuals or Households.
Estimated Total Burden Hours: 562,583.

OMB Number: 1545–2000.
Type of Review: Extension without change of a currently approved collection.
Title: Notice 2006–40, Credit for Production From Advanced Nuclear Facilities.
Abstract: This notice provides the time and manner for a taxpayer to apply for an allocation of the national megawatt capacity limitation under Sec. 45J of the Internal Revenue Code. This information will be used to determine the portion of the national megawatt capacity limitation to which a taxpayer is entitled. The likely respondents are corporations and partnerships.
Affected Public: Private Sector: Businesses or other for-profits.
Estimated Total Burden Hours: 600.

OMB Number: 1545–2145.
Type of Review: Extension without change of a currently approved collection.
Title: Notice 2009–52, Election of Investment Tax Credit in Lieu of Production Tax Credit; Coordination

with Department of Treasury Grants for Specified Energy Property in Lieu of Tax Credits.

Abstract: The notice provides a description of the procedures that taxpayers will be required to follow to make an irrevocable election to take the investment tax credit for energy property under section 48 of the Internal Revenue Code in lieu of the production tax credit under section 45 of the Internal Revenue Code.

Affected Public: Private Sector: Businesses or other for-profits.

Estimated Total Burden Hours: 100.

OMB Number: 1545–2165.

Type of Review: Extension without change of a currently approved collection.

Title: TD 9479—Notice of Medical Necessity Criteria under the Mental Health Parity and Addition Equity Act of 2008 (REG–120692–09 TEMP).

Abstract: Section 9812 of the Code requires group health plans maintained by an employer with more than 50 employees to disclose upon request to participants and beneficiaries of the plan the medical necessity criteria used in making decisions regarding claims for benefits under the plan.

Affected Public: Private Sector: Businesses or other for-profits, Not-for-profit institutions.

Estimated Total Burden Hours: 1,900.

Dawn D. Wolfgang,

Treasury PRA Clearance Officer.

[FR Doc. 2013–01895 Filed 1–29–13; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0523]

Agency Information Collection (Loan Analysis) Activities Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, has submitted the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before March 1, 2013.

ADDRESSES: Submit written comments on the collection of information through *www.Regulations.gov* or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to ''OMB Control No. 2900–0523'' in any correspondence.

FOR FURTHER INFORMATION CONTACT: Crystal Rennie, Records Management Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420, (202) 632–7492, FAX (202) 632–7583 or email *denise.mclamb@mail.va.gov.* Please refer to ''OMB Control No. 2900–0523.''

SUPPLEMENTARY INFORMATION:

Title: Loan Analysis, VA Form 26–6393.

OMB Control Number: 2900–0523.

Type of Review: Extension of a currently approved collection.

Abstract: VA Form 26–6393 is used to determine a veteran-borrower qualification for a VA-guaranteed loan. Lenders complete and submit the form to provide evidence of their decision to submit a prior approval loan application or close a loan on the automatic basis is based upon appropriate application of VA credit standards.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on October 19, 2012, at pages 64385–64286.

Affected Public: Federal Government.

Estimated Annual Burden: 62,500 hours.

Estimated Average Burden per Respondent: 15 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 250,000.

Dated: January 24, 2013.

By direction of the Secretary.

William F. Russo,

Deputy Director, Office of Regulations Policy and Management, Office of General Counsel, Department of Veterans Affairs.

[FR Doc. 2013–01946 Filed 1–29–13; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0742]

Agency Information Collection (Survey of Chronic Gastrointestinal Illness in Persian Gulf Veterans) Activities Under OMB Review

AGENCY: Veterans Health Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Veterans Health Administration (VHA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden and includes the actual data collection instrument.

DATE: Comments must be submitted on or before March 1, 2013.

ADDRESSES: Submit written comments on the collection of information through *www.Regulations.gov;* or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to ''OMB Control No. 2900–0742'' in any correspondence.

FOR FURTHER INFORMATION CONTACT: Crystal Rennie, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420, (202) 632–7492, fax (202) 632–7583 or email *crystal.rennie@va.gov.* Please refer to ''OMB Control No. 2900–0742.''

SUPPLEMENTAL INFORMATION:

Titles:

a. Survey of Chronic Gastrointestinal Illness in Persian Gulf Veterans, VA Form 10–21092a.

b. VA Research Consent Form (Cases), VA Form 10–2109b.

c. VA Research Consent Form (Control), VA Form 10–2109c.

OMB Control Number: 2900–0742.

Type of Review: Extension of a currently approved collection.

Abstract: Approximately 25 percent military troops who were deployed in the first Persian Gulf War returned with persistent gastrointestinal symptoms, typical of diarrhea-predominant irritable bowl syndrome. The data collected from the survey will assist VA in determining whether chronic gastrointestinal illness in Persian Gulf Veterans was caused by the presence of bacteria in the intestines and whether eradication of these bacteria reduces symptoms of chronic diarrhea.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on October 22, 2012 at pages 64597–64598.

Affected Public: Individuals or households.

Estimated Total Annual Burden:

a. VA Research Consent Form (Cases), VA Form 10–2109a—41 hours.

b. VA Research Consent Form (Control), VA Form 10–2109b—31 hours.

c. Survey of Chronic Gastrointestinal Illness in Persian Gulf Veterans, VA Form 10–21092c—3,000 hours.

Estimated Average Burden Per Respondent:

a. VA Research Consent Form (Cases), VA Form 10–2109a—15 minutes.

b. VA Research Consent Form (Control), VA Form 10–2109b—10 minutes.

c. Survey of Chronic Gastrointestinal Illness in Persian Gulf Veterans, VA Form 10–21092c—45 minutes.

Frequency of Response: One time.

Estimated Number of Respondents:

a. Survey of Chronic Gastrointestinal Illness in Persian Gulf Veterans, VA Form 10–21092a—4,000.

b. VA Research Consent Form (Cases), VA Form 10–21092b—165.

c. VA Research Consent Form (Control), VA Form 10–21092c—189.

Dated: January 23, 2013.

By direction of the Secretary.

William F. Russo,

Deputy Director, Office of Regulations Policy and Management, Office of General Counsel, Department of Veterans Affairs.

[FR Doc. 2013–01948 Filed 1–29–13; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0358]

Agency Information Collection (Supplemental Information for Change of Program or Reenrollment After Unsatisfactory Attendance, Conduct or Progress) Activities Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–21), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before March 1, 2013.

ADDRESSES: Submit written comments on the collection of information through *www.Regulations.gov;* or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to ''OMB Control No. 2900–0358'' in any correspondence.

FOR FURTHER INFORMATION CONTACT: Crystal Rennie, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420, (202) 632–7492, fax (202) 632–7583 or email *crystal.rennie@mail.va.gov.* Please refer to ''OMB Control No. 2900–0358.''

SUPPLEMENTARY INFORMATION:

Title: Supplemental Information for Change of Program or Reenrollment After Unsatisfactory Attendance, Conduct or Progress, VA Form 22–8873.

OMB Control Number: 2900–0358.

Type of Review: Extension of a currently approved collection.

Abstract: Veterans and other eligible persons may change their program of education under conditions prescribed by Title 38 U.S.C. 3691. A claimant can normally make one change of program without VA approval. VA approval is required if the claimant makes any additional change of program. Before VA can approve benefits for a second or subsequent change of program, VA must first determine that the new program is suitable to the claimant's aptitudes, interests, and abilities, or that the cause of any unsatisfactory progress or conduct has been resolved before entering into a different program. VA Form 22–8873 is used to gather the necessary information only if the suitability of the proposed training program cannot be established from information already available in the claimant's VA education records or the results of academic or vocational counseling are not available to VA.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The Federal Register Notice with a 60-day comment period soliciting comments on this collection of information was published on October 19, 2012 at pages 64384–64385.

Affected Public: Individuals or households.

Estimated Annual Burden: 17,706 hours.

Estimated Average Burden Per Respondent: 30 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 35,411.

Dated: January 24, 2012.

By direction of the Secretary.

William F. Russo,

Deputy Director, Office of Regulations Policy and Management, Office of General Counsel, Department of Veterans Affairs.

[FR Doc. 2013–01949 Filed 1–29–13; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

Advisory Committee on Homeless Veterans, Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under the Federal Advisory Committee Act, 38 U.S.C. App. 2, that a meeting of the Advisory Committee on Homeless Veterans will be held on February 13–15, 2013. On February 13, the Committee will meet in Room 530 at the Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC, from 10:30 a.m. to 5 p.m. On February 14–15, the Committee will meet at 1722 Eye Street NW., Washington DC, from 8 a.m. on both days until 4 p.m. on February 15 and noon on February 16. The meeting is open to the public.

The purpose of the Committee is to provide the Secretary of Veterans Affairs with an on-going assessment of the effectiveness of the policies, organizational structures, and services of the Department in assisting homeless Veterans. The Committee shall assemble and review information relating to the needs of homeless Veterans and provide on-going advice on the most appropriate means of providing assistance to homeless Veterans. The Committee will make recommendations to the Secretary regarding such activities.

On February 13, the agenda will include briefings from VA and other officials regarding services for homeless Veterans. The Committee will also receive briefings on the annual report.

On February 14, the Committee will continue to receive briefings from VA and other officials regarding services for homeless Veterans. The Committee then will discuss items for its upcoming annual report and recommendations to the Secretary.

On February 15 the Committee will begin drafting items and recommendations for its upcoming annual report to the Secretary.

No time will be allocated at this meeting for receiving oral presentations from the public. Interested parties should provide written comments on issues affecting homeless Veterans for review by the Committee to Mr. Pete Dougherty, Designated Federal Officer, Homeless Veterans Initiative Office (075D), Department of Veterans Affairs, 1722 Eye Street NW., Washington, DC 20006, or email to *pete.dougherty@va.gov.* Individuals who wish to attend the meeting should contact Mr. Dougherty at (202) 461–1857.

Dated: January 24, 2013.

By Direction of the Secretary.

Vivian Drake,

Committee Management Officer.

[FR Doc. 2013–01907 Filed 1–29–13; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

Geriatrics and Gerontology Advisory Committee, Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under the Federal Advisory Committee Act, 5 U.S.C. App. 2, that a meeting of the Geriatrics and Gerontology Advisory Committee will be held on April 10–11, 2013, in Room 530 at the Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC. On April 10, the session will begin at 8:30 a.m. and end at 5 p.m. On April 11, the session will begin at 8 a.m. and end at 12 noon. This meeting is open to the public.

The purpose of the Committee is to provide advice to the Secretary of Veterans Affairs and the Under Secretary for Health on all matters pertaining to geriatrics and gerontology. The Committee assesses the capability of VA health care facilities and programs to meet the medical, psychological, and social needs of older Veterans and evaluates VA programs designated as Geriatric Research, Education, and Clinical Centers.

The meeting will feature presentations and discussions on VA's geriatrics and extended care programs, aging research activities, updates on VA's employee staff working in the area of geriatrics (to include training, recruitment and retention approaches), Veterans Health Administration (VHA) strategic planning activities in geriatrics and extended care, recent VHA efforts regarding dementia and program advances in palliative care, and performance and oversight of VA Geriatric Research, Education, and Clinical Centers.

No time will be allocated at this meeting for receiving oral presentations from the public. Interested parties should provide written comments for review by the Committee to Mrs. Marcia Holt-Delaney, Program Analyst, Geriatrics and Extended Care Services (10P4G), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420, or via email at *Marcia.Holt-Delaney@va.gov.* Individuals who wish to attend the meeting should contact Mrs. Holt-Delaney at (202) 461–6769.

Dated: January 24, 2013.

By Direction of the Secretary.

Vivian Drake,

Committee Management Officer.

[FR Doc. 2013–01927 Filed 1–29–13; 8:45 am]

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Part II

Bureau of Consumer Financial Protection

12 CFR Part 1026
Ability-to-Repay and Qualified Mortgage Standards under the Truth in Lending Act (Regulation Z); Final Rule

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1026

[CFPB–2011–0008; CFPB–2012–0022]

RIN 3170–AA17

Ability-to-Repay and Qualified Mortgage Standards Under the Truth in Lending Act (Regulation Z)

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Final rule; official interpretations.

SUMMARY: The Bureau of Consumer Financial Protection (Bureau) is amending Regulation Z, which implements the Truth in Lending Act (TILA). Regulation Z currently prohibits a creditor from making a higher-priced mortgage loan without regard to the consumer's ability to repay the loan. The final rule implements sections 1411 and 1412 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), which generally require creditors to make a reasonable, good faith determination of a consumer's ability to repay any consumer credit transaction secured by a dwelling (excluding an open-end credit plan, timeshare plan, reverse mortgage, or temporary loan) and establishes certain protections from liability under this requirement for ''qualified mortgages.'' The final rule also implements section 1414 of the Dodd-Frank Act, which limits prepayment penalties. Finally, the final rule requires creditors to retain evidence of compliance with the rule for three years after a covered loan is consummated.

DATES: The rule is effective January 10, 2014.

FOR FURTHER INFORMATION CONTACT: Joseph Devlin, Gregory Evans, David Friend, Jennifer Kozma, Eamonn K. Moran, or Priscilla Walton-Fein, Counsels; Thomas J. Kearney or Mark Morelli, Senior Counsels; or Stephen Shin, Managing Counsel, Office of Regulations, at (202) 435–7700.

SUPPLEMENTARY INFORMATION:

I. Summary of the Final Rule

The Consumer Financial Protection Bureau (Bureau) is issuing a final rule to implement laws requiring mortgage lenders to consider consumers' ability to repay home loans before extending them credit. The rule will take effect on January 10, 2014.

The Bureau is also releasing a proposal to seek comment on whether to adjust the final rule for certain community-based lenders, housing stabilization programs, certain refinancing programs of the Federal National Mortgage Association (Fannie Mae) or the Federal Home Loan Mortgage Corporation (Freddie Mac) (collectively, the GSEs) and Federal agencies, and small portfolio creditors. The Bureau expects to finalize the concurrent proposal this spring so that affected creditors can prepare for the January 2014 effective date.

Background

During the years preceding the mortgage crisis, too many mortgages were made to consumers without regard to the consumer's ability to repay the loans. Loose underwriting practices by some creditors—including failure to verify the consumer's income or debts and qualifying consumers for mortgages based on ''teaser'' interest rates that would cause monthly payments to jump to unaffordable levels after the first few years—contributed to a mortgage crisis that led to the nation's most serious recession since the Great Depression.

In response to this crisis, in 2008 the Federal Reserve Board (Board) adopted a rule under the Truth in Lending Act which prohibits creditors from making ''higher-price mortgage loans'' without assessing consumers' ability to repay the loans. Under the Board's rule, a creditor is presumed to have complied with the ability-to-repay requirements if the creditor follows certain specified underwriting practices. This rule has been in effect since October 2009.

In the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act, Congress required that for residential mortgages, creditors must make a reasonable and good faith determination based on verified and documented information that the consumer has a reasonable ability to repay the loan according to its terms. Congress also established a presumption of compliance for a certain category of mortgages, called ''qualified mortgages.'' These provisions are similar, but not identical to, the Board's 2008 rule and cover the entire mortgage market rather than simply higher-priced mortgages. The Board proposed a rule to implement the new statutory requirements before authority passed to the Bureau to finalize the rule.

Summary of Final Rule

The final rule contains the following key elements:

Ability-to-Repay Determinations. The final rule describes certain minimum requirements for creditors making ability-to-repay determinations, but does not dictate that they follow particular underwriting models. At a minimum, creditors generally must consider eight underwriting factors: (1) Current or reasonably expected income or assets; (2) current employment status; (3) the monthly payment on the covered transaction; (4) the monthly payment on any simultaneous loan; (5) the monthly payment for mortgage-related obligations; (6) current debt obligations, alimony, and child support; (7) the monthly debt-to-income ratio or residual income; and (8) credit history. Creditors must generally use reasonably reliable third-party records to verify the information they use to evaluate the factors.

The rule provides guidance as to the application of these factors under the statute. For example, monthly payments must generally be calculated by assuming that the loan is repaid in substantially equal monthly payments during its term. For adjustable-rate mortgages, the monthly payment must be calculated using the fully indexed rate or an introductory rate, whichever is higher. Special payment calculation rules apply for loans with balloon payments, interest-only payments, or negative amortization.

The final rule also provides special rules to encourage creditors to refinance ''non-standard mortgages''—which include various types of mortgages which can lead to payment shock that can result in default—into ''standard mortgages'' with fixed rates for at least five years that reduce consumers' monthly payments.

Presumption for Qualified Mortgages. The Dodd-Frank Act provides that ''qualified mortgages'' are entitled to a presumption that the creditor making the loan satisfied the ability-to-repay requirements. However, the Act did not specify whether the presumption of compliance is conclusive (*i.e.,* creates a safe harbor) or is rebuttable. The final rule provides a safe harbor for loans that satisfy the definition of a qualified mortgage and are not ''higher-priced,'' as generally defined by the Board's 2008 rule. The final rule provides a rebuttable presumption for higher-priced mortgage loans, as described further below.

The line the Bureau is drawing is one that has long been recognized as a rule of thumb to separate prime loans from subprime loans. Indeed, under the existing regulations that were adopted by the Board in 2008, only higher-priced mortgage loans are subject to an ability-to-repay requirement and a rebuttable presumption of compliance if creditors follow certain requirements. The new rule strengthens the requirements needed to qualify for a rebuttable presumption for subprime loans and defines with more particularity the grounds for rebutting the presumption. Specifically, the final rule provides that consumers may show a violation with regard to a subprime qualified mortgage by showing that, at the time the loan was originated, the consumer's income and debt obligations left insufficient residual income or assets to meet living expenses. The analysis would consider the consumer's monthly payments on the loan, loan-related obligations, and any simultaneous loans of which the creditor was aware, as well as any recurring, material living expenses of which the creditor was aware. Guidance accompanying the rule notes that the longer the period of time that the consumer has demonstrated actual ability to repay the loan by making timely payments, without modification or accommodation, after consummation or, for an adjustable-rate mortgage, after recast, the less likely the consumer will be able to rebut the presumption based on insufficient residual income.

With respect to prime loans—which are not currently covered by the Board's ability-to-repay rule—the final rule applies the new ability-to-repay requirements but creates a strong presumption for those prime loans that constitute qualified mortgages. Thus, if a prime loan satisfies the qualified mortgage criteria described below, it will be conclusively presumed that the creditor made a good faith and reasonable determination of the consumer's ability to repay.

General Requirements for Qualified Mortgages. The Dodd-Frank Act sets certain product-feature prerequisites and affordability underwriting requirements for qualified mortgages and vests discretion in the Bureau to decide whether additional underwriting or other requirements should apply. The final rule implements the statutory criteria, which generally prohibit loans with negative amortization, interest-only payments, balloon payments, or terms exceeding 30 years from being qualified mortgages. So-called ''no-doc'' loans where the creditor does not verify income or assets also cannot be qualified mortgages. Finally, a loan generally cannot be a qualified mortgage if the points and fees paid by the consumer exceed three percent of the total loan amount, although certain ''bona fide discount points'' are excluded for prime loans. The rule provides guidance on the calculation of points and fees and thresholds for smaller loans.

The final rule also establishes general underwriting criteria for qualified mortgages. Most importantly, the general rule requires that monthly payments be calculated based on the highest payment that will apply in the first five years of the loan and that the consumer have a total (or ''back-end'') debt-to-income ratio that is less than or equal to 43 percent. The appendix to the rule details the calculation of debt-to-income for these purposes, drawing upon Federal Housing Administration guidelines for such calculations. The Bureau believes that these criteria will protect consumers by ensuring that creditors use a set of underwriting requirements that generally safeguard affordability. At the same time, these criteria provide bright lines for creditors who want to make qualified mortgages.

The Bureau also believes that there are many instances in which individual consumers can afford a debt-to-income ratio above 43 percent based on their particular circumstances, but that such loans are better evaluated on an individual basis under the ability-to-repay criteria rather than with a blanket presumption. In light of the fragile state of the mortgage market as a result of the recent mortgage crisis, however, the Bureau is concerned that creditors may initially be reluctant to make loans that are not qualified mortgages, even though they are responsibly underwritten. The final rule therefore provides for a second, temporary category of qualified mortgages that have more flexible underwriting requirements so long as they satisfy the general product feature prerequisites for a qualified mortgage and also satisfy the underwriting requirements of, and are therefore eligible to be purchased, guaranteed or insured by either (1) the GSEs while they operate under Federal conservatorship or receivership; or (2) the U.S. Department of Housing and Urban Development, Department of Veterans Affairs, or Department of Agriculture or Rural Housing Service. This temporary provision will phase out over time as the various Federal agencies issue their own qualified mortgage rules and if GSE conservatorship ends, and in any event after seven years.

Rural Balloon-Payment Qualified Mortgages. The final rule also implements a special provision in the Dodd-Frank Act that would treat certain balloon-payment mortgages as qualified mortgages if they are originated and held in portfolio by small creditors operating predominantly in rural or underserved areas. This provision is designed to assure credit availability in rural areas, where some creditors may only offer balloon-payment mortgages. Loans are only eligible if they have a term of at least five years, a fixed-interest rate, and meet certain basic underwriting standards; debt-to-income ratios must be considered but are not subject to the 43 percent general requirement.

Creditors are only eligible to make rural balloon-payment qualified mortgages if they originate at least 50 percent of their first-lien mortgages in counties that are rural or underserved, have less than $2 billion in assets, and (along with their affiliates) originate no more than 500 first-lien mortgages per year. The Bureau will designate a list of ''rural'' and ''underserved'' counties each year, and has defined coverage more broadly than originally had been proposed. Creditors must generally hold the loans on their portfolios for three years in order to maintain their ''qualified mortgage'' status.

Other Final Rule Provisions. The final rule also implements Dodd-Frank Act provisions that generally prohibit prepayment penalties except for certain fixed-rate, qualified mortgages where the penalties satisfy certain restrictions and the creditor has offered the consumer an alternative loan without such penalties. To match with certain statutory changes, the final rule also lengthens to three years the time creditors must retain records that evidence compliance with the ability-to-repay and prepayment penalty provisions and prohibits evasion of the rule by structuring a closed-end extension of credit that does not meet the definition of open-end credit as an open-end plan.

Summary of Concurrent Proposal

The concurrent proposal seeks comment on whether the general ability-to-repay and qualified mortgage rule should be modified to address potential adverse consequences on certain narrowly-defined categories of lending programs. Because those measures were not proposed by the Board originally, the Bureau believes additional public input would be helpful. Specifically, the proposal seeks comment on whether it would be appropriate to exempt designated non-profit lenders, homeownership stabilization programs, and certain Federal agency and GSE refinancing programs from the ability-to-repay requirements because they are subject to their own specialized underwriting criteria.

The proposal also seeks comment on whether to create a new category of qualified mortgages, similar to the one for rural balloon-payment mortgages, for loans without balloon-payment features that are originated and held on portfolio by small creditors. The new category would not be limited to lenders that operate predominantly in rural or underserved areas, but would use the same general size thresholds and other criteria as the rural balloon-payment rules. The proposal also seeks comment on whether to increase the threshold separating safe harbor and rebuttable presumption qualified mortgages for both rural balloon-payment qualified mortgages and the new small portfolio qualified mortgages, in light of the fact that small creditors often have higher costs of funds than larger creditors. Specifically, the Bureau is proposing a threshold of 3.5 percentage points above APOR for first-lien loans.

II. Background

For over 20 years, consumer advocates, legislators, and regulators have raised concerns about creditors originating mortgage loans without regard to the consumer's ability to repay the loan. Beginning in about 2006, these concerns were heightened as mortgage delinquencies and foreclosure rates increased dramatically, caused in part by the loosening of underwriting standards. *See* 73 FR 44524 (July 30, 2008). The following discussion provides background information, including a brief summary of the legislative and regulatory responses to the foregoing concerns, which culminated in the enactment of the Dodd-Frank Act on July 21, 2010, the Board's May 11, 2011, proposed rule to implement certain amendments to TILA made by the Dodd-Frank Act, and now the Bureau's issuance of this final rule to implement sections 1411, 1412, and 1414 of that act.

A. The Mortgage Market

Overview of the Market and the Mortgage Crisis

The mortgage market is the single largest market for consumer financial products and services in the United States, with approximately $9.9 trillion in mortgage loans outstanding.[1] During the last decade, the market went through an unprecedented cycle of expansion and contraction that was fueled in part by the securitization of mortgages and creation of increasingly sophisticated derivative products. So many other parts of the American financial system were drawn into mortgage-related activities that, when the housing market collapsed in 2008, it sparked the most severe recession in the United States since the Great Depression.[2]

The expansion in this market is commonly attributed to both particular economic conditions (including an era of low interest rates and rising housing prices) and to changes within the industry. Interest rates dropped significantly—by more than 20 percent—from 2000 through 2003.[3] Housing prices increased dramatically—about 152 percent—between 1997 and 2006.[4] Driven by the decrease in interest rates and the increase in housing prices, the volume of refinancings increased rapidly, from about 2.5 million loans in 2000 to more than 15 million in 2003.[5]

In the mid-2000s, the market experienced a steady deterioration of credit standards in mortgage lending, with evidence that loans were made solely against collateral, or even against expected increases in the value of collateral, and without consideration of ability to repay. This deterioration of credit standards was particularly evidenced by the growth of ''subprime'' and ''Alt-A'' products, which consumers were often unable to repay.[6] Subprime products were sold primarily to consumers with poor or no credit history, although there is evidence that some consumers who would have qualified for ''prime'' loans were steered into subprime loans as well.[7] The Alt-A category of loans permitted consumers to take out mortgage loans while providing little or no documentation of income or other evidence of repayment ability. Because these loans involved additional risk, they were typically more expensive to consumers than ''prime'' mortgages, although many of them had very low introductory interest rates. In 2003, subprime and Alt-A origination volume was about $400 billion; in 2006, it had reached $830 billion.[8]

So long as housing prices were continuing to increase, it was relatively easy for consumers to refinance their existing loans into more affordable products to avoid interest rate resets and other adjustments. When housing prices began to decline in 2005, however, refinancing became more difficult and delinquency rates on subprime and Alt-A products increased dramatically.[9] More and more consumers, especially those with subprime and Alt-A loans, were unable or unwilling to make their mortgage payments. An early sign of the mortgage crisis was an upswing in early payment defaults—generally defined as borrowers being 60 or more days delinquent within the first year. Prior to 2006, 1.1 percent of mortgages would end up 60 or more days delinquent within the first two years.[10] Taking a more expansive definition of early payment default to include 60 days delinquent within the first two years, this figure was double the historic average during 2006, 2007 and 2008.[11] In 2006, 2007, and 2008, 2.3 percent, 2.1 percent, and 2.3 percent of mortgages ended up 60 or more days delinquent within the first two years, respectively. By the summer of 2006, 1.5 percent of loans less than a year old were in

[1] Fed. Reserve Sys., *Flow of Funds Accounts of the United States,* at 67 tbl.L.10 (2012), *available at http://www.federalreserve.gov/releases/z1/Current/z1.pdf* (as of the end of the third quarter of 2012).

[2] *See* Thomas F. Siems, *Branding the Great Recession,* Fin. Insights (Fed. Reserve Bank of Dall.) May 13, 2012, at 3, *available at http://www.dallasfed.org/assets/documents/banking/firm/fi/fi1201.pdf* (stating that the [great recession] ''was the longest and deepest economic contraction, as measured by the drop in real GDP, since the Great Depression.'').

[3] *See* U.S. Dep't of Hous. & Urban Dev., *An Analysis of Mortgage Refinancing, 2001–2003,* at 2 (2004) (''An Analysis of Mortgage Refinancing, 2001–2003''), *available at www.huduser.org/Publications/pdf/MortgageRefinance03.pdf*; Souphala Chomsisengphet & Anthony Pennington-Cross, *The Evolution of the Subprime Mortgage Market,* 88 Fed. Res. Bank of St. Louis Rev. 31, 48 (2006), *available at http://research.stlouisfed.org/publications/review/article/5019*.

[4] U.S. Fin. Crisis Inquiry Comm'n, *The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States* 156 (Official Gov't ed. 2011) (''FCIC Report''), *available at http://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf*.

[5] An Analysis of Mortgage Refinancing, 2001–2003, at 1.

[6] FCIC Report at 88. These products included most notably 2/28 and 3/27 hybrid adjustable rate mortgages (ARMs) and option ARM products. *Id.* at 106. A hybrid ARM is an adjustable rate mortgage loan that has a low fixed introductory rate for a certain period of time. An option ARM is an adjustable rate mortgage loan that has a scheduled loan payment that may result in negative amortization for a certain period of time, but that expressly permits specified larger payments in the contract or servicing documents, such as an interest-only payment or a fully amortizing payment. For these loans, the scheduled negatively amortizing payment was typically described in marketing and servicing materials as the ''optional payment.'' These products were often marketed to subprime customers.

[7] For example, the Federal Reserve Board on July 18, 2011, issued a consent cease and desist order and assessed an $85 million civil money penalty against Wells Fargo & Company of San Francisco, a registered bank holding company, and Wells Fargo Financial, Inc., of Des Moines. The order addresses allegations that Wells Fargo Financial employees steered potential prime-eligible consumers into more costly subprime loans and separately falsified income information in mortgage applications. In addition to the civil money penalty, the order requires that Wells Fargo compensate affected consumers. *See* Press Release, Fed. Reserve Bd. (July 20, 2011), *available at http://www.federalreserve.gov/newsevents/press/enforcement/20110720a.htm*.

[8] Inside Mortg. Fin., *Mortgage Originations by Product, in 1.* The 2011 Mortgage Market Statistical Annual 20 (2011).

[9] FCIC Report at 215–217.

[10] CoreLogic's TrueStandings Servicing (reflects first-lien mortgage loans) (data service accessible only through paid subscription).

[11] *Id.*

default, and this figure peaked at 2.5 percent in late 2007, well above the 1.0 percent peak in the 2000 recession.[12] First payment defaults—mortgages taken out by consumers who never made a single payment—exceeded 1.5 percent of loans in early 2007.[13] In addition, as the economy worsened, the rates of serious delinquency (90 or more days past due or in foreclosure) for the subprime and Alt-A products began a steep increase from approximately 10 percent in 2006, to 20 percent in 2007, to more than 40 percent in 2010.[14]

The impact of this level of delinquencies was severe on creditors who held loans on their books and on private investors who purchased loans directly or through securitized vehicles. Prior to and during the bubble, the evolution of the securitization of mortgages attracted increasing involvement from financial institutions that were not directly involved in the extension of credit to consumers and from investors worldwide. Securitization of mortgages allows originating creditors to sell off their loans (and reinvest the funds earned in making new ones) to investors who want an income stream over time. Securitization had been pioneered by what are now called government-sponsored enterprises (GSEs), including the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac). But by the early 2000s, large numbers of private financial institutions were deeply involved in creating increasingly complex mortgage-related investment vehicles through securities and derivative products. The private securitization-backed subprime and Alt-A mortgage market ground to a halt in 2007 in the face of the rising delinquencies on subprime and Alt-A products.[15]

Six years later, the United States continues to grapple with the fallout. The fall in housing prices is estimated to have resulted in about $7 trillion in household wealth losses.[16] In addition, distressed homeownership and foreclosure rates remain at unprecedented levels.[17]

Response and Government Programs

In light of these conditions, the Federal government began providing support to the mortgage markets in 2008 and continues to do so at extraordinary levels today. The Housing and Economic Recovery Act of 2008, which became effective on October 1, 2008, provided both new safeguards and increased regulation for Fannie Mae and Freddie Mac, as well as provisions to assist troubled borrowers and to the hardest hit communities. Fannie Mae and Freddie Mac, which supported the mainstream mortgage market, experienced heavy losses and were placed in conservatorship by the Federal government in 2008 to support the collapsing mortgage market.[18] Because private investors have withdrawn from the mortgage securitization market and there are no other effective secondary market mechanisms in place, the GSEs' continued operations help ensure that the secondary mortgage market continues to function and to assist consumers in obtaining new mortgages or refinancing existing mortgages. The Troubled Asset Relief Program (TARP), created to implement programs to stabilize the financial system during the financial crisis, was authorized through the Emergency Economic Stabilization Act of 2008 (EESA), as amended by the American Recovery and Reinvestment Act of 2009, and includes programs to help struggling homeowners avoid foreclosure.[19] Since 2008, several other Federal government efforts have endeavored to keep the country's housing finance system functioning, including the Treasury Department's and the Federal Reserve System's mortgage-backed securities (MBS) purchase programs to help keep interest rates low and the Federal Housing Administration's (FHA's) increased market presence. As a result, mortgage credit has remained available, albeit with more restrictive underwriting terms that limit or preclude some consumers' access to credit. These same government agencies together with the GSEs and other market participants have also undertaken a series of efforts to help families avoid foreclosure through loan-modification programs, loan-refinance programs and foreclosure alternatives.[20]

Size and Volume of the Current Mortgage Origination Market

Even with the economic downturn and tightening of credit standards, approximately $1.28 trillion in mortgage loans were originated in 2011.[21] In exchange for an extension of mortgage credit, consumers promise to make regular mortgage payments and provide their home or real property as collateral. The overwhelming majority of homebuyers continue to use mortgage loans to finance at least some of the

[12] *Id.* at 215. (CoreLogic Chief Economist Mark Fleming told the FCIC that the early payment default rate ''certainly correlates with the increase in the Alt-A and subprime shares and the turn of the housing market and the sensitivity of those loan products.'').

[13] *Id.*

[14] *Id.* at 217.

[15] *Id.* at 124.

[16] *The U.S. Housing Market: Current Conditions and Policy Considerations,* at 3 (Fed. Reserve Bd., White Paper, 2012), available at *http://www.federalreserve.gov/publications/other-reports/files/housing-white-paper-20120104.pdf.*

[17] Lender Processing Servs., PowerPoint Presentation, *LPS Mortgage Monitor: May 2012 Mortgage Performance Observations, Data as of April 2012 Month End,* 3, 11 (May 2012), *available at http://www.lpsvcs.com/LPSCorporateInformation/CommunicationCenter/DataReports/Pages/Mortgage-Monitor.aspx.*

[18] The Housing and Economic Recovery Act of 2008 (HERA), which created the Federal Housing Finance Agency (FHFA), granted the Director of FHFA discretionary authority to appoint FHFA conservator or receiver of the Enterprises ''for the purpose of reorganizing, rehabilitating, or winding up the affairs of a regulated entity.'' Housing and Economic Recovery Act of 2008, section 1367 (a)(2), amending the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, 12 U.S.C. 4617(a)(2). On September 6, 2008, FHFA exercised that authority, placing the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) into conservatorships. The two GSEs have since received more than $180 billion in support from the Treasury Department. Through the second quarter of 2012, Fannie Mae has drawn $116.1 billion and Freddie Mac has drawn $71.3 billion, for an aggregate draw of $187.5 billion from the Treasury Department. Fed. Hous. Fin. Agency, *Conservator's Report on the Enterprises' Financial Performance,* at 17 (Second Quarter 2012), available at *http://www.fhfa.gov/webfiles/24549/ConservatorsReport2Q2012.pdf.*

[19] The Making Home Affordable Program (MHA) is the umbrella program for Treasury's homeowner assistance and foreclosure mitigation efforts. The main MHA components are the Home Affordable Modification Program (HAMP), a Treasury program that uses TARP funds to provide incentives for mortgage servicers to modify eligible first-lien mortgages, and two initiatives at the GSEs that use non-TARP funds. Incentive payments for modifications to loans owned or guaranteed by the GSEs are paid by the GSEs, not TARP. Treasury over time expanded MHA to include sub-programs designed to overcome obstacles to sustainable HAMP modifications. Treasury also allocated TARP funds to support two additional housing support efforts: An FHA refinancing program and TARP funding for 19 state housing finance agencies, called the Housing Finance Agency Hardest Hit Fund. In the first half of 2012, Treasury extended the application period for HAMP by a year to December 31, 2013, and opened HAMP to non-owner-occupied rental properties and to consumers with a wider range of debt-to-income ratios under ''HAMP Tier 2.''

[20] The Home Affordable Refinance Program (HARP) is designed to help eligible homeowners refinance their mortgage. HARP is designed for those homeowners who are current on their mortgage payments but have been unable to get traditional refinancing because the value of their homes has declined. For a mortgage to be considered for a HARP refinance, it must be owned or guaranteed by the GSEs. HARP ends on December 31, 2013.

[21] Moody's Analytics, *Credit Forecast 2012* (2012) (''Credit Forecast 2012''), available at *http://www.economy.com/default.asp* (reflects first-lien mortgage loans) (data service accessibly only through paid subscription).

purchase price of their property. In 2011, 93 percent of all home purchases were financed with a mortgage credit transaction.[22]

Consumers may obtain mortgage credit to purchase a home, to refinance an existing mortgage, to access home equity, or to finance home improvement. Purchase loans and refinancings together produced 6.3 million new first-lien mortgage loan originations in 2011.[23] The proportion of loans that are for purchases as opposed to refinances varies with the interest rate environment and other market factors. In 2011, 65 percent of the market was refinance transactions and 35 percent was purchase loans, by volume.[24] Historically the distribution has been more even. In 2000, refinances accounted for 44 percent of the market while purchase loans comprised 56 percent; in 2005, the two products were split evenly.[25]

With a home equity transaction, a homeowner uses his or her equity as collateral to secure consumer credit. The credit proceeds can be used, for example, to pay for home improvements. Home equity credit transactions and home equity lines of credit resulted in an additional 1.3 million mortgage loan originations in 2011.[26]

The market for higher-priced mortgage loans remains significant. Data reported under the Home Mortgage Disclosure Act (HMDA) show that in 2011 approximately 332,000 transactions, including subordinate liens, were reportable as higher-priced mortgage loans. Of these transactions, refinancings accounted for approximately 44 percent of the higher-priced mortgage loan market, and 90 percent of the overall higher-priced mortgage loan market involved first-lien transactions. The median first-lien higher-priced mortgage loan was for $81,000, while the interquartile range (quarter of the transactions are below, quarter of the transactions are above) was $47,000 to $142,000.

GSE-eligible loans, together with the other federally insured or guaranteed loans, cover the majority of the current mortgage market. Since entering conservatorship in September 2008, the GSEs have bought or guaranteed roughly three of every four mortgages originated in the country. Mortgages guaranteed by FHA make up most of the rest.[27] Outside of the securitization available through the Government National Mortgage Association (Ginnie Mae) for loans primarily backed by FHA, there are very few alternatives in place today to assume the secondary market functions served by the GSEs.[28]

Continued Fragility of the Mortgage Market

The current mortgage market is especially fragile as a result of the recent mortgage crisis. Tight credit remains an important factor in the contraction in mortgage lending seen over the past few years. Mortgage loan terms and credit standards have tightened most for consumers with lower credit scores and with less money available for a down payment. According to CoreLogic's TrueStandings Servicing, a proprietary data service that covers about two-thirds of the mortgage market, average underwriting standards have tightened considerably since 2007. Through the first nine months of 2012, for consumers that have received closed-end first-lien mortgages, the weighted average FICO[29] score was 750, the loan-to-value (LTV) ratio was 78 percent, and the debt-to-income (DTI) ratio was 34.5 percent.[30] In comparison, in the peak of the housing bubble in 2007, the weighted average FICO score was 706, the LTV was 80 percent, and the DTI was 39.8 percent.[31]

In this tight credit environment, the data suggest that creditors are not willing to take significant risks. In terms of the distribution of origination characteristics, for 90 percent of all the Fannie Mae and Freddie Mac mortgage loans originated in 2011, consumers had a FICO score over 700 and a DTI less than 44 percent.[32] According to the Federal Reserve's Senior Loan Officer Opinion Survey on Bank Lending Practices, in April 2012 nearly 60 percent of creditors reported that they would be much less likely, relative to 2006, to originate a conforming home-purchase mortgage[33] to a consumer with a 10 percent down payment and a credit score of 620—a traditional marker for those consumers with weaker credit histories.[34] The Federal Reserve Board calculates that the share of mortgage borrowers with credit scores below 620 has fallen from about 17 percent of consumers at the end of 2006 to about 5 percent more recently.[35] Creditors also appear to have pulled back on offering these consumers loans insured by the FHA, which provides mortgage insurance on loans made by FHA-approved creditors throughout the United States and its territories and is especially structured to help promote affordability.[36]

The Bureau is acutely aware of the high levels of anxiety in the mortgage market today. These concerns include the continued slow pace of recovery, the confluence of multiple major regulatory and capital initiatives, and the compliance burdens of the various Dodd-Frank Act rulemakings (including uncertainty on what constitutes a qualified residential mortgage (QRM), which, as discussed below, relates to the Dodd-Frank Act's credit risk retention requirements and mortgage securitizations). These concerns are causing discussion about whether creditors will consider exiting the business. The Bureau acknowledges that it will likely take some time for the mortgage market to stabilize and that creditors will need to adjust their operations to account for several major regulatory and capital regimes.

B. TILA and Regulation Z

In 1968, Congress enacted the Truth in Lending Act (TILA), 15 U.S.C. 1601

[22] Inside Mortg. Fin., *New Homes Sold by Financing, in* 1 The 2012 Mortgage Market Statistical Annual 12 (2012).

[23] Credit Forecast 2012.

[24] Inside Mortg. Fin., *Mortgage Originations by Product, in* The 2012 Mortgage Market Statistical Annual 17 (2012).

[25] *Id.* These percentages are based on the dollar amount of the loans.

[26] Credit Forecast (2012) (reflects open-end and closed-end home equity loans).

[27] Fed. Hous. Fin. Agency, *A Strategic Plan for Enterprise Conservatorships: The Next Chapter in a Story that Needs an Ending,* at 14 (2012) ("FHFA Report"), *available at http://www.fhfa.gov/webfiles/23344/StrategicPlanConservatorshipsFINAL.pdf.*

[28] FHFA Report at 8–9. Secondary market issuance remains heavily reliant upon the explicitly government guaranteed securities of FNMA, FHLMC, and GNMA. Through the first three quarters of 2012, approximately $1.2 trillion of the $1.33 trillion in mortgage originations have been securitized, less than $10 billion of the $1.2 trillion were non-agency mortgage backed securities. Inside Mortgage Finance (Nov. 2, 2012), at 4.

[29] FICO is a type of credit score that makes up a substantial portion of the credit report that lenders use to assess an applicant's credit risk and whether to extend a loan

[30] CoreLogic, TrueStandings Servicing Database, *available at http://www.truestandings.com* (data reflects first-lien mortgage loans) (data service accessible only through paid subscription). According to CoreLogic's TrueStandings Servicing, FICO reports that in 2011, approximately 38 percent of consumers receiving first-lien mortgage credit had a FICO score of 750 or greater.

[31] *Id.*

[32] *Id.*

[33] A conforming mortgage is one that is eligible for purchase or credit guarantee by Fannie Mae or Freddie Mac.

[34] Fed. Reserve Bd., *Senior Loan Officer Opinion Survey on Bank Lending Practices,* available at *http://www.federalreserve.gov/boarddocs/SnLoanSurvey/default.htm.*

[35] Federal Reserve Board staff calculations based on the Federal Reserve Bank of New York Consumer Credit Panel. The 10th percentile of credit scores on mortgage originations rose from 585 in 2006 to 635 at the end of 2011.

[36] FHA insures mortgages on single family and multifamily homes including manufactured homes and hospitals. It is the largest insurer of mortgages in the world, insuring over 34 million properties since its inception in 1934.

et seq., based on findings that the informed use of credit resulting from consumers' awareness of the cost of credit would enhance economic stability and competition among consumer credit providers. One of the purposes of TILA is to promote the informed use of consumer credit by requiring disclosures about its costs and terms. *See* 15 U.S.C. 1601. TILA requires additional disclosures for loans secured by consumers' homes and permits consumers to rescind certain transactions secured by their principal dwellings when the required disclosures are not provided. 15 U.S.C. 1635, 1637a. Section 105(a) of TILA directs the Bureau (formerly directed the Board of Governors of the Federal Reserve System) to prescribe regulations to carry out TILA's purposes and specifically authorizes the Bureau, among other things, to issue regulations that contain such additional requirements, classifications, differentiations, or other provisions, or that provide for such adjustments and exceptions for all or any class of transactions, that in the Bureau's judgment are necessary or proper to effectuate the purposes of TILA, facilitate compliance thereof, or prevent circumvention or evasion therewith. *See* 15 U.S.C. 1604(a).

General rulemaking authority for TILA transferred to the Bureau in July 2011, other than for certain motor vehicle dealers in accordance with the Dodd-Frank Act section 1029, 12 U.S.C. 5519. Pursuant to the Dodd-Frank Act and TILA, as amended, the Bureau published for public comment an interim final rule establishing a new Regulation Z, 12 CFR part 1026, implementing TILA (except with respect to persons excluded from the Bureau's rulemaking authority by section 1029 of the Dodd-Frank Act). 76 FR 79768 (Dec. 22, 2011). This rule did not impose any new substantive obligations but did make technical and conforming changes to reflect the transfer of authority and certain other changes made by the Dodd-Frank Act. The Bureau's Regulation Z took effect on December 30, 2011. The Official Staff Interpretations interpret the requirements of the regulation and provides guidance to creditors in applying the rules to specific transactions. *See* 12 CFR part 1026, Supp. I.

C. The Home Ownership and Equity Protection Act (HOEPA) and HOEPA Rules

In response to evidence of abusive practices in the home-equity lending market, in 1994 Congress amended TILA by enacting the Home Ownership and Equity Protection Act (HOEPA) as part of the Riegle Community Development and Regulatory Improvement Act of 1994. Public Law 103–325, 108 Stat. 2160. HOEPA was enacted as an amendment to TILA to address abusive practices in refinancing and home-equity mortgage loans with high interest rates or high fees.[37] Loans that meet HOEPA's high-cost triggers are subject to special disclosure requirements and restrictions on loan terms, and consumers with high-cost mortgages have enhanced remedies for violations of the law.[38]

The statute applied generally to closed-end mortgage credit, but excluded purchase money mortgage loans and reverse mortgages. Coverage was triggered where a loan's annual percentage rate (APR) exceeded comparable Treasury securities by specified thresholds for particular loan types, or where points and fees exceeded eight percent of the total loan amount or a dollar threshold.[39]

For high-cost loans meeting either of those thresholds, HOEPA required creditors to provide special pre-closing disclosures, restricted prepayment penalties and certain other loan terms, and regulated various creditor practices, such as extending credit without regard to a consumer's ability to repay the loan. HOEPA also provided a mechanism for consumers to rescind covered loans that included certain prohibited terms and to obtain higher damages than are allowed for other types of TILA violations. Finally, HOEPA amended TILA section 131, 15

U.S.C. 1641, to provide that purchasers of high-cost loans generally are subject to all claims and defenses against the original creditor with respect to the mortgage, including a creditor's failure to make an ability-to-repay determination before making the loan. HOEPA created special substantive protections for high-cost mortgages, such as prohibiting a creditor from engaging in a pattern or practice of extending a high-cost mortgage to a consumer based on the consumer's collateral without regard to the consumer's repayment ability, including the consumer's current and expected income, current obligations, and employment. TILA section 129(h); 15 U.S.C. 1639(h).

In addition to the disclosures and limitations specified in the statute, HOEPA expanded the Board's rulemaking authority, among other things, to prohibit acts or practices the Board found to be unfair and deceptive in connection with mortgage loans.[40]

In 1995, the Board implemented the HOEPA amendments at §§ 226.31, 226.32, and 226.33 [41] of Regulation Z. *See* 60 FR 15463 (Mar. 24, 1995). In particular, § 226.32(e)(1) [42] implemented TILA section 129(h)'s ability-to-repay requirements to prohibit a creditor from engaging in a pattern or practice of extending a high-cost mortgage based on the consumer's collateral without regard to the consumer's repayment ability, including the consumer's current income, current obligations, and employment status.

In 2001, the Board published additional significant changes to expand both HOEPA's protections to more loans by revising the annual percentage rate (APR) threshold for first-lien mortgage loans, expanded the definition of points and fees to include the cost of optional credit insurance and debt cancellation premiums, and enhanced the restrictions associated with high-cost loans. *See* 66 FR 65604 (Dec. 20, 2001). In addition, the ability-to-repay provisions in the regulation were revised to provide for a presumption of a violation of the rule if the creditor engages in a pattern or practice of making high-cost mortgages without verifying and documenting the consumer's repayment ability.

[37] HOEPA amended TILA by adding new sections 103(aa) and 129, 15 U.S.C. 1602(aa) and 1639.

[38] HOEPA defines a class of ''high-cost mortgages,'' which are generally closed-end home-equity loans (excluding home-purchase loans) with annual percentage rates (APRs) or total points and fees exceeding prescribed thresholds. Mortgages covered by the HOEPA amendments have been referred to as ''HOEPA loans,'' ''Section 32 loans,'' or ''high-cost mortgages.'' The Dodd-Frank Act now refers to these loans as ''high-cost mortgages.'' *See* Dodd-Frank Act section 1431; TILA section 103(aa). For simplicity and consistency, this final rule uses the term ''high-cost mortgages'' to refer to mortgages covered by the HOEPA amendments.

[39] The Dodd-Frank Act adjusted the baseline for the APR comparison, lowered the points and fees threshold, and added a prepayment trigger.

[40] As discussed above, with the enactment of the Dodd-Frank Act, general rulemaking authority for TILA, including HOEPA, transferred from the Board to the Bureau on July 21, 2011.

[41] Subsequently renumbered as sections 1026.31, 1026.32, and 1026.33 of Regulation Z. As discussed above, pursuant to the Dodd-Frank Act and TILA, as amended, the Bureau published for public comment an interim final rule establishing a new Regulation Z, 12 CFR part 1026, implementing TILA (except with respect to persons excluded from the Bureau's rulemaking authority by section 1029 of the Dodd-Frank Act). 76 FR 79768 (Dec. 22, 2011). The Bureau's Regulation Z took effect on December 30, 2011.

[42] Subsequently renumbered as section 1026.32(e)(1) of Regulation Z.

[43] Along with the Board, the other Federal banking agencies included the Office of the Comptroller of the Currency (OCC), the Federal Deposit Insurance Corporation (FDIC), Office of Thrift Supervision (OTS), and the National Credit Union Administration (NCUA).

D. 2006 and 2007 Interagency Supervisory Guidance

In December 2005, the Federal banking agencies [43] responded to concerns about the rapid growth of nontraditional mortgages in the previous two years by proposing supervisory guidance. Nontraditional mortgages are mortgages that allow the consumer to defer repayment of principal and sometimes interest. The guidance advised institutions of the need to reduce ''risk layering'' with respect to these products, such as by failing to document income or lending nearly the full appraised value of the home. The final guidance issued in September 2006 specifically advised creditors that layering risks in nontraditional mortgage loans to consumers receiving subprime credit may significantly increase risks to consumers as well as institutions. *See* Interagency Guidance on Nontraditional Mortgage Product Risks, 71 FR 58609 (Oct. 4, 2006) (2006 Nontraditional Mortgage Guidance).

The Federal banking agencies addressed concerns about the subprime market in March 2007 with proposed supervisory guidance addressing the heightened risks to consumers and institutions of adjustable-rate mortgages with two- or three-year ''teaser'' interest rates followed by substantial increases in the rate and payment. The guidance, finalized in June of 2007, set out the standards institutions should follow to ensure consumers in the subprime market obtain loans they can afford to repay. Among other steps, the guidance advised creditors: (1) To use the fully indexed rate and fully-amortizing payment when qualifying consumers for loans with adjustable rates and potentially non-amortizing payments; (2) to limit stated income and reduced documentation loans to cases where mitigating factors clearly minimize the need for full documentation of income; and (3) to provide that prepayment penalty clauses expire a reasonable period before reset, typically at least 60 days. *See* Statement on Subprime Mortgage Lending, 72 FR 37569 (July 10, 2007) (2007 Subprime Mortgage Statement).[44] The Conference of State Bank Supervisors (CSBS) and the American Association of Residential Mortgage Regulators (AARMR) issued parallel statements for state supervisors to use with state-supervised entities, and many states adopted the statements.

E. 2008 HOEPA Final Rule

After the Board finalized the 2001 HOEPA rules, new consumer protection issues arose in the mortgage market. In 2006 and 2007, the Board held a series of national hearings on consumer protection issues in the mortgage market. During those hearings, consumer advocates and government officials expressed a number of concerns, and urged the Board to prohibit or restrict certain underwriting practices, such as ''stated income'' or ''low documentation'' loans, and certain product features, such as prepayment penalties. *See* 73 FR 44527 (July 30, 2008). The Board was also urged to adopt additional regulations under HOEPA, because, unlike the Interagency Supervisory Guidance, the regulations would apply to all creditors and would be enforceable by consumers through civil actions. As discussed above, in 1995 the Board implemented TILA section 129(h)'s ability-to-repay requirements for high-cost mortgage loans. In 2008, the Board exercised its authority under HOEPA to extend certain consumer protections concerning a consumer's ability to repay and prepayment penalties to a new category of ''higher-priced mortgage loans'' (HPMLs) [45] with APRs that are lower than those prescribed for high-cost loans but that nevertheless exceed the average prime offer rate by prescribed amounts. This new category of loans was designed to include subprime credit. Specifically, the Board exercised its authority to revise HOEPA's restrictions on high-cost loans based on a conclusion that the revisions were necessary to prevent unfair and deceptive acts or practices in connection with mortgage loans. 73 FR 44522 (July 30, 2008) (2008 HOEPA Final Rule). The Board determined that imposing the burden to prove ''pattern or practice'' on an individual consumer would leave many consumers with a lesser remedy, such as those provided under some State laws, or without any remedy for loans made without regard to repayment ability. In particular, the Board concluded that a prohibition on making individual loans without regard for repayment ability was necessary to ensure a remedy for consumers who are given unaffordable loans and to deter irresponsible lending, which injures individual consumers. The 2008 HOEPA Final Rule provides a presumption of compliance with the higher-priced mortgage ability-to-repay requirements if the creditor follows certain procedures regarding underwriting the loan payment, assessing the debt-to-income ratio or residual income, and limiting the features of the loan, in addition to following certain procedures mandated for all creditors. *See* § 1026.34(a)(4)(iii) and (iv). However, the 2008 HOEPA Final Rule makes clear that even if the creditor follows the required and optional criteria, the creditor has merely obtained a presumption of compliance with the repayment ability requirement. The consumer can still rebut or overcome that presumption by showing that, despite following the required and optional procedures, the creditor nonetheless disregarded the consumer's ability the loan.

F. The Dodd-Frank Act

In 2007, Congress held numerous hearings focused on rising subprime foreclosure rates and the extent to which lending practices contributed to them.[46] Consumer advocates testified

[44] The 2006 Nontraditional Mortgage Guidance and the 2007 Subprime Mortgage Statement will hereinafter be referred to collectively as the ''Interagency Supervisory Guidance.''

[45] Under the Board's 2008 HOEPA Final Rule, a higher-priced mortgage loan is a consumer credit transaction secured by the consumer's principal dwelling with an APR that exceeds the average prime offer rate (APOR) for a comparable transaction, as of the date the interest rate is set, by 1.5 or more percentage points for loans secured by a first lien on the dwelling, or by 3.5 or more percentage points for loans secured by a subordinate lien on the dwelling. The definition of a ''higher-priced mortgage loan'' includes practically all ''high-cost mortgages'' because the latter transactions are determined by higher loan pricing threshold tests. *See* 12 CFR 226.35(a)(1), since codified in parallel by the Bureau at 12 CFR 1026.35(a)(1).

[46] *E.g., Progress in Administration and Other Efforts to Coordinate and Enhance Mortgage Foreclosure Prevention: Hearing before the H. Comm. on Fin. Servs.,* 110th Cong. (2007); *Legislative Proposals on Reforming Mortgage Practices: Hearing before the H. Comm. on Fin. Servs.,* 110th Cong. (2007); *Legislative and Regulatory Options for Minimizing and Mitigating Mortgage Foreclosures: Hearing before the H. Comm. on Fin. Servs.,* 110th Cong. (2007); *Ending Mortgage Abuse: Safeguarding Homebuyers: Hearing before the S. Subcomm. on Hous., Transp., and Cmty. Dev. of the S. Comm. on Banking, Hous., and Urban Affairs,* 110th Cong. (2007); *Improving Federal Consumer Protection in Financial Services: Hearing before the H. Comm. on Fin. Servs.,* 110th Cong. (2007); *The Role of the Secondary Market in Subprime Mortgage Lending: Hearing before the Subcomm. on Fin. Insts. and Consumer Credit of the H. Comm. on Fin. Servs.,* 110th Cong. (2007); *Possible Responses to Rising Mortgage Foreclosures: Hearing before the H. Comm. on Fin. Servs.,* 110th Cong. (2007); *Subprime Mortgage Market Turmoil: Examining the Role of Securitization: Hearing before the Subcomm. on Secs., Ins., and Inv. of the S. Comm. on Banking, Hous., and Urban Affairs,* 110th Cong. (2007); *Subprime and Predatory Lending: New Regulatory Guidance, Current Market Conditions, and Effects on Regulated Financial Institutions: Hearing before the Subcomm. on Fin. Insts. and Consumer Credit of the H. Comm. on Fin. Servs.,* 110th Cong. (2007); *Mortgage Market Turmoil: Causes and Consequences, Hearing before the S. Comm. on Banking, Hous., and Urban Affairs,* 110th Cong. (2007); *Preserving the American Dream: Predatory Lending Practices and Home Foreclosures, Hearing before the S. Comm. on Banking, Hous., and Urban Affairs,* 110th Cong. (2007).

that certain lending terms or practices contributed to the foreclosures, including a failure to consider the consumer's ability to repay, low- or no-documentation loans, hybrid adjustable-rate mortgages, and prepayment penalties. Industry representatives, on the other hand, testified that adopting substantive restrictions on subprime loan terms would risk reducing access to credit for some consumers. In response to these hearings, the House of Representatives passed the Mortgage Reform and Anti-Predatory Lending Act, both in 2007 and again in 2009. H.R. 3915, 110th Cong. (2007); H.R. 1728, 111th Cong. (2009). Both bills would have amended TILA to provide consumer protections for mortgages, including ability-to-repay requirements, but neither bill was passed by the Senate. Instead, both houses shifted their focus to enacting comprehensive financial reform legislation.

In December 2009, the House passed the Wall Street Reform and Consumer Protection Act of 2009, its version of comprehensive financial reform legislation, which included an ability-to-repay and qualified mortgage provision. H.R. 4173, 111th Cong. (2009). In May 2010, the Senate passed its own version of ability-to-repay requirements in its own version of comprehensive financial reform legislation, called the Restoring American Financial Stability Act of 2010. S. 3217, 111th Cong. (2010). After conference committee negotiations, the Dodd-Frank Act was passed by both houses of Congress and was signed into law on July 21, 2010. Public Law 111–203, 124 Stat. 1376 (2010).

In the Dodd-Frank Act, Congress established the Bureau and, under sections 1061 and 1100A, generally consolidated the rulemaking authority for Federal consumer financial laws, including TILA and RESPA, in the Bureau.[47] Congress also provided the Bureau, among other things, with supervision authority for Federal consumer financial laws over certain entities, including insured depository institutions and credit unions with total assets over $10 billion and their affiliates, and mortgage-related non-depository financial services providers.[48] In addition, Congress provided the Bureau with authority, subject to certain limitations, to enforce the Federal consumer financial laws, including the 18 enumerated consumer laws. Title X of the Dodd-Frank Act, and rules thereunder. The Bureau can bring civil actions in court and administrative enforcement proceedings to obtain remedies such as civil penalties and cease-and-desist orders.

At the same time, Congress significantly amended the statutory requirements governing mortgage practices with the intent to restrict the practices that contributed to the crisis. Title XIV of the Dodd-Frank Act contains a modified version of the Mortgage Reform and Anti-Predatory Lending Act.[49] The Dodd-Frank Act requires the Bureau to propose consolidation of the major federal mortgage disclosures, imposes new requirements and limitations to address a wide range of consumer mortgage issues, and imposes credit risk retention requirements in connection with mortgage securitization.

Through the Dodd-Frank Act, Congress expanded HOEPA to apply to more types of mortgage transactions, including purchase money mortgage loans and home-equity lines of credit. Congress also amended HOEPA's existing high-cost triggers, added a prepayment penalty trigger, and expanded the protections associated with high-cost mortgages.[50]

In addition, sections 1411, 1412, and 1414 of the Dodd-Frank Act created new TILA section 129C, which establishes, among other things, new ability-to-repay requirements and new limits on prepayment penalties. Section 1402 of the Dodd-Frank Act states that Congress created new TILA section 129C upon a finding that ''economic stabilization would be enhanced by the protection, limitation, and regulation of the terms of residential mortgage credit and the practices related to such credit, while ensuring that responsible, affordable mortgage credit remains available to consumers.'' TILA section 129B(a)(1), 15 U.S.C. 1639b(a)(1). Section 1402 of the Dodd-Frank Act further states that the purpose of TILA section 129C is to ''assure that consumers are offered and receive residential mortgage loans on terms that reasonably reflect their ability to repay the loans.'' TILA section 129B(a)(2), 15 U.S.C. 1639b(a)(2).

Specifically, TILA section 129C:

- Expands coverage of the ability-to-repay requirements to any consumer credit transaction secured by a dwelling, except an open-end credit plan, credit secured by an interest in a timeshare plan, reverse mortgage, or temporary loan.
- Prohibits a creditor from making a mortgage loan unless the creditor makes a reasonable and good faith determination, based on verified and documented information, that the consumer has a reasonable ability to repay the loan according to its terms, and all applicable taxes, insurance, and assessments.
- Provides a presumption of compliance with the ability-to-repay requirements if the mortgage loan is a ''qualified mortgage,'' which does not contain certain risky features and does not exceed certain thresholds for points and fees on the loan and which meets such other criteria as the Bureau may prescribe.
- Prohibits prepayment penalties unless the mortgage is a fixed-rate qualified mortgage that is not a higher-priced mortgage loan, and the amount and duration of the prepayment penalty are limited.

The statutory ability-to-repay standards reflect Congress's belief that certain lending practices (such as low- or no-documentation loans or underwriting loans without regard to principal repayment) led to consumers having mortgages they could not afford, resulting in high default and foreclosure rates. Accordingly, new TILA section 129C generally prohibits a creditor from making a residential mortgage loan unless the creditor makes a reasonable and good faith determination, based on verified and documented information, that the consumer has a reasonable ability to repay the loan according to its terms.

To provide more certainty to creditors while protecting consumers from unaffordable loans, the Dodd-Frank Act provides a presumption of compliance with the ability-to-repay requirements for certain ''qualified mortgages.'' TILA section 129C(b)(1) states that a creditor

[47] Sections 1011 and 1021 of the Dodd-Frank Act, in title X, the ''Consumer Financial Protection Act,'' Public Law 111–203, secs. 1001–1100H, codified at 12 U.S.C. 5491, 5511. The Consumer Financial Protection Act is substantially codified at 12 U.S.C. 5481–5603. Section 1029 of the Dodd-Frank Act excludes from this transfer of authority, subject to certain exceptions, any rulemaking authority over a motor vehicle dealer that is predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both. 12 U.S.C. 5519.

[48] Sections 1024 through 1026 of the Dodd-Frank Act, codified at 12 U.S.C. 5514 through 5516.

[49] Although S. Rept. No. 111–176 contains general legislative history concerning the Dodd-Frank Act and the Senate ability-to-repay provisions, it does not address the House Mortgage Reform and Anti-Predatory Lending Act. Separate legislative history for the predecessor House bills is available in H. Rept. No. 110–441 for H.R. 3915 (2007), and H. Rept. No. 111–194 for H.R. 1728 (2009).

[50] Under the Dodd-Frank Act, HOEPA protections would be triggered where: (1) A loan's annual percentage rate (APR) exceeds the average prime offer rate by 6.5 percentage points for most first-lien mortgages and 8.5 percentage points for subordinate lien mortgages; (2) a loan's points and fees exceed 5 percent of the total transaction amount, or a higher threshold for loans below $20,000; or (3) the creditor may charge a prepayment penalty more than 36 months after loan consummation or account opening, or penalties that exceed more than 2 percent of the amount prepaid.

or assignee may presume that a loan has met the repayment ability requirement if the loan is a qualified mortgage. Qualified mortgages are prohibited from containing certain features that Congress considered to increase risks to consumers and must comply with certain limits on points and fees.

The Dodd-Frank Act creates special remedies for violations of TILA section 129C. As amended by section 1416 of the Dodd-Frank Act, TILA provides that a consumer who brings a timely action against a creditor for a violation of TILA section 129C(a) (the ability-to-repay requirements) may be able to recover special statutory damages equal to the sum of all finance charges and fees paid by the consumer, unless the creditor demonstrates that the failure to comply is not material. TILA section 130(a). This recovery is in addition to: (1) Actual damages; (2) statutory damages in an individual action or class action, up to a prescribed threshold; and (3) court costs and attorney fees that would be available for violations of other TILA provisions. In addition, the statute of limitations for a violation of TILA section 129C is three years from the date of the occurrence of the violation (as compared to one year for most other TILA violations, except for actions brought under section 129 or 129B, or actions brought by a State attorney general to enforce a violation of section 129, 129B, 129C, 129D, 129E, 129F, 129G, or 129H, which may be brought not later than 3 years after the date on which the violation occurs, and private education loans under 15 U.S.C. 1650(a), which may be brought not later than one year from the due date of first regular payment of principal). TILA section 130(e). Moreover, as amended by section 1413 of the Dodd-Frank Act, TILA provides that when a creditor, or an assignee, other holder or their agent initiates a foreclosure action, a consumer may assert a violation of TILA section 129C(a) ''as a matter of defense by recoupment or setoff.'' TILA section 130(k). There is no time limit on the use of this defense and the amount of recoupment or setoff is limited, with respect to the special statutory damages, to no more than three years of finance charges and fees. For high-cost loans an assignee generally continues to be subject to all claims and defenses, not only in foreclosure, with respect to that mortgage that the consumer could assert against the creditor of the mortgage, unless the assignee demonstrates, by a preponderance of evidence, that a reasonable person exercising ordinary due diligence, could not determine that the mortgage was a high-cost mortgage. TILA section 131(d).

In addition to the foregoing ability-to-repay provisions, the Dodd-Frank Act established other new standards concerning a wide range of mortgage lending practices, including compensation of mortgage originators,[51] Federal mortgage disclosures,[52] and mortgage servicing.[53] Those and other Dodd-Frank Act provisions are the subjects of other rulemakings by the Bureau. For additional information on those other rulemakings, see the discussion below in part III.C.

G. Qualified Residential Mortgage Rulemaking

Section 15G of the Securities Exchange Act of 1934, added by section 941(b) of the Dodd-Frank Act, generally requires the securitizer of asset-backed securities (ABS) to retain not less than five percent of the credit risk of the assets collateralizing the ABS. 15 U.S.C. 78o–11. The Dodd-Frank Act's credit risk retention requirements are aimed at addressing weaknesses and failures in the securitization process and the securitization markets.[54] By requiring that the securitizer retain a portion of the credit risk of the assets being securitized, the Dodd-Frank Act provides securitizers an incentive to monitor and ensure the quality of the assets underlying a securitization transaction. Six Federal agencies (not including the Bureau) are tasked with implementing this requirement. Those agencies are the Board, Office of the Comptroller of the Currency (OCC), Federal Deposit Insurance Corporation (FDIC), Securities and Exchange Commission (SEC), Federal Housing Finance Agency (FHFA), and Department of Housing and Urban Development (HUD) (collectively, the QRM agencies).

Section 15G of the Securities Exchange Act of 1934 provides that the credit risk retention requirements shall not apply to an issuance of ABS if all of the assets that collateralize the ABS are ''qualified residential mortgages'' (QRMs). *See* 15 U.S.C. 78o–11(c)(1)(C)(iii), (4)(A) and (B). Section 15G requires the QRM agencies to jointly define what constitutes a QRM, taking into consideration underwriting and product features that historical loan performance data indicate result in a lower risk of default. *See* 15 U.S.C. 78o–11(e)(4). Notably, section 15G also provides that the definition of a QRM shall be ''no broader than'' the definition of a ''qualified mortgage,'' as the term is defined under TILA section 129C(b)(2), as amended by the Dodd-Frank Act, and regulations adopted thereunder. 15 U.S.C. 78o–11(e)(4)(C).

On April 29, 2011, the QRM agencies issued joint proposed risk retention rules, including a proposed QRM definition (2011 QRM Proposed Rule). *See* 76 FR 24090 (Apr. 29, 2011). The proposed rule has not been finalized. Among other requirements, the 2011 QRM Proposed Rule incorporates the qualified mortgage restrictions on negative amortization, interest-only, and balloon payments, limits points and fees to three percent of the loan amount, and prohibits prepayment penalties. The proposed rule also establishes underwriting standards designed to ensure that QRMs have high credit quality, including:

- A maximum ''front-end'' monthly debt-to-income ratio (which looks at only the consumer's mortgage payment relative to income, but not at other debts) of 28 percent;
- A maximum ''back-end'' monthly debt-to-income ratio (which includes all of the consumer's debt, not just the mortgage payment) of 36 percent;
- A maximum loan-to-value (LTV) ratio of 80 percent in the case of a purchase transaction (with a lesser combined LTV permitted for refinance transactions);
- A 20 percent down payment requirement in the case of a purchase transaction; and
- Credit history verification and documentation requirements.

The proposed rule also includes appraisal requirements, restrictions on the assumability of the mortgage, and requires the creditor to commit to certain servicing policies and procedures regarding loss mitigation. *See* 76 FR at 24166–67.

To provide clarity on the definitions, calculations, and verification requirements for the QRM standards, the 2011 QRM Proposed Rule incorporates certain definitions and key terms established by HUD and required to be used by creditors originating FHA-insured residential mortgages. *See* 76 FR at 24119. Specifically, the 2011 QRM Proposed Rule incorporates the definitions and standards set out in the HUD Handbook 4155.1 (New Version),

[51] Sections 1402 through 1405 of the Dodd-Frank Act, codified at 15 U.S.C. 1639b.

[52] Section 1032(f) of the Dodd-Frank Act, codified at 12 U.S.C. 5532(f).

[53] Sections 1418, 1420, 1463, and 1464 of the Dodd-Frank Act, codified at 12 U.S.C. 2605; 15 U.S.C. 1638, 1638a, 1639f, and 1639g.

[54] As noted in the legislative history of section 15G of the Securities Exchange Act of 1934, ''[w]hen securitizers retain a material amount of risk, they have 'skin in the game,' aligning their economic interest with those of investors in asset-backed securities.'' *See* S. Rept. 176, 111th Cong., at 129 (2010).

Mortgage Credit Analysis for Mortgage Insurance, as in effect on December 31, 2010, for determining and verifying the consumer's funds and the consumer's monthly housing debt, total monthly debt, and monthly gross income.[55]

The qualified mortgage and QRM definitions are distinct and relate to different parts of the Dodd-Frank Act with different purposes, but both are designed to address problems that had arisen in the mortgage origination process. The qualified mortgage standard provides creditors with a presumption of compliance with the requirement in TILA section 129C(a) to assess a consumer's ability to repay a residential mortgage loan. The purpose of these provisions is to ensure that consumers are offered and receive residential mortgage loans on terms that reasonably reflect their ability to repay the loans. *See* TILA section 129B(a)(2). The Dodd-Frank Act's credit risk retention requirements are intended to address problems in the securitization markets and in mortgage markets by requiring that securitizers, as a general matter, retain an economic interest in the credit risk of the assets they securitize. The QRM credit risk retention requirement was meant to incentivize creditors to make more responsible loans because they will need to keep some skin in the game.[56]

Nevertheless, as discussed above, the Dodd-Frank Act requires that the QRM definition be ''no broader than'' the qualified mortgage definition. Therefore, in issuing the 2011 QRM Proposed Rule, the QRM agencies sought to incorporate the statutory qualified mortgage standards, in addition to other requirements, into the QRM definition. 76 FR at 24118. This approach was designed to minimize the potential for conflicts between the QRM standards in the proposed rule and the qualified mortgage definition that the Bureau would ultimately adopt in a final rule.

In the 2011 QRM Proposed Rule, the QRM agencies stated their expectation to monitor the rules adopted by the Bureau under TILA to define a qualified mortgage and to review those rules to ensure that the definition of QRM in the final rule is ''no broader'' than the definition of a qualified mortgage and to appropriately implement the Dodd-Frank Act's credit risk retention requirement. *See* 76 FR at 24118. In preparing this final rule, the Bureau has consulted regularly with the QRM agencies to coordinate the qualified mortgage and qualified residential mortgage definitions. However, while the Bureau's qualified mortgage definition will set the outer boundary of a QRM, the QRM agencies have discretion under the Dodd-Frank Act to define QRMs in a way that is stricter than the qualified mortgage definition.

III. Summary of the Rulemaking Process

A. The Board's Proposal

In 2011, the Board published for public comment a proposed rule amending Regulation Z to implement the foregoing ability-to-repay amendments to TILA made by the Dodd-Frank Act. *See* 76 FR 27390 (May 11, 2011) (2011 ATR Proposal, the Board's proposal or the proposal). Consistent with the Dodd-Frank Act, the Board's proposal applied the ability-to-repay requirements to any consumer credit transaction secured by a dwelling (including vacation home loans and home equity loans), except an open-end credit plan, extension of credit secured by a consumer's interest in a timeshare plan, reverse mortgage, or temporary loan with a term of 12 months or less.

The Board's proposal provided four options for complying with the ability-to-repay requirement, including by making a ''qualified mortgage.'' First, the proposal would have allowed a creditor to meet the general ability-to-repay standard by originating a covered mortgage loan for which the creditor considered and verified eight underwriting factors in determining repayment ability, and, for adjustable rate loans, the mortgage payment calculation is based on the fully indexed rate.[57] Second, the proposal would have allowed a creditor to refinance a ''non-standard mortgage'' into a ''standard mortgage.''[58] Under this option, the proposal would not have required the creditor to verify the consumer's income or assets. Third, the proposal would have allowed a creditor to originate a qualified mortgage, which provides special protection from liability for creditors. Because the Board determined that it was unclear whether that protection is intended to be a safe harbor or a rebuttable presumption of compliance with the repayment ability requirement, the Board proposed two alternative definitions of a qualified mortgage.[59] Finally, the proposal would have allowed a small creditor operating predominantly in rural or underserved areas to originate a balloon-payment qualified mortgage if the loan term is five years or more, and the payment calculation is based on the scheduled periodic payments, excluding the balloon payment.[60] The Board's proposal also would have implemented the Dodd-Frank Act's limits on prepayment penalties, lengthened the time creditors must retain evidence of compliance with the ability-to-repay and prepayment penalty provisions, and prohibited evasion of the rule by structuring a closed-end extension of credit that does not meet the definition of an open-end plan. As discussed above, rulemaking authority under TILA generally transferred from the Board to the Bureau in July 2011, including the authority under Dodd-Frank Act section 1412 to prescribe regulations to carry out the purposes of the qualified mortgage rules. 12 U.S.C. 5512; 12 U.S.C. 5581; 15 U.S.C. 1639c. As discussed above, TILA section 105(a) directs the Bureau to prescribe regulations to carry out the purposes of

[55] *See* U.S. Dep't of Hous. & Urban Dev., Housing Handbook 4155.1, *Mortgage Credit Analysis for Mortgage Insurance* (rev. Mar. 2011) (''HUD Handbook 4155.1''), *available at http://portal.hud.gov/hudportal/HUD?src=/program_offices/administration/hudclips/handbooks/hsgh/4155.1*.

[56] *See* S. Rept. 176, 111th Cong., at 129 (2010).

[57] The eight factors are: (1) Current or reasonably expected income or assets; (2) current employment status; (3) the monthly payment on the mortgage; (4) the monthly payment on any simultaneous loan; (5) the monthly payment for mortgage-related obligations; (6) current debt obligations; (7) the monthly debt-to-income ratio, or residual income; and (8) credit history.

[58] This alternative is based on a Dodd-Frank Act provision that is meant to provide flexibility for certain streamlined refinancings, which are no- or low-documentation transactions designed to refinance a consumer quickly under certain circumstances, when such refinancings would move consumers out of risky mortgages and into more stable mortgage products—what the proposal defined as mortgage loans that, among other things, do not contain negative amortization, interest-only payments, or balloon payments, and have limited points and fees. TILA section 129C(a)(6)(E); 15 U.S.C. 1639c(a)(6)(E).

[59] The Board's proposed first alternative would have operated as a legal safe harbor and define a ''qualified mortgage'' as a mortgage for which: (a) The loan does not contain negative amortization, interest-only payments, or balloon payments, or a loan term exceeding 30 years; (b) the total points and fees do not exceed 3 percent of the total loan amount; (c) the consumer's income or assets are verified and documented; and (d) the underwriting of the mortgage is based on the maximum interest rate in the first five years, uses a payment schedule that fully amortizes the loan over the loan term, and takes into account any mortgage-related obligations. The Board's proposed second alternative would have provided a rebuttable presumption of compliance and defined a ''qualified mortgage'' as including the criteria listed above in the first alternative as well as considering and verifying the following additional underwriting requirements from the ability-to-repay standard: The consumer's employment status, the monthly payment for any simultaneous loan, the consumer's current debt obligations, the total debt-to-income ratio or residual income, and the consumer's credit history.

[60] This alternative is based on statutory provision. TILA section 129C(b)(2)(E); 15 U.S.C. 1639c. As the Board's proposal noted, this standard is evidently meant to accommodate community banks that originate balloon-payment mortgages in lieu of adjustable-rate mortgages to hedge against interest rate risk.

TILA. Except with respect to the substantive restrictions on high-cost mortgages provided in TILA section 129, TILA section 105(a) authorizes the Bureau to prescribe regulations that may contain additional requirements, classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for all or any class of transactions that the Bureau determines are necessary or proper to effectuate the purposes of TILA, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.

B. Comments and Post-Proposal Outreach

The Board received numerous comments on the proposal, including comments regarding the criteria for a ''qualified mortgage'' and whether a qualified mortgage provides a safe harbor or a presumption of compliance with the repayment ability requirements. As noted above, in response to the proposed rule, the Board received approximately 1,800 letters from commenters, including members of Congress, creditors, consumer groups, trade associations, mortgage and real estate market participants, and individual consumers. As of July 21, 2011, the Dodd-Frank Act generally transferred the Board's rulemaking authority for TILA, among other Federal consumer financial laws, to the Bureau. Accordingly, all comment letters on the proposed rule were also transferred to the Bureau. Materials submitted were filed in the record and are publicly available at *http://www.regulations.gov.*

Through various comment letters and the Bureau's own collection of data, the Bureau received additional information and new data pertaining to the proposed rule. Accordingly, in May 2012, the Bureau reopened the comment period in order to solicit further comment on data and new information, including data that may assist the Bureau in defining loans with characteristics that make it appropriate to presume that the creditor complied with the ability-to-repay requirements or assist the Bureau in assessing the benefits and costs to consumers, including access to credit, and covered persons, as well as the market share covered by, alternative definitions of a ''qualified mortgage.'' The Bureau received approximately 160 comments in response to the reopened comment period from a variety of commenters, including creditors, consumer groups, trade associations, mortgage and real estate market participants, individuals, small entities, the SBA's Office of Advocacy, and FHA. As discussed in more detail below, the Bureau has considered these comments in adopting this final rule.

C. Other Rulemakings

In addition to this final rule, the Bureau is adopting several other final rules and issuing one proposal, all relating to mortgage credit to implement requirements of title XIV of the Dodd-Frank Act. The Bureau is also issuing a final rule jointly with other Federal agencies to implement requirements for mortgage appraisals in title XIV. Each of the final rules follows a proposal issued in 2011 by the Board or in 2012 by the Bureau alone or jointly with other Federal agencies. Collectively, these proposed and final rules are referred to as the Title XIV Rulemakings.

- *Ability to Repay:* Simultaneously with this final rule (the 2013 ATR Final Rule), the Bureau is issuing a proposal to amend certain provisions of the final rule, including by the addition of exemptions for certain nonprofit creditors and certain homeownership stabilization programs and a definition of a ''qualified mortgage'' for certain loans made and held in portfolio by small creditors (the 2013 ATR Concurrent Proposal). The Bureau expects to act on the 2013 ATR Concurrent Proposal on an expedited basis, so that any exceptions or adjustments can take effect simultaneously with this final rule.
- *Escrows:* The Bureau is finalizing a rule, following a March 2011 proposal issued by the Board (the Board's 2011 Escrows Proposal),[61] to implement certain provisions of the Dodd-Frank Act expanding on existing rules that require escrow accounts to be established for higher-priced mortgage loans and creating an exemption for certain loans held by creditors operating predominantly in rural or underserved areas, pursuant to TILA section 129D as established by Dodd-Frank Act sections 1461. 15 U.S.C. 1639d. The Bureau's final rule is referred to as the 2013 Escrows Final Rule.
- *HOEPA:* Following its July 2012 proposal (the 2012 HOEPA Proposal),[62] the Bureau is issuing a final rule to implement Dodd-Frank Act requirements expanding protections for ''high-cost mortgages'' under the Homeownership and Equity Protection Act (HOEPA), pursuant to TILA sections 103(bb) and 129, as amended by Dodd-Frank Act sections 1431 through 1433. 15 U.S.C. 1602(bb) and 1639. The Bureau also is finalizing rules to implement certain title XIV requirements concerning homeownership counseling, including a requirement that creditors provide lists of homeownership counselors to applicants for federally related mortgage loans, pursuant to RESPA section 5(c), as amended by Dodd-Frank Act section 1450. 12 U.S.C. 2604(c). The Bureau's final rule is referred to as the 2013 HOEPA Final Rule.
- *Servicing:* Following its August 2012 proposals (the 2012 RESPA Servicing Proposal and 2012 TILA Servicing Proposal),[63] the Bureau is adopting final rules to implement Dodd-Frank Act requirements regarding force-placed insurance, error resolution, information requests, and payment crediting, as well as requirements for mortgage loan periodic statements and adjustable-rate mortgage reset disclosures, pursuant to section 6 of RESPA and sections 128, 128A, 129F, and 129G of TILA, as amended or established by Dodd-Frank Act sections 1418, 1420, 1463, and 1464. 12 U.S.C. 2605; 15 U.S.C. 1638, 1638a, 1639f, and 1639g. The Bureau also is finalizing rules on early intervention for troubled and delinquent consumers, and loss mitigation procedures, pursuant to the Bureau's authority under section 6 of RESPA, as amended by Dodd-Frank Act section 1463, to establish obligations for mortgage servicers that it finds to be appropriate to carry out the consumer protection purposes of RESPA, and its authority under section 19(a) of RESPA to prescribe rules necessary to achieve the purposes of RESPA. The Bureau's final rule under RESPA with respect to mortgage servicing also establishes requirements for general servicing standards policies and procedures and continuity of contact pursuant to its authority under section 19(a) of RESPA. The Bureau's final rules are referred to as the 2013 RESPA Servicing Final Rule and the 2013 TILA Servicing Final Rule, respectively.
- *Loan Originator Compensation:* Following its August 2012 proposal (the 2012 Loan Originator Proposal),[64] the Bureau is issuing a final rule to implement provisions of the Dodd-Frank Act requiring certain creditors and loan originators to meet certain duties of care, including qualification requirements; requiring the establishment of certain compliance procedures by depository institutions; prohibiting loan originators, creditors, and the affiliates of both from receiving compensation in various forms (including based on the terms of the transaction) and from sources other than

[61] 76 FR 11598 (Mar. 2, 2011).

[62] 77 FR 49090 (Aug. 15,2012).

[63] 77 FR 57200 (Sept. 17, 2012) (RESPA); 77 FR 57318 (Sept. 17, 2012) (TILA).

[64] 77 FR 55272 (Sept. 7, 2012).

the consumer, with specified exceptions; and establishing restrictions on mandatory arbitration and financing of single premium credit insurance, pursuant to TILA sections 129B and 129C as established by Dodd-Frank Act sections 1402, 1403, and 1414(a). 15 U.S.C. 1639b, 1639c. The Bureau's final rule is referred to as the 2013 Loan Originator Final Rule.

• *Appraisals:* The Bureau, jointly with other Federal agencies,[65] is issuing a final rule implementing Dodd-Frank Act requirements concerning appraisals for higher-risk mortgages, pursuant to TILA section 129H as established by Dodd-Frank Act section 1471. 15 U.S.C. 1639h. This rule follows the agencies' August 2012 joint proposal (the 2012 Interagency Appraisals Proposal).[66] The agencies' joint final rule is referred to as the 2013 Interagency Appraisals Final Rule. In addition, following its August 2012 proposal (the 2012 ECOA Appraisals Proposal),[67] the Bureau is issuing a final rule to implement provisions of the Dodd-Frank Act requiring that creditors provide applicants with a free copy of written appraisals and valuations developed in connection with applications for loans secured by a first lien on a dwelling, pursuant to section 701(e) of the Equal Credit Opportunity Act (ECOA) as amended by Dodd-Frank Act section 1474. 15 U.S.C. 1691(e). The Bureau's final rule is referred to as the 2013 ECOA Appraisals Final Rule.

The Bureau is not at this time finalizing proposals concerning various disclosure requirements that were added by title XIV of the Dodd-Frank Act, integration of mortgage disclosures under TILA and RESPA, or a simpler, more inclusive definition of the finance charge for purposes of disclosures for closed-end mortgage transactions under Regulation Z. The Bureau expects to finalize these proposals and to consider whether to adjust regulatory thresholds under the Title XIV Rulemakings in connection with any change in the calculation of the finance charge later in 2013, after it has completed quantitative testing, and any additional qualitative testing deemed appropriate, of the forms that it proposed in July 2012 to combine TILA mortgage disclosures with the good faith estimate (RESPA GFE) and settlement statement (RESPA settlement statement) required under the Real Estate Settlement Procedures Act, pursuant to Dodd-Frank Act section 1032(f) and sections 4(a) of RESPA and 105(b) of TILA, as amended by Dodd-Frank Act sections 1098 and 1100A, respectively (the 2012 TILA–RESPA Proposal).[68] Accordingly, the Bureau already has issued a final rule delaying implementation of various affected title XIV disclosure provisions.[69] The Bureau's approaches to coordinating the implementation of the Title XIV Rulemakings and to the finance charge proposal are discussed in turn below.

Coordinated Implementation of Title XIV Rulemakings

As noted in all of its foregoing proposals, the Bureau regards each of the Title XIV Rulemakings as affecting aspects of the mortgage industry and its regulations. Accordingly, as noted in its proposals, the Bureau is coordinating carefully the Title XIV Rulemakings, particularly with respect to their effective dates. The Dodd-Frank Act requirements to be implemented by the Title XIV Rulemakings generally will take effect on January 21, 2013, unless final rules implementing those requirements are issued on or before that date and provide for a different effective date. *See* Dodd-Frank Act section 1400(c), 15 U.S.C. 1601 note. In addition, some of the Title XIV Rulemakings are to take effect no later than one year after they are issued. *Id.*

The comments on the appropriate effective date for this final rule are discussed in detail below in part VI of this notice. In general, however, consumer advocates requested that the Bureau put the protections in the Title XIV Rulemakings into effect as soon as practicable. In contrast, the Bureau received some industry comments indicating that implementing so many new requirements at the same time would create a significant cumulative burden for creditors. In addition, many commenters also acknowledged the advantages of implementing multiple revisions to the regulations in a coordinated fashion.[70] Thus, a tension exists between coordinating the adoption of the Title XIV Rulemakings and facilitating industry's implementation of such a large set of new requirements. Some have suggested that the Bureau resolve this tension by adopting a sequenced implementation, while others have requested that the Bureau simply provide a longer implementation period for all of the final rules.

The Bureau recognizes that many of the new provisions will require creditors to make changes to automated systems and, further, that most administrators of large systems are reluctant to make too many changes to their systems at once. At the same time, however, the Bureau notes that the Dodd-Frank Act established virtually all of these changes to institutions' compliance responsibilities, and contemplated that they be implemented in a relatively short period of time. And, as already noted, the extent of interaction among many of the Title XIV Rulemakings necessitates that many of their provisions take effect together. Finally, notwithstanding commenters' expressed concerns for cumulative burden, the Bureau expects that creditors actually may realize some efficiencies from adapting their systems for compliance with multiple new, closely related requirements at once, especially if given sufficient overall time to do so.

Accordingly, the Bureau is requiring that, as a general matter, creditors and other affected persons begin complying with the final rules on January 10, 2014. As noted above, section 1400(c) of the Dodd-Frank Act requires that some provisions of the Title XIV Rulemakings take effect no later than one year after the Bureau issues them. Accordingly, the Bureau is establishing January 10, 2014, one year after issuance of this final rule and the Bureau's 2013 Escrows and HOEPA Final Rules (*i.e.,* the earliest of the title XIV final rules), as the baseline effective date for most of the Title XIV Rulemakings. The Bureau believes that, on balance, this approach will facilitate the implementation of the rules' overlapping provisions, while also affording creditors sufficient time to implement the more complex or resource-intensive new requirements.

The Bureau has identified certain rulemakings or selected aspects thereof, however, that do not present significant implementation burdens for industry. Accordingly, the Bureau is setting

[65] Specifically, the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the National Credit Union Administration, and the Federal Housing Finance Agency.

[66] 77 FR 54722 (Sept. 5, 2012).

[67] 77 FR 50390 (Aug. 21, 2012).

[68] 77 FR 51116 (Aug. 23, 2012).

[69] 77 FR 70105 (Nov. 23, 2012).

[70] Of the several final rules being adopted under the Title XIV Rulemakings, six entail amendments to Regulation Z, with the only exceptions being the 2013 RESPA Servicing Final Rule (Regulation X) and the 2013 ECOA Appraisals Final Rule (Regulation B); the 2013 HOEPA Final Rule also amends Regulation X, in addition to Regulation Z. The six Regulation Z final rules involve numerous instances of intersecting provisions, either by cross-references to each other's provisions or by adopting parallel provisions. Thus, adopting some of those amendments without also adopting certain other, closely related provisions would create significant technical issues, *e.g.,* new provisions containing cross-references to other provisions that do not yet exist, which could undermine the ability of creditors and other parties subject to the rules to understand their obligations and implement appropriate systems changes in an integrated and efficient manner.

earlier effective dates for those final rules or certain aspects thereof, as applicable. Those effective dates are set forth and explained in the **Federal Register**s notices for those final rules.

More Inclusive Finance Charge Proposal

As noted above, the Bureau proposed in the 2012 TILA–RESPA Proposal to make the definition of finance charge more inclusive, thus rendering the finance charge and annual percentage rate a more useful tool for consumers to compare the cost of credit across different alternatives. 77 FR 51116, 51143 (Aug. 23, 2012). Because the new definition would include additional costs that are not currently counted, it would cause the finance charges and APRs on many affected transactions to increase. This in turn could cause more such transactions to become subject to various compliance regimes under Regulation Z. Specifically, the finance charge is central to the calculation of a transaction's ''points and fees,'' which in turn has been (and remains) a coverage threshold for the special protections afforded ''high-cost mortgages'' under HOEPA. Points and fees also will be subject to a 3-percent limit for purposes of determining whether a transaction is a ''qualified mortgage'' under this final rule. Meanwhile, the APR serves as a coverage threshold for HOEPA protections as well as for certain protections afforded ''higher-priced mortgage loans'' under § 1026.35, including the mandatory escrow account requirements being amended by the 2013 Escrows Final Rule. Finally, because the 2013 Interagency Appraisals Final Rule uses the same APR-based coverage test as is used for identifying higher-priced mortgage loans, the APR affects that rulemaking as well. Thus, the proposed more inclusive finance charge would have had the indirect effect of increasing coverage under HOEPA and the escrow and appraisal requirements for higher-priced mortgage loans, as well as decreasing the number of transactions that may be qualified mortgages—even holding actual loan terms constant—simply because of the increase in calculated finance charges, and consequently APRs, for closed-end mortgage transactions generally.

As noted above, these expanded coverage consequences were not the intent of the more inclusive finance charge proposal. Accordingly, as discussed more extensively in the Escrows Proposal, the HOEPA Proposal, the ATR Proposal, and the Interagency Appraisals Proposal, the Board and subsequently the Bureau (and other agencies) sought comment on certain adjustments to the affected regulatory thresholds to counteract this unintended effect. First, the Board and then the Bureau proposed to adopt a ''transaction coverage rate'' for use as the metric to determine coverage of these regimes in place of the APR. The transaction coverage rate would have been calculated solely for coverage determination purposes and would not have been disclosed to consumers, who still would have received only a disclosure of the expanded APR. The transaction coverage rate calculation would exclude from the prepaid finance charge all costs otherwise included for purposes of the APR calculation except charges retained by the creditor, any mortgage broker, or any affiliate of either. Similarly, the Board and Bureau proposed to reverse the effects of the more inclusive finance charge on the calculation of points and fees; the points and fees figure is calculated only as a HOEPA and qualified mortgage coverage metric and is not disclosed to consumers. The Bureau also sought comment on other potential mitigation measures, such as adjusting the numeric thresholds for particular compliance regimes to account for the general shift in affected transactions' APRs.

The Bureau's 2012 TILA–RESPA Proposal sought comment on whether to finalize the more inclusive finance charge proposal in conjunction with the Title XIV Rulemakings or with the rest of the TILA–RESPA Proposal concerning the integration of mortgage disclosure forms. 77 FR 51116, 51125 (Aug. 23, 2012). Upon additional consideration and review of comments received, the Bureau decided to defer a decision whether to adopt the more inclusive finance charge proposal and any related adjustments to regulatory thresholds until it later finalizes the TILA–RESPA Proposal. 77 FR 54843 (Sept. 6, 2012); 77 FR 54844 (Sept. 6, 2012).[71] Accordingly, this final rule and the 2013 Escrows, HOEPA, and Interagency Appraisals Final Rules all are deferring any action on their respective proposed adjustments to regulatory thresholds.

IV. Legal Authority

The final rule was issued on January 10, 2013, in accordance with 12 CFR 1074.1. The Bureau issued this final rule pursuant to its authority under TILA and the Dodd-Frank Act. *See* TILA section 105(a), 15 U.S.C. 1604(a). On July 21, 2011, section 1061 of the Dodd-Frank Act transferred to the Bureau the ''consumer financial protection functions'' previously vested in certain other Federal agencies, including the Board. The term ''consumer financial protection function'' is defined to include ''all authority to prescribe rules or issue orders or guidelines pursuant to any Federal consumer financial law, including performing appropriate functions to promulgate and review such rules, orders, and guidelines.''[72] TILA is defined as a Federal consumer financial law.[73] Accordingly, the Bureau has authority to issue regulations pursuant to TILA.

A. TILA Ability-to-Repay and Qualified Mortgage Provisions

As discussed above, the Dodd-Frank Act amended TILA to generally prohibit a creditor from making a residential mortgage loan without a reasonable and good faith determination that, at the time the loan is consummated, the consumer has a reasonable ability to repay the loan, along with taxes, insurance, and assessments. TILA section 129C(a), 15 U.S.C. 1639c(a). As described below in part IV.B, the Bureau has authority to prescribe regulations to carry out the purposes of TILA pursuant to TILA section 105(a). 15 U.S.C. 1604(a). In particular, it is the purpose of TILA section 129C, as amended by the Dodd-Frank Act, to assure that consumers are offered and receive residential mortgage loans on terms that reasonably reflect their ability to repay the loans and that are understandable and not unfair, deceptive, and abusive. TILA section 129B(a)(2); 15 U.S.C. 1639b(a)(2).

The Dodd-Frank Act also provides creditors originating ''qualified mortgages'' special protection from liability under the ability-to-repay requirements. TILA section 129C(b), 15 U.S.C. 1639c(b). TILA generally defines a ''qualified mortgage'' as a residential mortgage loan for which: the loan does not contain negative amortization, interest-only payments, or balloon payments; the term does not exceed 30 years; the points and fees generally do not exceed three percent of the loan amount; the income or assets are considered and verified; and the underwriting is based on the maximum rate during the first five years, uses a

[71] These notices extended the comment period on the more inclusive finance charge and corresponding regulatory threshold adjustments under the 2012 TILA–RESPA and HOEPA Proposals. It did not change any other aspect of either proposal.

[72] 12 U.S.C. 5581(a)(1).

[73] Dodd-Frank Act section 1002(14), 12 U.S.C. 5481(14) (defining ''Federal consumer financial law'' to include the ''enumerated consumer laws'' and the provisions of title X of the Dodd-Frank Act), Dodd-Frank Act section 1002(12), 12 U.S.C. 5481(12) (defining ''enumerated consumer laws'' to include TILA).

payment schedule that fully amortizes the loan over the loan term, and takes into account all mortgage-related obligations. TILA section 129C(b)(2), 15 U.S.C. 1639c(b)(2). In addition, to constitute a qualified mortgage a loan must meet ''any guidelines or regulations established by the Bureau relating to ratios of total monthly debt to monthly income or alternative measures of ability to pay regular expenses after payment of total monthly debt, taking into account the income levels of the borrower and such other factors as the Bureau may determine are relevant and consistent with the purposes described in [TILA section 129C(b)(3)(B)(i)].''

The Dodd-Frank Act also provides the Bureau with authority to prescribe regulations that revise, add to, or subtract from the criteria that define a qualified mortgage upon a finding that such regulations are necessary or proper to ensure that responsible, affordable mortgage credit remains available to consumers in a manner consistent with the purposes of the ability-to-repay requirements; or are necessary and appropriate to effectuate the purposes of the ability-to-repay requirements, to prevent circumvention or evasion thereof, or to facilitate compliance with TILA sections 129B and 129C. TILA section 129C(b)(3)(B)(i), 15 U.S.C. 1639c(b)(3)(B)(i). In addition, TILA section 129C(b)(3)(A) provides the Bureau with authority to prescribe regulations to carry out the purposes of the qualified mortgage provisions, such as to ensure that responsible, affordable mortgage credit remains available to consumers in a manner consistent with the purposes of TILA section 129C. TILA section 129C(b)(3)(A), 15 U.S.C. 1939c(b)(3)(A). As discussed in the section-by-section analysis below, the Bureau is issuing certain provisions of this rule pursuant to its authority under TILA section 129C(b)(3)(B)(i).

The Dodd-Frank Act provides the Bureau with other specific grants of rulewriting authority with respect to the ability-to-repay and qualified mortgage provisions. With respect to the ability-to-repay provisions, TILA section 129C(a)(6)(D)(i) through (iii) provides that when calculating the payment obligation that will be used to determine whether the consumer can repay a covered transaction, the creditor must use a fully amortizing payment schedule and assume that: (1) The loan proceeds are fully disbursed on the date the loan is consummated; (2) the loan is repaid in substantially equal, monthly amortizing payments for principal and interest over the entire term of the loan with no balloon payment; and (3) the interest rate over the entire term of the loan is a fixed rate equal to the fully indexed rate at the time of the loan closing, without considering the introductory rate. 15 U.S.C. 1639c(a)(6)(D)(i) through (iii). However, TILA section 129C(a)(6)(D) authorizes the Bureau to prescribe regulations for calculating the payment obligation for loans that require more rapid repayment (including balloon payments), and which have an annual percentage rate that does not exceed a certain rate threshold. 15 U.S.C. 1639c(a)(6)(D).

With respect to the qualified mortgage provisions, the Dodd-Frank Act contains several specific grants of rulewriting authority. First, as described above, for purposes of defining ''qualified mortgage,'' TILA section 129C(b)(2)(A)(vi) provides the Bureau with authority to establish guidelines or regulations relating to monthly debt-to-income ratios or alternative measures of ability to pay. Second, TILA section 129C(b)(2)(D) provides that the Bureau shall prescribe rules adjusting the qualified mortgage points and fees limits described above to permit creditors that extend smaller loans to meet the requirements of the qualified mortgage provisions. 15 U.S.C. 1639c(b)(2)(D)(ii). In prescribing such rules, the Bureau must consider their potential impact on rural areas and other areas where home values are lower. *Id.* Third, TILA section 129C(b)(2)(E) provides the Bureau with authority to include in the definition of ''qualified mortgage'' loans with balloon payment features, if those loans meet certain underwriting criteria and are originated by creditors that operate predominantly in rural or underserved areas, have total annual residential mortgage originations that do not exceed a limit set by the Bureau, and meet any asset size threshold and any other criteria as the Bureau may establish, consistent with the purposes of TILA. 15 U.S.C. 1639c(b)(2)(E). As discussed in the section-by-section analysis below, the Bureau is issuing certain provisions of this rule pursuant to its authority under TILA sections 129C(a)(6)(D), (b)(2)(A)(vi), (b)(2)(D), and (b)(2)(E).

B. Other Rulemaking and Exception Authorities

This final rule also relies on other rulemaking and exception authorities specifically granted to the Bureau by TILA and the Dodd-Frank Act, including the authorities discussed below.

TILA

TILA section 105(a). As amended by the Dodd-Frank Act, TILA section 105(a), 15 U.S.C. 1604(a), directs the Bureau to prescribe regulations to carry out the purposes of TILA, and provides that such regulations may contain additional requirements, classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for all or any class of transactions that the Bureau judges are necessary or proper to effectuate the purposes of TILA, to prevent circumvention or evasion thereof, or to facilitate compliance therewith. A purpose of TILA is ''to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit.'' TILA section 102(a), 15 U.S.C. 1601(a). This stated purpose is informed by Congress's finding that ''economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit[.]'' TILA section 102(a). Thus, strengthened competition among financial institutions is a goal of TILA, achieved through the effectuation of TILA's purposes.

Historically, TILA section 105(a) has served as a broad source of authority for rules that promote the informed use of credit through required disclosures and substantive regulation of certain practices. However, Dodd-Frank Act section 1100A clarified the Bureau's section 105(a) authority by amending that section to provide express authority to prescribe regulations that contain ''additional requirements'' that the Bureau finds are necessary or proper to effectuate the purposes of TILA, to prevent circumvention or evasion thereof, or to facilitate compliance therewith. This amendment clarified the authority to exercise TILA section 105(a) to prescribe requirements beyond those specifically listed in the statute that meet the standards outlined in section 105(a). The Dodd-Frank Act also clarified the Bureau's rulemaking authority over high-cost mortgages under HOEPA pursuant to section 105(a). As amended by the Dodd-Frank Act, TILA section 105(a) authority to make adjustments and exceptions to the requirements of TILA applies to all transactions subject to TILA, except with respect to the substantive provisions of TILA section 129, 15 U.S.C. 1639, that apply to the high-cost mortgages defined in TILA section 103(bb), 15 U.S.C. 1602(bb).

TILA, as amended by the Dodd-Frank Act, states that it is the purpose of the ability-to-repay requirements of TILA section 129C to assure that consumers are offered and receive residential mortgage loans on terms that reasonably reflect their ability to repay the loans and that are understandable and not unfair, deceptive, or abusive. TILA section 129B(a)(2). The Bureau interprets this addition as a new purpose of TILA. Therefore, the Bureau believes that its authority under TILA section 105(a) to make exceptions, adjustments, and additional provisions, among other things, that the Bureau finds are necessary or proper to effectuate the purposes of TILA, to prevent circumvention or evasion thereof, or to facilitate compliance therewith applies with respect to the purpose of section 129C as well as the purpose described in section TILA section 129B(a)(2).

The purpose of TILA section 129C is informed by the findings articulated in section 129B(a) that economic stabilization would be enhanced by the protection, limitation, and regulation of the terms of residential mortgage credit and the practices related to such credit, while ensuring that responsible and affordable mortgage credit remains available to consumers.

As discussed in the section-by-section analysis below, the Bureau is issuing regulations to carry out TILA's purposes, including such additional requirements, adjustments, and exceptions as, in the Bureau's judgment, are necessary and proper to carry out the purposes of TILA, prevent circumvention or evasion thereof, or to facilitate compliance therewith. In developing these aspects of the final rule pursuant to its authority under TILA section 105(a), the Bureau has considered the purposes of TILA, including the purposes of TILA section 129C, and the findings of TILA, including strengthening competition among financial institutions and promoting economic stabilization, and the findings of TILA section 129B(a)(1), that economic stabilization would be enhanced by the protection, limitation, and regulation of the terms of residential mortgage credit and the practices related to such credit, while ensuring that responsible, affordable mortgage credit remains available to consumers. The Bureau believes that ensuring that mortgage credit is offered and received on terms consumers can afford ensures the availability of responsible, affordable mortgage credit.

TILA section 129B(e). Dodd-Frank Act section 1405(a) amended TILA to add new section 129B(e), 15 U.S.C. 1639B(e). That section authorizes the Bureau to prohibit or condition terms, acts, or practices relating to residential mortgage loans that the Bureau finds to be abusive, unfair, deceptive, predatory, necessary or proper to ensure that responsible, affordable mortgage credit remains available to consumers in a manner consistent with the purposes of TILA section 129C, necessary or proper to effectuate the purposes of sections 129B and 129C, to prevent circumvention or evasion thereof, or to facilitate compliance with such sections, or are not in the interest of the consumer. In developing rules under TILA section 129B(e), the Bureau has considered whether the rules are in the interest of the consumer, as required by the statute. As discussed in the section-by-section analysis below, the Bureau is issuing portions of this rule pursuant to its authority under TILA section 129B(e).

The Dodd-Frank Act

Dodd-Frank Act section 1022(b). Section 1022(b)(1) of the Dodd-Frank Act authorizes the Bureau to prescribe rules ''as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof.'' 12 U.S.C. 5512(b)(1). TILA and title X of the Dodd-Frank Act are Federal consumer financial laws. Accordingly, the Bureau is exercising its authority under Dodd-Frank Act section 1022(b) to prescribe rules that carry out the purposes and objectives of TILA and title X and prevent evasion of those laws.

V. Section-by-Section Analysis

Section 1026.25 Record Retention

25(a) General Rule

Section 1416 of the Dodd-Frank Act revised TILA section 130(e) to extend the statute of limitations for civil liability for a violation of TILA section 129C, as well as sections 129 and 129B, to three years after the date a violation occurs. Existing § 1026.25(a) requires that creditors retain evidence of compliance with Regulation Z for two years after disclosures must be made or action must be taken. Accordingly, the Board proposed to revise § 226.25(a) [74] to require that creditors retain records that show compliance with proposed § 226.43, which would implement TILA section 129C, for at least three years after consummation. The Board did not propose to alter the regulation's existing clarification that administrative agencies responsible for enforcing Regulation Z may require creditors under the agency's jurisdiction to retain records for a longer period, if necessary to carry out the agency's enforcement responsibilities under TILA section 108, 15 U.S.C. 1607. Under TILA section 130(e), as amended by Dodd-Frank, the statute of limitations for civil liability for a violation of other sections of TILA remains one year after the date a violation occurs, except for private education loans under 15 U.S.C. 1650(a), actions brought under section 129 or 129B, or actions brought by a State attorney general to enforce a violation of section 129, 129B, 129C, 129D, 129E, 129F, 129G, or 129H. 15 U.S.C. 1640(e). Moreover, as amended by section 1413 of the Dodd-Frank Act, TILA provides that when a creditor, an assignee, other holder or their agent initiates a foreclosure action, a consumer may assert a violation of TILA section 129C(a) ''as a matter of defense by recoupment or setoff.'' TILA section 130(k). There is no time limit on the use of this defense.

As discussed below, the Bureau is adopting minor modifications to § 1026.25(a) and adding in new § 1026.25(c) to reflect section 1416 of the Dodd-Frank Act, in § 1026.25(c)(3) as well as other exceptional record retention requirements related to mortgage loans.

25(c) Records Related to Certain Requirements for Mortgage Loans

The Bureau is adopting the revision proposed in § 226.25(a) to require a creditor to retain records demonstrating compliance with § 1026.43 consistent with the extended statute of limitations for violations of that section, though the Bureau is adopting this requirement in § 1026.25(c)(3) to provide additional clarity. As the 2012 TILA–RESPA Proposal proposed new § 1026.25(c)(1) and the 2012 Loan Originator Proposal proposed new § 1026.25(c)(2), the Bureau concludes that adding new § 1026.25(c)(3) eases compliance burden by placing all record retention requirements that are related to mortgage loans and which differ from the general record retention in one section, § 1026.25(c). Likewise, the Bureau is amending § 1026.25(a) to reflect that certain record retention requirements, such as records related to minimum standards for transactions secured by a dwelling, are governed by § 1026.43(c).

Commenters did not provide the Bureau with significant, specific feedback with respect to proposed § 226.25(a), although industry

[74] This section-by-section analysis discusses the Board's proposal by reference to the Board's Regulation Z, 12 CFR part 226, which the Board proposed to amend, and discusses the Bureau's final rule by reference to the Bureau's Regulation Z, 12 CFR part 1026, which this final rule amends.

commenters generally expressed concern with respect to the compliance burden of the 2011 ATR Proposal. Increasing the period a creditor must retain records from two to three years may impose some marginal increase in the creditor's compliance burden in the form of incremental cost of storage. However, the Bureau believes that even absent the rule, responsible creditors will likely elect to retain records of compliance with § 1026.43 for a period of time well beyond three years, given that the statute allows consumers to bring a defensive claim for recoupment or setoff in the event that a creditor or assignee initiates foreclosure proceedings. Indeed, at least one commenter noted this tension and requested that the Bureau provide further regulatory instruction, although the Bureau does not deem it necessary to mandate recordkeeping burdens beyond what is required by section 1416 of the Dodd-Frank Act. Furthermore, the record-keeping burden imposed by the rule is tailored only to show compliance with § 1026.43, and the Bureau believes is justified to protect the interests of both creditors and consumers in the event that an affirmative claim is brought during the first three years after consummation.

The Bureau believes that calculating the record retention period under § 1026.43 from loan consummation facilitates compliance by establishing a single, clear start to the period, even though a creditor will take action (*e.g.,* underwriting the covered transaction and offering a consumer the option of a covered transaction without a prepayment penalty) over several days or weeks prior to consummation. The Bureau is thus adopting the timeframe as proposed to reduce compliance burden.

Existing comment 25(a)–2 clarifies that, in general, a creditor need retain only enough information to reconstruct the required disclosures or other records. The Board proposed, and the Bureau is adopting, amendments to comment 25(a)–2 and a new comment 25(c)(3)–1 to clarify that, if a creditor must verify and document information used in underwriting a transaction subject to § 1026.43, the creditor must retain evidence sufficient to demonstrate having done so, in compliance with § 1026.25(a) and § 1026.25(c)(3). In an effort to reduce compliance burden, comment 25(c)(3)–1 also clarifies that creditors need not retain actual paper copies of the documentation used to underwrite a transaction but that creditors must be able to reproduce those records accurately.

The Board proposed comment 25(a)–7 to provide guidance on retaining records evidencing compliance with the requirement to offer a consumer an alternative covered transaction without a prepayment penalty, as discussed below in the section-by-section analysis of § 1026.43(g)(3) through (5). The Bureau believes the requirement to offer a transaction without a prepayment penalty under TILA section 129C(c)(4) is intended to ensure that consumers who choose an alternative covered transaction with a prepayment penalty do so voluntarily. The Bureau further believes it is unnecessary, and contrary to the Bureau's efforts to streamline its regulations, facilitate regulatory compliance, and minimize compliance burden, for a creditor to document compliance with the requirement to offer an alternative covered transaction without a prepayment penalty when a consumer does not choose a transaction with a prepayment penalty or if the covered transaction is not consummated. Accordingly, the Bureau is adopting as proposed comment 25(a)–7 as comment 25(c)(3)–2, to clarify that a creditor must retain records that document compliance with that requirement if a transaction subject to § 1026.43 is consummated with a prepayment penalty, but need not retain such records if a covered transaction is consummated without a prepayment penalty or a covered transaction is not consummated. *See* § 1026.43(g)(6).

The Board proposed comment 25(a)–7 also to provide specific guidance on retaining records evidencing compliance with the requirement to offer a consumer an alternative covered transaction without a prepayment penalty when a creditor offers a transaction through a mortgage broker. As discussed in detail below in the section-by-section analysis of § 1026.43(g)(4), the Board proposed that if the creditor offers a covered transaction with a prepayment penalty through a mortgage broker, the creditor must present the mortgage broker an alternative covered transaction without a prepayment penalty. Also, the creditor must provide, by agreement, for the mortgage broker to present to the consumer that transaction or an alternative covered transaction without a prepayment penalty offered by another creditor that has a lower interest rate or a lower total dollar amount of origination points or fees and discount points than the creditor's presented alternative covered transaction. The Bureau did not receive significant comment on this clarification, and is adopting the comment largely as proposed, renumbered as comment 25(c)(3)–2. Comment 25(c)(3)–2 also clarifies that, to demonstrate compliance with § 1026.43(g)(4), the creditor must retain a record of (1) the alternative covered transaction without a prepayment penalty presented to the mortgage broker pursuant to § 1026.43(g)(4)(i), such as a rate sheet, and (2) the agreement with the mortgage broker required by § 1026.34(g)(4)(ii).

Section 1026.32 Requirements for High-Cost Mortgages

32(b) Definitions

32(b)(1)

Points and Fees—General

Section 1412 of the Dodd-Frank Act added TILA section 129C(b)(2)(A)(vii), which defines a ''qualified mortgage'' as a loan for which, among other things, the total ''points and fees'' do not exceed 3 percent of the total loan amount. The limits on points and fees for qualified mortgages are implemented in new § 1026.43(e)(3).

TILA section 129C(b)(2)(C) generally defines ''points and fees'' for qualified mortgages to have the same meaning as in TILA section 103(aa)(4) (renumbered as section 103(bb)(4)), which defines ''points and fees'' for the purpose of determining whether a transaction qualifies as a high-cost mortgage under HOEPA.[75] TILA section 103(aa)(4) is implemented in current § 1026.32(b)(1). Accordingly, the Board proposed in § 226.43(b)(9) that, for a qualified mortgage, ''points and fees'' has the same meaning as in § 226.32(b)(1).

The Board also proposed in the 2011 ATR Proposal to amend § 226.32(b)(1) to implement revisions to the definition of ''points and fees'' under section 1431 of the Dodd-Frank Act. Among other things, the Dodd-Frank Act excluded certain private mortgage insurance premiums from, and added loan originator compensation and prepayment penalties to, the definition of ''points and fees'' that had previously

[75] The Dodd-Frank Act renumbered existing TILA section 103(aa), which contains the definition of ''points and fees,'' for the high-cost mortgage points and fees threshold, as section 103(bb). *See* § 1100A(1)(A) of the Dodd-Frank Act. However, in defining points and fees for the qualified mortgage points and fees limits, TILA section 129C(b)(2)(C) refers to TILA section 103(aa)(4) rather than TILA section 103(bb)(4). To give meaning to this provision, the Bureau concludes that the reference to TILA section in 103(aa)(4) in TILA section 129C(b)(2)(C) is mistaken and therefore interprets TILA section 129C(b)(2)(C) as referring to the points and fees definition in renumbered TILA section 103(bb)(4). This proposal generally references TILA section 103(aa) to refer to the pre-Dodd-Frank provision, which is in effect until the Dodd-Frank Act's amendments take effect, and TILA section 103(bb) to refer to the provision as amended.

applied to high-cost mortgage loans under HOEPA. In the Bureau's 2012 HOEPA Proposal, the Bureau republished the Board's proposed revisions to § 226.32(b)(1), with only minor changes, in renumbered § 1026.32(b)(1).

The Bureau noted in its 2012 HOEPA Proposal that it was particularly interested in receiving comments concerning any newly-proposed language and the application of the definition in the high-cost mortgage context. The Bureau received numerous comments from both industry and consumer advocacy groups, the majority of which were neither specific to newly-proposed language nor to the application of the definition to high-cost mortgages. These comments largely reiterated comments that the Board and the Bureau had received in the ATR rulemaking docket. The Bureau is addressing comments received in response to 2012 HOEPA Proposal in the 2013 HOEPA Final Rule. Similarly, comments received in response to the Board's 2011 ATR Proposal are discussed in this final rule. The Bureau is carefully coordinating the 2013 HOEPA and ATR Final Rules to ensure a consistent and cohesive regulatory framework. The Bureau is now finalizing § 1026.32(b)(1), (b)(3), (b)(4)(i), (b)(5), and (b)(6)(i) in this rule in response to the comments received on both proposals. The Bureau is finalizing § 1026.32(b)(2), (b)(4)(ii), and (b)(6)(ii) in the 2013 HOEPA Final Rule.

Existing § 1026.32(b)(1) defines ''points and fees'' by listing included charges in § 1026.32(b)(1)(i) through (iv). As discussed below, the Board proposed revisions to § 226.32(b)(1)(i) through (iv) and proposed to add new § 226.32(b)(1)(v) and (vi). In the 2012 HOEPA Proposal, the Bureau proposed to add the phrase ''in connection with a closed-end mortgage loan'' to § 1026.32(b)(1) to clarify that its definition of ''points and fees'' would have applied only for closed-end mortgages. The Bureau also proposed to define ''points and fees'' in § 1026.32(b)(3) for purposes of defining which open-end credit plans qualify as ''high-cost mortgages'' under HOEPA. However, that section is not relevant to this rulemaking because the ability-to-repay requirement in TILA section 129C does not apply to open-end credit. Accordingly, the Bureau is adopting § 1026.32(b)(1) with the clarification that its definition of ''points and fees'' is ''in connection with a closed-end mortgage loan.''

Payable at or before consummation. In the 2011 ATR Proposal, the Board noted that the Dodd-Frank Act removed the phrase ''payable at or before closing'' from the high-cost mortgage points and fees test in TILA section 103(aa)(1)(B). *See* TILA section 103(bb)(1)(A)(ii). Prior to the Dodd-Frank Act, fees and charges were included in points and fees for the high-cost mortgage points and fees test only if they were payable at or before closing. The phrase ''payable at or before closing'' is also not in TILA's provisions on the points and fees cap for qualified mortgages. *See* TILA section 129C(b)(2)(A)(vii), (b)(2)(C). Thus, the Board stated that, with a few exceptions, the statute provides that any charge that falls within the ''points and fees'' definition must be counted toward the limits on points and fees for both high-cost mortgages and qualified mortgages, even if it is payable after loan closing. The Board noted that the exceptions are mortgage insurance premiums and charges for credit insurance and debt cancellation and suspension coverage. The statute expressly states that these premiums and charges are included in points and fees only if payable at or before closing. *See* TILA section 103(bb)(1)(C) (for mortgage insurance) and TILA section 103(bb)(4)(D) (for credit insurance and debt cancellation and suspension coverage).

The Board expressed concern that some fees that occur after closing, such as fees to modify a loan, might be deemed to be points and fees. If so, the Board cautioned that calculating the points and fees to determine whether a transaction is a qualified mortgage may be difficult because the amount of future fees (*e.g.,* loan modification fees) cannot be known prior to closing. The Board noted that creditors might be exposed to excessive litigation risk if consumers were able at any point during the life of a mortgage to argue that the points and fees for the loan exceed the qualified mortgage limits due to fees imposed after loan closing. The Board expressed concern that creditors therefore might be discouraged from making qualified mortgages, which would undermine Congress's goal of increasing incentives for creditors to make more stable, affordable loans. The Board requested comment on whether any other types of fees should be included in points and fees only if they are ''payable at or before closing.''

Several industry commenters stated that charges paid after closing should not be included in points and fees and requested that the Bureau clarify whether such charges are included. For example, some industry commenters sought confirmation that charges for a subsequent loan modification would not be included in points and fees. More generally, industry commenters argued that they would have difficulty calculating charges that would be paid after closing and that including such charges in points and fees would create uncertainty and litigation risk. In response to the Bureau's 2012 HOEPA Proposal, one consumer advocate noted that there are inconsistent and confusing standards for when charges must be payable to be included in points and fees. This commenter recommended that the Bureau adopt a ''known at or before closing'' standard, arguing that this standard would clarify that financed points are included, would prevent creditors from evading the points and fees test by requiring consumers to pay charges after consummation, and would provide certainty to creditors that must know the amount of points and fees at or before closing.

The Bureau appreciates that creditors need certainty in calculating points and fees so they can ensure that they are originating qualified mortgages (or are not exceeding the points and fees thresholds for high-cost mortgages). The Dodd-Frank Act provides that for the points and fees tests for both qualified mortgages and high-cost mortgages, only charges ''payable in connection with'' the transaction are included in points and fees. *See* TILA sections 103(bb)(1)(A)(ii) (high-cost mortgages) and 129C(b)(2)(A)(vii) (qualified mortgages). The Bureau interprets this ''in connection with'' requirement as limiting the universe of charges that need to be included in points and fees. To clarify when charges or fees are ''in connection with'' a transaction, the Bureau is specifying in § 1026.32(b)(1) that fees or charges are included in points and fees only if they are ''known at or before consummation.''

The Bureau is also adding new comment 32(b)(1)–1, which provides examples of fees and charges that are and are not known at or before consummation. The comment explains that charges for a subsequent loan modification generally would not be included in points and fees because, at consummation, the creditor would not know whether a consumer would seek to modify the loan and therefore would not know whether charges in connection with a modification would ever be imposed. Indeed, loan modification fees likely would not be included in the finance charge under § 1026.4, as they would not be charges imposed by creditor as an incident to or a condition of the extension of credit. Thus, this clarification is consistent with the definition of the finance charge. Comment 32(b)(1)–1 also clarifies that the maximum prepayment penalties that may be charged or collected under the terms of a mortgage loan are included in points and fees under § 1026.32(b)(1)(v). In addition, comment 32(b)(1)–1 notes that, under § 1026.32(b)(1)(i)(C)(*1*) and (iv), premiums or other charges for private mortgage insurance and credit insurance payable after consummation are not included in points and fees. This means that such charges may be included in points and fees only if they are payable at or before consummation. Thus, even if the amounts of such premiums or other charges are known at or before consummation, they are included in points and fees only if they are payable at or before consummation.

32(b)(1)(i)

Points and Fees—Included in the Finance Charge

TILA section 103(aa)(4)(A) specifies that ''points and fees'' includes all items included in the finance charge, except interest or the time-price differential. This provision is implemented in current § 1026.32(b)(1)(i). Section 1431 of the Dodd-Frank Act added TILA section 103(bb)(1)(C), which excludes from points and fees certain types and amounts of mortgage insurance premiums.

The Board proposed to revise § 226.32(b)(1)(i) to implement these provisions. The Board proposed to move the exclusion of interest or the time-price differential to new § 226.32(b)(1)(i)(A). The Board also proposed to add § 226.32(b)(1)(i)(B) to implement the new exclusion for certain mortgage insurance. In § 226.32(b)(1)(i), the Board proposed to revise the phrase ''all items required to be disclosed under § 226.4(a) and 226.4(b)'' to read ''all items considered to be a finance charge under § 226.4(a) and 226.4(b)'' because § 226.4 does not itself require disclosure of the finance charge.

One industry commenter argued that the definition of points and fees was overbroad because it included all items considered to be a finance charge. The commenter asserted that several items that are included in the finance charge under § 1026.4(b) are vague or inapplicable in the context of mortgage transactions or duplicate items specifically addressed in other provisions. Several industry commenters also requested clarification about whether certain types of fees and charges are included in points and fees. At least two commenters asked that the Bureau clarify that closing agent costs are not included in points and fees.

The Bureau is adopting renumbered § 1026.32(b)(1)(i) and (i)(A) substantially as proposed, with certain clarifications in the commentary and in other parts of the rule as discussed below to address commenters' requests for clarification. For consistency with the language in § 1026.4, the Bureau is revising § 1026.32(b)(1)(i) to refer to ''items included in the finance charge'' rather than ''items considered to be a finance charge.''

As noted above, several commenters requested clarification regarding whether certain types of charges would be included in points and fees. With respect to closing agent charges, § 1026.4(a)(2) provides a specific rule for when such charges must be included in the finance charge. If they are not included in the finance charge, they would not be included in points and fees. Moreover, as discussed below and in new comment 32(b)(1)(i)(D)–1, certain closing agent charges may also be excluded from points and fees as bona fide third-party charges that are not retained by the creditor, loan originator, or an affiliate of either.

The Board also proposed to revise comment 32(b)(1)(i)–1, which states that § 226.32(b)(1)(i) includes in the total ''points and fees'' items defined as finance charges under § 226.4(a) and 226.4(b). The comment explains that items excluded from the finance charge under other provisions of § 226.4 are not included in the total ''points and fees'' under § 226.32(b)(1)(i), but may be included in ''points and fees'' under § 226.32(b)(1)(ii) and (iii). The Board proposed to revise this comment to state that items excluded from the finance charge under other provisions of § 226.4 may be included in ''points and fees'' under § 226.32(b)(1)(ii) through (vi).[76] The proposed revision was intended to reflect the additional items added to the definition of ''points and fees'' by the Dodd-Frank Act and corrected the previous omission of § 226.32(b)(1)(iv). *See* proposed § 226.32(b)(1)(v) and (vi).

The proposed comment also would have added an example of how this rule would operate. Under that example, a fee imposed by the creditor for an appraisal performed by an employee of the creditor meets the general definition of ''finance charge'' under § 226.4(a) as ''any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or a condition of the extension of credit.'' However, § 226.4(c)(7) expressly provides that appraisal fees are not finance charges. Therefore, under the general rule in proposed § 226.32(b)(1)(i) providing that finance charges must be counted as points and fees, a fee imposed by the creditor for an appraisal performed by an employee of the creditor would not have been counted in points and fees. Proposed § 226.32(b)(1)(iii), however, would have expressly included in points and fees items listed in § 226.4(c)(7) (including appraisal fees) if the creditor receives compensation in connection with the charge. A creditor would receive compensation for an appraisal performed by its own employee. Thus, the appraisal fee in this example would have been included in the calculation of points and fees.

The Bureau did not receive substantial comment on this proposed guidance. The Bureau is adopting comment 32(b)(1)(i)–1, with certain revisions for clarity. As revised, comment 32(b)(1)(i)–1 explains that certain items that may be included in the finance charge under § 1026.32(b)(1)(i) are excluded under § 1026.32(b)(1)(i)(A) through (F).

Mortgage Insurance

Under existing § 1026.32(b)(1)(i), mortgage insurance premiums are included in the finance charge and therefore are included in points and fees if payable at or before closing. As noted above, the Board proposed new § 226.32(b)(1)(i)(B) to implement TILA section 103(bb)(1)(C), which provides that points and fees shall exclude certain charges for mortgage insurance premiums. Specifically, the statute excludes: (1) Any premium charged for insurance provided by an agency of the Federal Government or an agency of a State; (2) any amount that is not in excess of the amount payable under policies in effect at the time of origination under section 203(c)(2)(A) of the National Housing Act, provided that the premium, charge, or fee is required to be refundable on a pro-rated basis and the refund is automatically issued upon notification of the satisfaction of the underlying mortgage loan; and (3) any premium paid by the consumer after closing.

The Board noted that the exclusions for certain premiums could plausibly be interpreted to apply to the definition of points and fees solely for purposes of high-cost mortgages and not for qualified mortgages. TILA section

[76] Proposed comment 32(b)(1)(i)–1 contained a typographical error. It stated that ''[i]tems excluded from the finance charge under other provisions of § 226.4 are not *excluded* in the total ''points and fees'' under § 226.32(b)(1)(i), but may be included in ''points and fees'' under § 226.32(b)(1)(ii) through § 226.32(b)(1)(vi).'' (emphasis added). It should have read that such items ''are not *included* in the total ''points and fees'' under § 226.32(b)(1)(i), but may be included in ''points and fees'' under § 226.32(b)(1)(ii) through § 226.32(b)(1)(vi).''

129C(b)(2)(C)(i) cross-references TILA section 103(aa)(4) (renumbered as 103(bb)(4)) for the definition of ''points and fees,'' but the provision on mortgage insurance appears in TILA section 103(bb)(1)(C) and not in section 103(bb)(4). The Board also noted that certain provisions in the Dodd-Frank Act's high-cost mortgage section regarding points and fees are repeated in the qualified mortgage section on points and fees. For example, both the high-cost mortgage provisions and the qualified mortgage provisions expressly exclude from points and fees ''bona fide third party charges not retained by the mortgage originator, creditor, or an affiliate of the creditor or mortgage originator.'' TILA sections 103(bb)(1)(A)(ii) (for high-cost mortgages), 129C(b)(2)(C)(i) (for qualified mortgages). The mortgage insurance provision, however, does not separately appear in the qualified mortgage section.

Nonetheless, the Board concluded that the better interpretation of the statute is that the mortgage insurance provision in TILA section 103(bb)(1)(C) applies to the meaning of points and fees for both high-cost mortgages and qualified mortgages. The Board noted that the statute's structure reasonably supports this view: by its plain language, the mortgage insurance provision prescribes how points and fees should be computed ''for purposes of paragraph (4),'' *i.e.,* for purposes of TILA section 103(bb)(4). The mortgage insurance provision contains no caveat limiting its application solely to the points and fees calculation for high-cost mortgages. Thus, the Board determined that the cross-reference in the qualified mortgage provisions to TILA section 103(bb)(4) should be read to include provisions that expressly prescribe how points and fees should be calculated under TILA section 103(bb)(4), wherever located.

The Board noted that its proposal to apply the mortgage insurance provision to the meaning of points and fees for both high-cost mortgages and qualified mortgages is also supported by the Board's authority under TILA section 105(a) to make adjustments to facilitate compliance with TILA. The Board also cited its authority under TILA section 129B(e) to condition terms, acts or practices relating to residential mortgage loans that the Board finds necessary or proper to effectuate the purposes of TILA. The purposes of TILA include ''assur[ing] that consumers are offered and receive residential mortgage loan on terms that reasonably reflect their ability to repay the loans.'' TILA section 129B(a)(2).

The Board also expressed concern about the increased risk of confusion and compliance error if points and fees were to have two separate meanings in TILA—one for determining whether a loan is a high-cost mortgage and another for determining whether a loan is a qualified mortgage. The Board stated that the proposal is intended to facilitate compliance by applying the mortgage insurance provision to the meaning of points and fees for both high-cost mortgages and qualified mortgages.

In addition, the Board expressed concern that market distortions could result due to different treatment of mortgage insurance in calculating points and fees for high-cost mortgages and qualified mortgages. ''Points and fees'' for both high-cost mortgages and qualified mortgages generally excludes ''bona fide third party charges not retained by the mortgage originator, creditor, or an affiliate of the creditor or mortgage originator.'' TILA sections 103(bb)(1)(A)(ii), 129C(b)(2)(C)(i). Under this general provision standing alone, premiums for up-front private mortgage insurance would be excluded from points and fees. However, as noted, the statute's specific provision on mortgage insurance (TILA section 103(bb)(1)(C)) imposes certain limitations on the amount and conditions under which up-front premiums for private mortgage insurance are excluded from points and fees. Applying the mortgage insurance provision to the definition of points and fees only for high-cost mortgages would mean that any premium amount for up-front private mortgage insurance could be charged on qualified mortgages; in most cases, none of that amount would be subject to the cap on points and fees for qualified mortgages because it would be excluded as a ''bona fide third party fee'' that is not retained by the creditor, loan originator, or an affiliate of either. The Board noted that, as a result, consumers who obtain qualified mortgages could be vulnerable to paying excessive up-front private mortgage insurance costs. The Board concluded that this outcome would undercut Congress's clear intent to ensure that qualified mortgages are products with limited fees and more safe features.

For the reasons noted by the Board, the Bureau interprets the mortgage insurance provision in TILA section 103(bb)(1)(C) as applying to the meaning of points and fees for both high-cost mortgages and qualified mortgages. The Bureau is also adopting this approach pursuant to its authority under TILA sections 105(a) and 129C(b)(3)(B)(i). Applying the mortgage insurance provision to the meaning of points and fees for qualified mortgages is necessary and proper to effectuate the purposes of, and facilitate compliance with the purposes of, the ability-to-repay requirements in TILA section 129C. Similarly, the Bureau finds that it is necessary and proper to use its authority under TILA section 129C(b)(3)(B)(i) to revise, add to, or subtract from the criteria that define a qualified mortgage. As noted above, construing the mortgage insurance provision as applying to qualified mortgages will reduce the likelihood that consumers who obtain qualified mortgages will pay excessive private mortgage insurance premiums, and therefore will help ensure that responsible, affordable credit remains available to consumers in a manner consistent with the purposes of TILA section 129C.

Proposed § 226.32(b)(1)(i)(B) tracked the substance of the statute with one exception. The Board interpreted the statute as excluding from points and fees not only up-front mortgage insurance premiums under government programs but also charges for mortgage guaranties under government programs. The Board noted that it was proposing the exclusion from points and fees of both mortgage insurance premiums and guaranty fees under government programs pursuant to its authority under TILA section 105(a) to make adjustments to facilitate compliance with TILA and its purposes and to effectuate the purposes of TILA. The Board also found that the exclusion is further supported by the Board's authority under TILA section 129B(e) to condition terms, acts or practices relating to residential mortgage loans that the Board finds necessary or proper to effectuate the purposes of TILA. The purposes of TILA include ''assur[ing] that consumers are offered and receive residential mortgage loan on terms that reasonably reflect their ability to repay the loans.'' TILA section 129B(a)(2).

The Board noted that both the U.S. Department of Veterans Affairs (VA) and the U.S. Department of Agriculture (USDA) expressed concerns that, if up-front charges for guaranties provided by those agencies and State agencies were included in points and fees, their loans might exceed high-cost thresholds and exceed the cap for qualified mortgages, thereby disrupting these programs and jeopardizing an important source of credit for many consumers. The Board requested comment on its proposal to exclude up-front charges for any guaranty under a Federal or State government program, as well as any up-front mortgage insurance premiums under government programs.

Several industry commenters argued that premiums for private mortgage insurance should be excluded altogether, even if the premiums do not satisfy the statutory standard for exclusion. These commenters noted that private mortgage insurance provides substantial benefits, allowing consumers who cannot afford a down payment an alternative for obtaining credit. Another commenter noted that the refundability requirement of the rule would make private mortgage insurance more expensive.

One industry commenter asserted that the language in proposed § 226.32(b)(1)(i)(B)(*2*) was inconsistent with the statutory language and the example in the commentary. The commenter suggested that a literal reading of proposed § 226.32(b)(1)(i)(B)(*2*) would require exclusion of the entire premium if it exceeded the FHA insurance premium, rather than merely exclusion of that portion of the premium in excess of the FHA premium. Another industry commenter maintained that the term ''upfront'' is vague and that the Bureau instead should use the phrase ''payable at or before closing.''

The Bureau is adopting proposed § 226.32(b)(1)(i)(B) as reunumbered § 1026.32(b)(1)(i)(B) with no substantive changes but with revisions for clarity. The Bureau is dividing proposed § 226.32(b)(1)(i)(B) into two parts. The first part, § 1026.32(b)(1)(i)(B), addresses insurance premiums and guaranty charges under government programs. The second part, § 1026.32(b)(1)(i)(C), addresses premiums for private mortgage insurance.

Consistent with the Board's proposal, § 1026.32(b)(1)(i)(B) excludes from points and fees charges for mortgage guaranties under government programs, as well as premiums for mortgage insurance under government programs. The Bureau concurs with the Board's interpretation that, in addition to mortgage insurance premiums under government programs, the statute also excludes from points and fees charges for mortgage guaranties under government programs. Like the Board, the Bureau believes that this conclusion is further supported by TILA sections 105(a) and 129C(b)(3)(B)(i) and that it is necessary and proper to invoke this authority. The exclusion from points and fees of charges for mortgage guaranties under government programs is necessary and proper to effectuate the purposes of TILA. The Bureau is concerned that including such charges in points and fees could cause loans offered through government programs to exceed high-cost mortgage thresholds and qualified mortgage points and fees limits, potentially disrupting an important source of affordable financing for many consumers. This exclusion helps ensure that loans do not unnecessarily exceed the points and fees limits for qualified mortgages, which is consistent with the purpose, stated in TILA section 129B(a)(2), of assuring that consumers are offered and receive residential mortgage loans on terms that reasonably reflect their ability to repay the loans and with the purpose stated in TILA section 129C(b)(3)(B)(i) of ensuring that responsible, affordable mortgage credit remains available to consumers in a manner consistent with the purposes of TILA section 129C.

Proposed comment 32(b)(1)(i)–2 provided an example of a mortgage insurance premium that is not counted in points and fees because the loan was insured by the FHA. The Bureau is renumbering this comment as 32(b)(1)(i)(B)–1 and revising it to add an additional example to clarify that mortgage guaranty fees under government programs, such as VA and USDA funding fees, are excluded from points and fees. The Bureau is also deleting the reference to ''up-front'' premiums and charges. Under the statute, premiums for mortgage insurance or guaranty fees in connection with a Federal or State government program are excluded from points and fees whenever paid. The statutory provision excluding premiums or charges paid after consummation applies only to private mortgage insurance.

The Bureau is addressing exclusions for private mortgage insurance in § 1026.32(b)(1)(i)(C). For private mortgage insurance premiums payable after consummation, § 1026.32(b)(1)(i)(C)(*1*) provides that the entire amount of the premium is excluded from points and fees. For private mortgage insurance premiums payable at or before consummation, § 1026.32(b)(1)(i)(C)(*1*) provides that the portion of the premium not in excess of the amount payable under policies in effect at the time of origination under section 203(c)(2)(A) of the National Housing Act is excluded from points and fees, provided that the premium is required to be refundable on a pro-rated basis and the refund is automatically issued upon notification of the satisfaction of the underlying mortgage loan.

As noted by one commenter, the language in proposed § 226.32(b)(1)(i)(B) could be read to conflict with the statute and the commentary because it suggested that, if a private mortgage insurance premium payable at or before consummation exceeded the FHA insurance premium, then the entire private mortgage insurance premium would be included in points and fees. The Bureau is clarifying in § 1026.32(b)(1)(i)(C)(*2*) that only the portion of the private mortgage insurance premium that exceeds the FHA premium must be included in points and fees. With respect to the comments requesting that all private mortgage insurance premiums be excluded from points and fees, the Bureau notes that TILA section 103(bb)(1)(C) prescribes specific and detailed conditions for excluding private mortgage insurance premiums. Under these circumstances, the Bureau does not believe it would be appropriate to exercise its exception authority to reverse Congress's decision.

Proposed comment 32(b)(1)(i)–3 explained that private mortgage insurance premiums payable at or before consummation need not be included in points and fees to the extent that the premium does not exceed the amount payable under policies in effect at the time of origination under section 203(c)(2)(A) of the National Housing Act and the premiums are required to be refunded on a pro-rated basis and the refund is automatically issued upon notification of satisfaction of the underlying mortgage loan. Proposed comment 32(b)(1)(i)–3 also provided an example of this exclusion. Proposed comment 32(b)(1)(i)–4 explained that private mortgage insurance premiums that do not qualify for an exclusion must be included in points and fees whether paid at or before consummation, in cash or financed, whether optional or required, and whether the amount represents the entire premium or an initial payment.

The Bureau did not receive substantial comments on these proposed interpretations. The Bureau is adopting comments 32(b)(1)(i)–3, and –4 with certain revisions for clarity and renumbered as comments 32(b)(1)(i)(C)–1 and –2. Comment 32(b)(1)(i)(C)–1.i is revised to specify that private mortgage insurance premiums paid after consummation are excluded from points and fees. The Bureau also adopts clarifying changes that specify that creditors originating conventional loans—even such loans that are not eligible to be FHA loans (*i.e.,* because their principal balance is too high)—should look to the permissible up-front premium amount for FHA loans, as implemented by applicable regulations and other written authorities issued by the FHA (such as Mortgagee Letters). For example, pursuant to HUD's Mortgagee Letter 12–4 (published March 6, 2012), the allowable up-front FHA premium for single-family homes is 1.75

percent of the base loan amount.[77] Finally, the Bureau clarifies that only the portion of the single or up-front PMI premium in excess of the allowable FHA premium (*i.e.,* rather than any monthly premium or portion thereof) must be included in points and fees. Comments 32(b)(1)(i)(C)–1 and –2 also have both been revised for clarity and consistency. For example, the comments as adopted refer to premiums ''payable at or before consummation'' rather than ''up-front'' premiums and to ''consummation'' rather than ''closing.'' The Bureau notes that the statute refers to ''closing'' rather than ''consummation.'' However, for consistency with the terminology in Regulation Z, the Bureau is using the term ''consummation.''

Bona Fide Third-Party Charges and Bona Fide Discount Points

The Dodd-Frank Act amended TILA to add nearly identical provisions excluding certain bona fide third-party charges and bona fide discount points from the calculation of points and fees for both qualified mortgages and high-cost mortgages.[78] Specifically, section 1412 of the Dodd-Frank Act added new TILA section 129C(b)(2)(C), which excludes certain bona fide third-party charges and bona fide discount points from the calculation of points and fees for the qualified mortgage points and fees threshold. Similarly, section 1431 of the Dodd-Frank Act amended TILA section 103(bb)(1)(A)(ii) and added TILA section 103(dd) to provide for nearly identical exclusions in calculating points and fees for the high-cost mortgage threshold.

In the 2011 ATR Proposal, the Board proposed to implement in § 226.43(e)(3)(ii)(A) through (C) the exclusion of certain bona fide third-party charges and bona fide discount points only for the calculation of points and fees for the qualified mortgage points and fees threshold. In the 2012 HOEPA Proposal, the Bureau proposed to implement these exclusions in proposed § 1026.32(b)(5) for the points and fees threshold for high-cost mortgages. The Bureau noted that proposed § 1026.32(b)(5) was generally consistent with the Board's proposed § 226.43(e)(3)(ii)(A) through (C).

The Bureau believes that it is appropriate to consolidate these exclusions in a single provision. The Bureau is now finalizing both rules, and the exclusions are nearly identical for both the qualified mortgage and high-cost mortgage contexts. Moreover, under the Board's ATR Proposal, the points and fees calculation for the qualified mortgage points and fees threshold already would have cross-referenced the definition of points and fees for high-cost mortgages in § 226.32(b)(1). Given that the points and fees calculations for both the qualified mortgage and high-cost mortgage points and fees thresholds will use the same points and fees definition in § 1026.32(b)(1), the Bureau believes it is unnecessary to implement nearly identical exclusions from points and fees in separate provisions for qualified mortgages and high-cost mortgages. Accordingly, the Bureau is consolidating the exclusions for certain bona fide third-party charges and bona fide discount points for both qualified mortgages and high-cost mortgages in new § 1026.32(b)(1)(i)(D) through (F). In addition, the definition of ''bona fide discount points'' for the purposes of § 1026.32(b)(1)(i)(E) and (F), which the 2011 ATR Proposal would have implemented in § 226.43(e)(3)(iv), is instead being implemented in § 1026.32(b)(3).

Bona fide third-party charges. TILA Section 129C(b)(2)(C)(i) excludes from points and fees ''bona fide third party charges not retained by the mortgage originator, creditor, or an affiliate of the creditor or mortgage originator.'' Tracking the statute, proposed § 226.43(e)(3)(ii)(A) would have excluded from ''points and fees'' for qualified mortgages any bona fide third party charge not retained by the creditor, loan originator, or an affiliate of either. Proposed § 226.43(e)(3)(iii) would have specified that the term ''loan originator'' has the same meaning as in § 226.36(a)(1).

Proposed § 226.43(e)(3)(ii)(A) would also have implemented TILA section 103(bb)(1)(C), which requires that premiums for private mortgage insurance be included in ''points and fees'' as defined in TILA section 103(bb)(4) under certain circumstances. Applying general rules of statutory construction, the Board concluded that the more specific provision on private mortgage insurance supersedes the more general provision permitting any bona fide third party charge not retained by the creditor, mortgage originator, or an affiliate of either to be excluded from ''points and fees.'' Thus, proposed § 226.43(e)(3)(ii)(A) would have excluded from points and fees any bona fide third party charge not retained by the creditor, loan originator, or an affiliate of either unless the charges were premiums for private mortgage insurance that were included in points and fees under § 226.32(b)(1)(i)(B).

The Board noted that, in setting the purchase price for specific loans, Fannie Mae and Freddie Mac make loan-level price adjustments (LLPAs) to compensate offset added risks, such as a high LTV or low credit score, among many other risk factors. Creditors may, but are not required to, increase the interest rate charged to the consumer so as to offset the impact of the LLPAs or increase the costs to the consumer in the form of points to offset the lost revenue resulting from the LLPAs. The Board noted that, during outreach, some creditors argued that these points should not be counted in points and fees for qualified mortgages under the exclusion for ''bona fide third party charges not retained by the loan originator, creditor, or an affiliate of either'' in TILA section 129C(b)(2)(C).

The Board acknowledged creditors' concerns about exceeding the qualified mortgage points and fees thresholds due to LLPAs required by the GSEs. However, the Board questioned whether an exemption for LLPAs would be consistent with congressional intent in limiting points and fees for qualified mortgages. The Board noted that points charged to meet GSE risk-based price adjustment requirements are arguably no different than other points charged on loans sold to any secondary market purchaser to compensate that purchaser for added loan-level risks. Congress clearly contemplated that discount points generally should be included in points and fees for qualified mortgages.

The Board noted that an exclusion for points charged by creditors in response to secondary market LLPAs also would raise questions about the appropriate treatment of points charged by creditors to offset loan-level risks on mortgage loans that they hold in portfolio. The Board reasoned that, under normal circumstances, these points are retained by the creditor, so it would not be appropriate to exclude them from points and fees under the ''bona fide third party charge'' exclusion. However, the Board cautioned that requiring that these points be included in points and fees, when similar charges on loans sold into the secondary market are excluded, may create undesirable market

[77] *See* Department of Housing and Urban Development, Mortgagee Letter 12–4 (Mar. 6, 2012), available at *http://portal.hud.gov/hudportal/documents/huddoc?id=12-04ml.pdf.*

[78] The exclusions differ in only one respect. To exclude two or one bona fide discount points from the points and fees test for determining whether a loan is a high-cost mortgage, TILA section 103(dd)(1)(B) and (C) specified that the interest rate for personal property loans before the discount must be within 1 or 2 percentage points, respectively, of the average rate on a loan in connection with which insurance is provided under title I of the National Housing Act. TILA section 129C(b)(2)(C), which prescribes conditions for excluding bona fide discount points from points and fees for qualified mortgages, does not contain analogous provisions.

imbalances between loans sold to the secondary market and loans held in portfolio.

The Board also noted that creditors may offset risks on their portfolio loans (or on loans sold into the secondary market) by charging a higher rate rather than additional points and fees; however, the Board recognized the limits of this approach to loan-level risk mitigation due to concerns such as exceeding high-cost mortgage rate thresholds. Nonetheless, the Board noted that in practice, an exclusion from the qualified mortgage points and fees calculation for all points charged to offset loan-level risks may create compliance and enforcement difficulties. The Board questioned whether meaningful distinctions between points charged to offset loan-level risks and other points and fees charged on a loan could be made clearly and consistently. In addition, the Board observed that such an exclusion could be overbroad and inconsistent with Congress's intent that points generally be counted toward the points and fees threshold for qualified mortgages.

The Board requested comment on whether and on what basis the final rule should exclude from points and fees for qualified mortgages points charged to meet risk-based price adjustment requirements of secondary market purchasers and points charged to offset loan-level risks on mortgages held in portfolio.

Consumer advocates did not comment on this issue. Many industry commenters argued that LLPAs should be excluded from points and fees as bona fide third party charges. The GSE commenters agreed that LLPAs should be excluded as bona fide third party charges, noting that they are not retained by the creditor. One GSE commenter noted that LLPAs are set fees that are transparent and accessible via the GSEs' Web sites. Some industry commenters contended that including LLPAs in points and fees would cause many loans to exceed the points and fees cap for qualified mortgages. Other industry commenters argued that requiring LLPAs to be included in points and fees would force creditors to recover the costs through increases in the interest rate. One of the GSE commenters acknowledged the concern that creditors holding loans in portfolio could be at a disadvantage if LLPAs were excluded from points and fees and suggested that the Bureau consider allowing such creditors to exclude published loan level risk adjustment fees.

One industry commenter urged the Bureau to coordinate with the agencies responsible for finalizing the 2011 QRM Proposed Rule to avoid unintended consequences. The 2011 ARM Proposed Rule, if adopted, would require, in certain circumstances, that sponsors of MBS create premium capture cash reserve accounts to limit sponsors' ability to monetize the excess spread between the proceeds from the sale of the interests and the par value of those interests. *See* 76 FR 24113. The commenter stated that this would result in any premium in the price of a securitization backed by residential mortgage loans being placed in a first-loss position in the securitization. The commenter argued that this would make premium loans too expensive to originate and that creditors would not be able to recover LLPAs through interest rate adjustments. The commenter maintained that if the LLPAs were included in the calculation for the qualified mortgage points and fees limit, creditors would also be severely constrained in recovering LLPAs through points. The commenter argued that LLPAs therefore should be excluded from the points and fees calculation for qualified mortgages.

The Bureau is adopting § 226.43(e)(3)(ii)(A), with certain revisions, as renumbered § 1026.32(b)(1)(i)(D). As revised, § 1026.32(b)(1)(i)(D) provides that a bona fide third party charge not retained by the creditor, loan originator, or an affiliate of either the general is excluded from points and fees unless the charge is required to be included under § 1026.32(b)(1)(i)(C) (for mortgage insurance premiums), (iii) (for real estate related fees), or (iv) (for credit insurance premiums). As noted above, the Board proposed that the specific provision regarding mortgage insurance, TILA section 103(bb)(1)(C), should govern the exclusion of private mortgage insurance premiums of points and fees, rather than TILA section 129C(b)(2)(C), which provides generally for the exclusion of certain bona fide third-party charges. The Bureau likewise believes that the specific statutory provisions regarding real estate related fees and credit insurance premiums in TILA section 103(bb)(4)(C) and (D) should govern whether these charges are included in points and fees rather than the more general provisions regarding exclusion of bona fide third-party charges, TILA sections 103(bb)(1)(A)(ii) (for high-cost mortgages) or 129C(b)(2)(C) (for qualified mortgages). Thus, § 1026.32(b)(1)(i)(D) provides that the general exclusion for bona fide third-party charges applies unless the charges are required to be included under § 1026.32(b)(1)(i)(C), (iii), or (iv).

The Bureau acknowledges that TILA sections 103(bb)(1)(A)(ii) and 129C(b)(2)(C) could plausibly be read to provide for a two-step calculation of points and fees: first, the creditor would calculate points and fees as defined in TILA section 103(bb)(4); and, second, the creditor would exclude all bona fide third-party charges not retained by the mortgage originator, creditor, or an affiliate of either, as provided in TILA sections 103(bb)(1)(A)(ii) (for high-cost mortgages) and 129C(b)(2)(C) (for qualified mortgages). Under this reading, charges for, *e.g.,* private mortgage insurance could initially, in step one, be included in points and fees but then, in step two, be excluded as bona fide third-party charges under TILA sections 103(bb)(1)(A)(ii) or 129C(b)(2)(C).

To give meaning to the specific statutory provisions regarding mortgage insurance, real estate related fees, and credit insurance, the Bureau believes that the better reading is that these specific provisions should govern whether such charges are included in points and fees, rather than the general provisions excluding certain bona fide third-party charges. For example, Congress added TILA section 103(bb)(1)(C), which prescribes certain conditions under which private mortgage insurance premiums would be included in points and fees. The Bureau believes that the purpose of this provision is to help ensure that consumers with a qualified mortgage are not charged excessive private mortgage insurance premiums. If such premiums could be excluded as bona fide third-party charges under TILA sections 103(bb)(1)(A)(ii) or 129C(b)(2)(C), then the purpose of this provision would be undermined. In further support of its interpretation, the Bureau is invoking its authority under TILA section 105(a) to make such adjustments and exceptions as are necessary and proper to effectuate the purposes of TILA, including that consumers are offered and receive residential mortgage loans on terms that reasonably reflect their ability to repay the loans. Similarly, the Bureau finds that it is necessary, proper and appropriate to use its authority under TILA section 129C(b)(3)(B)(i) to revise and subtract from the statutory language. This use of authority ensures that responsible, affordable mortgage credit remains available to consumers in a manner consistent with the purpose of TILA section 129C, referenced above, as well as effectuating that purpose.

As noted above, several industry commenters argued that points charged by creditors to offset LLPAs should be excluded from points and fees under § 1026.32(b)(1)(i)(D). In setting the purchase price for loans, the GSEs impose LLPAs to offset certain credit risks, and creditors may but are not required to recoup the revenue lost as a result of the LLPAs by increasing the costs to consumers in the form of points. The Bureau believes that the manner in which creditors respond to LLPAs is better viewed as a fundamental component of how the pricing of a mortgage loan is determined rather than as a third party charge. As the Board noted, allowing creditors to exclude points charged to offset LLPAs could create market imbalances between loans sold on the secondary market and loans held in portfolio. While such imbalances could be addressed by excluding risk adjustment fees more broadly, including fees charged by creditors for loans held in portfolio, the Bureau agrees with the Board that this could create compliance and enforcement difficulties. Thus, the Bureau concludes that points charged to offset LLPAs may not be excluded from points and fees under § 1026.32(b)(1)(i)(D). To the extent that creditors offer consumers the opportunity to pay points to lower the interest rate that the creditor would otherwise charge to recover the lost revenue from the LLPAs, such points may, if they satisfy the requirements of § 1026.32(b)(1)(i)(E) or (F), be excluded from points and fees as bona fide discount points.

As noted above, one commenter expressed concern that if the requirements for premium capture cash reserve accounts proposed in the 2011 QRM Proposed Rule were adopted, creditors would have difficulty in recovering the costs of LLPAs through rate and that, because of the points and fees limits for qualified mortgages, creditors would also have trouble recovering the costs of LLPAs through up-front charges to consumers. The Bureau notes that, as proposed, the premium capture cash reserve account requirement would not apply to securities sponsored by the GSEs and would not apply to securities comprised solely of QRMs. *See* 76 FR 24112, 24120. Thus, it is not clear, that even if it were adopted, the requirement would have as substantial an impact as suggested by the commenter. In any event, the requirement has merely been proposed, not finalized. The Bureau will continue to coordinate with the agencies responsible for finalizing the 2011 QRM Proposed Rule to consider the combined effects of that rule and the instant rule.

The Board proposed comment 43(e)(3)(ii)–1 to clarify the meaning in proposed § 226.43(e)(3)(ii)(A) of ''retained by'' the loan originator, creditor, or an affiliate of either. Proposed comment 43(e)(3)(ii)–1 provided that if a creditor charges a consumer $400 for an appraisal conducted by a third party not affiliated with the creditor, pays the third party appraiser $300 for the appraisal, and retains $100, the creditor may exclude $300 of this fee from ''points and fees'' but must count the $100 it retains in ''points and fees.''

As noted above, several commenters expressed confusion about the relationship between proposed § 226.43(e)(3)(ii)(A), which would have excluded bona fide third party charges not retained by the loan originator, creditor, or an affiliate of either, and proposed § 226.32(b)(1)(iii), which would have excluded certain real estate related charges if they are reasonable, if the creditor receives no direct or indirect compensation in connection with the charges, and the charges are not paid to an affiliate of the creditor. As explained above, the Bureau interprets the more specific provision governing the inclusion in points and fees of real estate related charges (implemented in § 1026.32(b)(1)(iii)) as taking precedence over the more general exclusion for bona fide third party charges in renumbered § 1026.32(b)(1)(i)(D). Accordingly, the Bureau does not believe that the example in proposed comment 43(e)(3)(ii)–1 is appropriate for illustrating the exclusion for bona fide third party charges because the subject of the example, appraisals, is specifically addressed in § 1026.32(b)(1)(iii).

The Bureau therefore is revising renumbered comment 32(b)(1)(i)(D)–1 by using a settlement agent charge to illustrate the exclusion for bona fide third party charges. By altering this example to address closing agent charges, the Bureau is also responding to requests from commenters that the Bureau provide more guidance on whether closing agent charges are included in points and fees. As noted above, proposed § 226.43(e)(3)(iii) would have specified that the term ''loan originator,'' as used in proposed § 226.43(e)(3)(ii)(A), has the same meaning as in § 226.36(a)(1). The Bureau is moving the cross-reference to the definition of ''loan originator'' in § 226.36(a)(1) to comment 32(b)(1)(i)(D)–1.

The Board proposed comment 43(e)(3)(ii)–2 to explain that, under § 226.32(b)(1)(i)(B), creditors would have to include in ''points and fees'' premiums or charges payable at or before consummation for any private guaranty or insurance protecting the creditor against the consumer's default or other credit loss to the extent that the premium or charge exceeds the amount payable under policies in effect at the time of origination under section 203(c)(2)(A) of the National Housing Act (12 U.S.C. 1709(c)(2)(A)). The proposed comment also would have explained that these premiums or charges would be included if the premiums or charges were not required to be refundable on a pro-rated basis, or the refund is not automatically issued upon notification of the satisfaction of the underlying mortgage loan. The comment would have clarified that, under these circumstances, even if the premiums and charges were not retained by the creditor, loan originator, or an affiliate of either, they would be included in the ''points and fees'' calculation for qualified mortgages. The comment also would have cross-referenced proposed comments 32(b)(1)(i)–3 and –4 for further discussion of including private mortgage insurance premiums in the points and fees calculation.

The Bureau is adopting proposed comment 43(e)(3)(ii)–2 substantially as proposed, renumbered as comment 32(b)(i)(D)–2. In addition, the Bureau also is adopting new comments 32(b)(i)(D)–3 and –4 to explain that the exclusion of bona fide third party charges under § 1026.32(b)(1)(i)(D) does not apply to real estate-related charges and credit insurance premiums. The inclusion of these items in points and fees is specifically addressed in § 1026.32(b)(iii) and (iv), respectively.

Bona fide discount points. TILA section 129C(b)(2)(C)(ii) excludes up to two bona fide discount points from points and fees under certain circumstances. Specifically, it excludes up to two bona fide discount points if the interest rate before the discount does not exceed the average prime offer rate by more than two percentage points. Alternatively, it excludes up to one discount point if the interest rate before the discount does not exceed the average prime offer rate by more than one percentage point. The Board proposed to implement this provision in proposed § 226.43(e)(3)(ii)(B) and (C).

Proposed § 226.43(e)(3)(ii)(B) would have permitted a creditor to exclude from points and fees for a qualified mortgage up to two bona fide discount points paid by the consumer in connection with the covered transaction, provided that: (1) The interest rate before the rate is discounted does not exceed the average prime offer rate, as defined in § 226.45(a)(2)(ii), by more than one percent; and (2) the average prime offer rate used for purposes of paragraph 43(e)(3)(ii)(B)(*1*) is the same average prime offer rate that applies to a comparable transaction as of the date the discounted interest rate for the covered transaction is set.

Proposed § 226.43(e)(3)(ii)(C) would have permitted a creditor to exclude from points and fees for a qualified mortgage up to one bona fide discount point paid by the consumer in connection with the covered transaction, provided that: (1) The interest rate before the discount does not exceed the average prime offer rate, as defined in § 226.45(a)(2)(ii), by more than two percent; (2) the average prime offer rate used for purposes of § 226.43(e)(3)(ii)(C)(*1*) is the same average prime offer rate that applies to a comparable transaction as of the date the discounted interest rate for the covered transaction is set; and (3) two bona fide discount points have not been excluded under § 226.43(e)(3)(ii)(B).

Several industry commenters argued that creditors should be permitted to exclude from points and fees more than two discount points. Some industry commenters maintained that creditors should be permitted to exclude as many discount points as consumers choose to pay. Another commenter contended that creditors should be able to exclude as many as three discount points.

A few industry commenters requested eliminating the requirement that, for the discount points to be bona fide, the interest rate before the discount must be within one or two percentage points of the average prime offer rate. One industry commenter argued that this requirement is too inflexible. Several commenters recommended that this requirement be adjusted for jumbo loans and for second homes. Another commenter claimed that this requirement would limit the options for consumers paying higher interest rates and that these are the consumers for whom it would be most beneficial to pay down their interest rates.

Several commenters argued that the effect of these two limitations for excluding discount points from points and fees—the limit on the number of discount points that could be excluded and the requirement that the pre-discount rate be within one or two points of the average prime offer rate—would have a negative impact on consumers. They maintained that these limitations would prevent consumers from choosing their optimal combination of interest rate and points for their financial circumstances.

One commenter noted that proposed § 226.43(e)(3)(ii)(B) and (C) would require that, for the discount points or point to be excluded from points and fees, the interest rate before the discount must not exceed the average prime offer rate by more than one or two ''percent,'' respectively. The commenter recommended that, for clarity and consistency with the statute, the requirement should instead require that the interest rate before the discount be within one or two ''percentage points'' of the average prime offer rate.

The Bureau is adopting proposed § 226.43(e)(3)(ii)(B) and (C), renumbered as § 1026.32(b)(1)(i)(E) and (F), with certain revisions. As suggested by a commenter, the Bureau is revising both § 1026.32(b)(1)(i)(E)(*1*) and (F)(*1*) to require that, to exclude the discount points or point, the interest rate must be within one or two ''percentage points'' (rather than ''percent'') of the average prime offer rate. This formulation is clearer and consistent with the statutory language. The Bureau is also adding § 1026.32(b)(1)(i)(E)(*2*) and (F)(*2*) to implement TILA section 103(dd)(1)(B) and (C), which specify that, to exclude discount points from points and fees for purposes of determining whether a loan is a high-cost mortgage, the interest rate for personal property loans before the discount must be within one or two percentage points, respectively, of the average rate on a loan in connection with which insurance is provided under title I of the National Housing Act. This provision does not apply to the points and fees limit for qualified mortgages, regardless of whether a loan is a high-cost mortgage. The provision is included in the final rule for completeness. Finally, in § 1026.32(b)(1)(i)(F), the Bureau is clarifying that bona fide discount points cannot be excluded under § 1026.32(b)(1)(i)(F) if any bona fide discount points already have been excluded under § 1026.32(b)(1)(i)(E).

As noted above, several commenters urged the Bureau to alter or eliminate the limitations on how many discount points may be excluded and the requirement that the pre-discount interest rate must be within one or two points of the average prime offer rate. A few industry commenters also requested that the Bureau adjust the limitation on the pre-discount interest rate specifically for jumbo loans and loans for vacation homes. These commenters noted that interest rates for such loans otherwise would often be too high to qualify for the exclusion for bona fide discount points. The Bureau recognizes that these limitations may circumscribe the ability of consumers to purchase discount points to lower their interest rates. Nevertheless, the Bureau does not believe it would be appropriate to exercise its exception authority. Congress apparently concluded that there was a greater probability of consumer injury when consumers purchased more than two discount points or when the consumers were using discount points to buy down higher interest rates. The Bureau also notes that, in other sections of the Dodd-Frank Act, Congress prescribed different thresholds above the average prime offer rate for jumbo loans. *See* TILA sections 129C(c)(1)(B) (prepayment penalties) and 129H(f)(2) (appraisals). Congress did not do so in the provision regarding exclusion of bona fide discount points.

The Bureau is adding new comment 32(b)(1)(i)(E)–2 to note that the term ''bona fide discount point'' is defined in § 1026.32(b)(3). To streamline the rule, the Bureau is moving into new comment 32(b)(1)(i)(E)–2 the explanation that the average prime offer rate used for purposes of for both § 1026.32(b)(1)(i)(E) and (F) is the average prime offer rate that applies to a comparable transaction as of the date the discounted interest rate for the covered transaction is set. The Board proposed comment 43(e)(3)(ii)–5 to clarify that the average prime offer rate table indicates how to identify the comparable transaction. The Bureau is adding the language from proposed comment 43(e)(3)(ii)–5 to new comment 32(b)(1)(i)(E)–2, with a revision to the cross-reference for the comment addressing ''comparable transaction.''

Proposed comment 43(e)(3)(ii)–3 would have included an example to illustrate the rule permitting exclusion of two bona fide discount points. The example would have assumed a covered transaction that is a first-lien, purchase money home mortgage with a fixed interest rate and a 30-year term. It would also have assumed that the consumer locks in an interest rate of 6 percent on May 1, 2011, that was discounted from a rate of 6.5 percent because the consumer paid two discount points. Finally, assume that the average prime offer rate as of May 1, 2011 for first-lien, purchase money home mortgages with a fixed interest rate and a 30-year term is 5.5 percent. In this example, the creditor would have been able to exclude two discount points from the ''points and fees'' calculation because the rate from which the discounted rate was derived exceeded the average prime offer rate for a comparable transaction as of the date the rate on the covered transaction was set by only 1 percent.

The Bureau is adopting proposed comment 43(e)(3)(ii)–3 substantially as proposed but renumbered as comment 32(b)(1)(i)(E)–3. The Bureau is also adding new comment 32(b)(1)(i)(F)–1 to explain that comments 32(b)(1)(i)(E)–1 and –2 provide guidance concerning the definitions of ''bona fide discount point'' and ''average prime offer rate,'' respectively.

Proposed comment 43(e)(3)(ii)–4 would have provided an example to illustrate the rule permitting exclusion of one bona fide discount point. The example assumed a covered transaction that is a first-lien, purchase money home mortgage with a fixed interest rate and a 30-year term. The example also would have assumed that the consumer locks in an interest rate of 6 percent on May 1, 2011, that was discounted from a rate of 7 percent because the consumer paid four discount points. Finally, the example would have assumed that the average prime offer rate as of May 1, 2011, for first-lien, purchase money home mortgages with a fixed interest rate and a 30-year term is 5 percent.

In this example, the creditor would have been able to exclude one discount point from the ''points and fees'' calculation because the rate from which the discounted rate was derived (7 percent) exceeded the average prime offer rate for a comparable transaction as of the date the rate on the covered transaction was set (5 percent) by only 2 percent. The Bureau is adopting proposed comment 43(e)(3)(ii)–4 substantially as proposed but renumbered as comment 32(b)(1)(i)(F)–2.

32(b)(1)(ii)

When HOEPA was enacted in 1994, it required that ''all compensation paid to mortgage brokers'' be counted toward the threshold for points and fees that triggers special consumer protections under the statute. Specifically, TILA section 103(aa)(4) provided that charges are included in points and fees only if they are payable at or before consummation and did not expressly address whether ''backend'' payments from creditors to mortgage brokers funded out of the interest rate (commonly referred to as yield spread premiums) are included in points and fees.[79] This requirement is implemented in existing § 1026.32(b)(1)(ii), which requires that all compensation paid by consumers directly to mortgage brokers be included in points and fees, but does not address compensation paid by creditors to mortgage brokers or compensation paid by any company to individual employees (such as loan officers who are employed by a creditor or mortgage broker).

The Dodd-Frank Act substantially expanded the scope of compensation included in points and fees for both the high-cost mortgage threshold in HOEPA and the qualified mortgage points and fees limits.[80] Section 1431 of the Dodd-Frank Act amended TILA to require that ''all compensation paid *directly or indirectly* by a consumer *or creditor* to a mortgage originator from any source, including a mortgage originator that is also the creditor in a table-funded transaction,'' be included in points and fees. TILA section 103(bb)(4)(B) (emphasis added). Under amended TILA section 103(bb)(4)(B), compensation paid to anyone that qualifies as a ''mortgage originator'' is to be included in points and fees.[81] Thus, in addition to compensation paid to mortgage brokerage firms and individual brokers, points and fees also includes compensation paid to other mortgage originators, including employees of a creditor (i.e., loan officers). In addition, as noted above, the Dodd-Frank Act removed the phrase ''payable at or before closing'' from the high-cost mortgage points and fees test and did not apply the ''payable at or before closing'' limitation to the points and fees cap for qualified mortgages. *See* TILA sections 103(bb)(1)(A)(ii) and 129C(b)(2)(A)(vii), (b)(2)(C). Thus, the statute appears to contemplate that even compensation paid to mortgage brokers and other loan originators after consummation should be counted toward the points and fees thresholds.

This change is one of several provisions in the Dodd-Frank Act that focus on loan originator compensation and regulation, in apparent response to concerns that industry compensation practices contributed to the mortgage market crisis by creating strong incentives for brokers and retail loan officers to steer consumers into higher-priced loans. Specifically, loan originators were often paid a commission by creditors that increased with the interest rate on a transaction. These commissions were funded by creditors through the increased revenue received by the creditor as a result of the higher rate paid by the consumer and were closely tied to the price the creditor expected to receive for the loan on the secondary market as a result of that higher rate.[82] In addition, many mortgage brokers charged consumers up-front fees to cover some of their costs at the same time that they accepted backend payments from creditors out of the rate. This may have contributed to consumer confusion about where the brokers' loyalties lay.

The Dodd-Frank Act took a number of steps to address loan originator compensation issues, including: (1) Adopting requirements that loan originators be ''qualified'' as defined by Bureau regulations; (2) generally prohibiting compensation based on rate and other terms (except for loan amount) and prohibiting a loan originator from receiving compensation from both consumers and other parties in a single transaction; (3) requiring the promulgation of additional rules to prohibit steering consumers to less advantageous transactions; (4) requiring the disclosure of loan originator compensation; and (5) restricting loan originator compensation under HOEPA and the qualified mortgage provisions by including such compensation within the points and fees calculations. *See* TILA sections 103(bb)(4)(A)(ii), (B);

[79] Some commenters use the term ''yield spread premium'' to refer to any payment from a creditor to a mortgage broker that is funded by increasing the interest rate that would otherwise be charged to the consumer in the absence of that payment. These commenters generally assume that any payment to the brokerage firm by the creditor is funded out of the interest rate, reasoning that had the consumer paid the brokerage firm directly, the creditor would have had lower expenses and would have been able to charge a lower rate. Other commenters use the term ''yield spread premium'' more narrowly to refer only to a payment from a creditor to a mortgage broker that is based on the interest rate, *i.e.,* the mortgage broker receives a larger payment if the consumer agrees to a higher interest rate. To avoid confusion, the Bureau is limiting its use of the term and is instead more specifically describing the payment at issue.

[80] Currently, the points and fees threshold for determining whether a loan is a high-cost mortgage is the greater of 8 percent of the total loan amount or $400 (adjusted for inflation). Section 1431 of the Dodd-Frank Act lowered the points and fees threshold for determining whether a loan is a high-cost mortgage to 5 percent of the total transaction amount for loans of $20,000 or more and to the lesser of 8 percent of the total transaction amount or $1,000 for loans less than $20,000.

[81] ''Mortgage originator'' is generally defined to include ''any person who, for direct or indirect compensation or gain, or in the expectation of direct or indirect compensation or gain—(i) takes a residential mortgage loan application; (ii) assists a consumer in obtaining or applying to obtain a residential mortgage loan; or (iii) offers or negotiates terms of a residential mortgage loan.'' TILA section 103(dd)(2). The statute excludes certain persons from the definition, including a person who performs purely administrative or clerical tasks; an employee of a retailer of manufactured homes who does not take a residential mortgage application or offer or negotiate terms of a residential mortgage loan; and, subject to certain conditions, real estate brokers, sellers who finance three or fewer properties in a 12-month period, and servicers. TILA section 103(dd)(2)(C) through (F).

[82] For more detailed discussions, see the Bureau's 2012 Loan Originator Proposal and the final rule issued by the Board in 2010. 77 FR 55272, 55276, 55290 (Sept. 7, 2012); 75 FR 58509, 5815–16, 58519–20 (Sept. 24, 2010) (2010 Loan Originator Final Rule).

128(a)(18); 129B(b), (c); 129C(b)(2)(A)(vii), (C)(i).

The Board proposed revisions to § 226.32(b)(1)(ii) to implement the inclusion of more forms of loan originator compensation into the points and fees thresholds. Those proposed revisions tracked the statutory language, with two exceptions. First, proposed § 226.32(b)(1)(ii) did not include the phrase ''from any source.'' The Board noted that the statute covers compensation paid ''directly or indirectly'' to the loan originator, and concluded that it would be redundant to cover compensation ''from any source.'' Second, for consistency with Regulation Z, the proposal used the term ''loan originator'' as defined in § 226.36(a)(1), rather than the term ''mortgage originator'' that appears in section 1401 of the Dodd-Frank Act. *See* TILA section 103(cc)(2). The Board explained that it interpreted the definitions of mortgage originator under the statute and loan originator under existing Regulation Z to be generally consistent, with one exception that the Board concluded was not relevant for purposes of the points and fees thresholds. Specifically, the statutory definition refers to ''any person who represents to the public, through advertising or other means of communicating or providing information (including the use of business cards, stationery, brochures, signs, rate lists, or other promotional items), that such person can or will provide'' the services listed in the definition (such as offering or negotiating loan terms), while the existing Regulation Z definition does not include persons solely on this basis. The Board concluded that it was not necessary to add this element of the definition to implement the points and fees calculations anyway, reasoning that the calculation of points and fees is concerned only with loan originators that receive compensation for performing defined origination functions in connection with a consummated loan. The Board noted that a person who merely represents to the public that such person can offer or negotiate mortgage terms for a consumer has not yet received compensation for that function, so there is no compensation to include in the calculation of points and fees for a particular transaction.

In the proposed commentary, the Board explained what compensation would and would not have been included in points and fees under proposed § 226.32(b)(1)(ii). The Board proposed to revise existing comment 32(b)(1)(ii)–1 to clarify that compensation paid by either a consumer or a creditor to a loan originator, as defined in § 1026.36(a)(1), would be included in points and fees. Proposed comment 32(b)(1)(ii)–1 also stated that loan originator compensation already included in points and fees because it is included in the finance charge under § 226.32(b)(1)(i) would not be counted again under § 226.32(b)(1)(ii).

Proposed comment 32(b)(1)(ii)–2.i stated that, in determining points and fees, loan originator compensation includes the dollar value of compensation paid to a loan originator for a specific transaction, such as a bonus, commission, yield spread premium, award of merchandise, services, trips, or similar prizes, or hourly pay for the actual number of hours worked on a particular transaction. Proposed comment 32(b)(1)(ii)–2.ii clarified that loan originator compensation excludes compensation that cannot be attributed to a transaction at the time of origination, including, for example, the base salary of a loan originator that is also the employee of the creditor, or compensation based on the performance of the loan originator's loans or on the overall quality of a loan originator's loan files. Proposed comment 32(b)(1)(ii)–2.i also explained that compensation paid to a loan originator for a covered transaction must be included in the points and fees calculation for that transaction whenever paid, whether at or before closing or any time after closing, as long as the compensation amount can be determined at the time of closing. In addition, proposed comment 32(b)(1)(ii)–2.i provided three examples of compensation paid to a loan originator that would have been included in the points and fees calculation.

Proposed comment 32(b)(1)(ii)–3 stated that loan originator compensation includes amounts the loan originator retains and is not dependent on the label or name of any fee imposed in connection with the transaction. Proposed comment 32(b)(1)(ii)–3 offered an example of a loan originator imposing and retaining a ''processing fee'' and stated that such a fee is loan originator compensation, regardless of whether the loan originator expends the fee to process the consumer's application or uses it for other expenses, such as overhead.

The Board requested comment on the types of loan originator compensation that must be included in points and fees. The Board also sought comment on the appropriateness of specific examples given in the commentary.

Many industry commenters objected to the basic concept of including loan originator compensation in points and fees, urging the Bureau to use its exception authority to exclude loan originator compensation from points and fees altogether. Several industry commenters contended that other statutory provisions and rules, including the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (SAFE Act), the Board's 2010 Loan Originator Final Rule, and certain Dodd-Frank Act provisions (including those proposed to be implemented in the Bureau's 2012 Loan Originator Proposal), adequately regulate loan originator compensation and prohibit or restrict problematic loan originator compensation practices. Accordingly, they argued it is therefore unnecessary to include loan originator compensation in points and fees.

Many industry commenters also asserted that the amount of compensation paid to loan originators has little or no bearing on a consumer's ability to repay a mortgage, and thus that including loan originator compensation in points and fees under this rulemaking is unnecessary. They further asserted that including loan originator compensation in points and fees would greatly increase compliance burdens on creditors, discourage creditors from making qualified mortgages, and ultimately reduce access to credit and increase the cost of credit.

Several industry commenters argued that, if the Bureau does not exclude all loan originator compensation from points and fees, then the Bureau should at least exclude compensation paid to individual loan originators (*i.e.,* loan officers who are employed by creditors or mortgage brokerage firms). They argued that compensation paid to individual loan originators is already included in the cost of the loan, either in the interest rate or in origination fees. They maintained that including compensation paid to individual loan originators in points and fees would therefore constitute double counting.

Several industry commenters also claimed that they would face significant challenges in determining the amount of compensation for individual loan originators. They noted that creditors need clear, objective standards for determining whether loans satisfy the qualified mortgage standard, and that the complexity of apportioning compensation to individual loans at the time of each closing to determine the amount of loan originator compensation to count toward the points and fees cap would create uncertainty. They also noted that having to track individual loan originators' compensation and allocate that compensation to individual loans would create additional compliance burdens, particularly for compensation paid after closing. Several industry commenters also stated that estimating loan originator compensation in table-funded transactions would prove difficult because the funding assignee may not know the amount paid by the table-funded creditor to the individual loan originator.

Several industry commenters also asserted that including compensation paid to individual loan originators would lead to anomalous results: Otherwise identical loans could have significant differences in points and fees depending on the timing of the mortgage loan or the identity of the loan officer. They noted, for example, that a loan that qualifies a loan officer for a substantial bonus because it enables a loan officer to satisfy a long-term (*e.g.,* annual) origination-volume target or a loan that is originated by a high-performing loan officer could have substantially higher loan originator compensation, and thus substantially higher points and fees, than an otherwise identical loan. Because the consumers would not be paying higher fees or interest rates because of such circumstances, the commenters argued that the result would not further the goals of the statute.

Some industry commenters made a separate argument that the proposed method for including loan originator compensation in points and fees would create an unfair playing field for mortgage brokers. These commenters noted that, since a brokerage firm can be paid by only one source under the Board's 2010 Loan Originator Final Rule and related provisions of the Dodd-Frank Act, a payment by a creditor to a mortgage broker must cover both the broker's overhead costs and the cost of compensating the individual that worked on the transaction. The creditor's entire payment to the mortgage broker is loan originator compensation that is included in points and fees, so that loan originator compensation in a wholesale transaction includes both the compensation received from the creditor to cover the overhead costs of the mortgage broker and the compensation that the broker passes through to the individual employee who worked on the transaction. By contrast, in a loan obtained directly from a creditor, the creditor would have to include in points and fees the compensation paid to the loan officer, but could choose to recover its overhead costs through the interest rate rather than an up-front charge that would count toward the points and fees thresholds. One industry commenter provided examples illustrating that, as a result of this difference, loans obtained through a mortgage broker could have interest rates and fees identical to those in a loan obtained directly through a creditor but could have significantly higher loan originator compensation included in points and fees. Thus, particularly for smaller loan amounts, commenters expressed concern that it would be difficult for loans originated through mortgage brokers to remain under the points and fees limits for qualified mortgages.

A nonprofit loan originator commenter also argued that including loan originator compensation in points and fees could undercut programs that help low and moderate income consumers obtain affordable mortgages. This commenter noted that it relies on payments from creditors to help it provide services to consumers and that counting such payments as loan originator compensation and including them in points and fees could jeopardize its programs. The commenter requested that this problem be addressed by excluding nonprofit organizations from the definition of loan originator or by excluding payments by creditors to nonprofit organizations from points and fees.

Consumer advocates approved of including loan originator compensation in points and fees, regardless of when and by whom the compensation is paid. They asserted that including loan originator compensation would promote more consistent treatment by ensuring that all payments that loan originators receive count toward the points and fees thresholds, regardless of whether the payment is made by the consumer or the creditor and whether it is paid through the rate or through up-front fees. They maintained that the provision was intended to help prevent consumers from paying excessive amounts for loan origination services. More specifically, some consumer advocates argued that the Dodd-Frank Act provision requiring inclusion of loan originator compensation in points and fees is an important part of a multi-pronged approach to address widespread steering of consumers into more expensive mortgage transactions, and in particular, to address the role of commissions funded through the interest rate in such steering. The consumer advocates noted that separate prohibitions on compensation based on terms and on a loan originator's receiving compensation from both the consumer and another party do not limit the amount of compensation a loan originator can receive or prevent a loan originator from inducing consumers to agree to above-market interest rates. They expressed concern that, particularly in the subprime market, loan originators could specialize in originating transactions with above-market interest rates, with the expectation they could arrange to receive above-market compensation for all of their transactions. Consumer advocates argued that counting all methods of loan originator compensation toward the points and fees thresholds was intended to deter such conduct.

Consumer advocates also pointed out that in the wholesale context, the consumer has the option of paying the brokerage firm directly for its services. Such payments have always been included within the calculation of points and fees for HOEPA purposes. The advocates argued that when a consumer elects not to make the up-front payment but instead elects to fund the same amount of money for the brokerage through an increased rate, there is no justification for treating the money received by the brokerage as a result of the consumer's decision any differently.

The Bureau has carefully considered the comments received in light of the concerns about various issues with regard to loan originator compensation practices, the general concerns about the impacts of the ability-to-repay/qualified mortgage rule and revised HOEPA thresholds on a market in which access to mortgage credit is already extremely tight, differences between the retail and wholesale origination channels, and practical considerations regarding both the burdens of day-to-day implementation and the opportunities for evasion by parties who wish to engage in rent-seeking. As discussed further below, the Bureau is concerned about implementation burdens and anomalies created by the requirement to include loan originator compensation in points and fees, the impacts that it could have on pricing and access to credit, and the risks that rent-seekers will continue to find ways to evade the statutory scheme. Nevertheless, the Bureau believes that, in light of the historical record and of Congress's evident concern with loan originator compensation practices, it would not be appropriate to waive the statutory requirement that loan originator compensation be included in points and fees. The Bureau has, however, worked to craft the rule that implements Congress's judgment in a way that is practicable and that reduces potential negative impacts of the statutory requirement, as discussed below. The Bureau is also seeking comment in the concurrent proposal being published elsewhere in today's **Federal Register** on whether additional measures would better protect consumers and reduce implementation burdens and unintended consequences.

Accordingly, the Bureau in adopting § 1026.32(b)(1)(ii) has generally tracked the statutory language and the Board's proposal in the regulation text, but has expanded the commentary to provide more detailed guidance to clarify what compensation must be included in points and fees. The Dodd-Frank Act requires inclusion in points and fees of ''all compensation paid directly or indirectly by a consumer or creditor to a mortgage originator from any source, including a mortgage originator that is also the creditor in a table-funded transaction.'' *See* TILA section 103(bb)(4)(B). Consistent with the Board's proposal, revised § 1026.32(b)(ii) does not include the phrase ''from any source.'' The Bureau agrees that the phrase is unnecessary because the provision expressly covers compensation paid ''directly or indirectly'' to the loan originator. Like the Board's proposal, the final rule also uses the term ''loan originator'' as defined in § 1026.36(a)(1), not the term ''mortgage originator'' under section 1401 of the Dodd-Frank Act. *See* TILA section 103(cc)(2). The Bureau agrees that the definitions are consistent in relevant respects and notes that it is in the process of amending the regulatory definition to harmonize it even more closely with the Dodd-Frank Act definition of ''mortgage originator.''[83] Accordingly, the Bureau believes use of consistent terminology in Regulation Z will facilitate compliance. Finally, as revised, § 1026.32(b)(1)(ii) also does not include the language in proposed § 226.32(b)(1)(ii) that specified that the provision also applies to a loan originator that is the creditor in a table-funded transaction. The Bureau has concluded that that clarification is unnecessary because a creditor in a table-funded transaction is already included in the definition of loan originator in § 1026.36(a)(1). To clarify what compensation must be included in points and fees, revised § 1026.32(b)(1)(ii) specifies that compensation must be included if it can be attributed to the particular transaction at the time the interest rate is set. These limitations are discussed in more detail below.

In adopting the general rule, the Bureau carefully considered arguments by industry commenters that loan originator compensation should not be included in points and fees because other statutory provisions and rules already regulate loan originator compensation, because loan originator compensation is already included in the costs of mortgage loans, and because including loan originator compensation in points and fees would push many loans over the 3 percent cap on points and fees for qualified mortgages (or even over the points and fees limits for determining whether a loan is a high-cost mortgage under HOEPA), which would increase costs and impair access to credit.

The Bureau views the fact that other provisions within the Dodd-Frank Act address other aspects of loan originator compensation and activity as evidence of the high priority that Congress placed on regulating such compensation. The other provisions pointed to by the commenters address specific compensation practices that created particularly strong incentives for loan originators to ''upcharge'' consumers on a loan-by-loan basis and particular confusion about loan originators' loyalties. The Bureau believes that the inclusion of loan originator compensation in points and fees has distinct purposes. In addition to discouraging more generalized rent-seeking and excessive loan originator compensation, the Bureau believes that Congress may have been focused on particular risks to consumers. Thus, with respect to qualified mortgages, including loan originator compensation in points and fees helps to ensure that, in cases in which high up-front compensation might otherwise cause the creditor and/or loan originator to be less concerned about long-term sustainability, the creditor is not able to invoke a presumption of compliance if challenged to demonstrate that it made a reasonable and good faith determination of the consumer's ability to repay the loan. Similarly in HOEPA, the threshold triggers additional consumer protections, such as enhanced disclosures and housing counseling, for the loans with the highest up-front pricing.

The Bureau recognizes that the method that Congress chose to effectuate these goals does not ensure entirely consistent results as to whether a loan is a qualified mortgage or a high-cost transaction. For instance, loans that are identical to consumers in terms of up-front costs and interest rate may nevertheless have different points and fees based on the identity of the loan originator who handled the transaction for the consumer, since different individual loan originators in a retail environment or different brokerage firms in a wholesale environment may earn different commissions from the creditor without that translating in differences in costs to the consumer. In addition, there are anomalies introduced by the fact that ''loan originator'' is defined to include mortgage broker firms and individual employees hired by either brokers or creditors, but not creditors themselves. As a result, counting the total compensation paid to a mortgage broker firm will capture both the firm's overhead costs and the compensation that the firm passes on to its individual loan officer. By contrast, in a retail transaction, the creditor would have to include in points and fees the compensation that it paid to its loan officer, but would continue to have the option of recovering its overhead costs through the interest rate, instead of an up-front charge, to avoid counting them toward the points and fees thresholds. Indeed, the Bureau expects that the new requirement may prompt creditors to shift certain other expenses into rate to stay under the thresholds.

Nevertheless, to the extent there are anomalies from including loan originator compensation in points and fees, these anomalies appear to be the result of deliberate policy choices by Congress to expand the historical definition of points and fees to include all methods of loan originator compensation, whether derived from up-front charges or from the rate, without attempting to capture all overhead expenses by creditors or the gain on sale that the creditor can realize upon closing a mortgage. The Bureau agrees that counting loan originator compensation that is structured through rate toward the points and fees thresholds could cause some loans not to be classified as qualified mortgages and to trigger HOEPA protections, compared to existing treatment under HOEPA and its implementing regulation. However, the Bureau views this to be exactly the result that Congress intended.

In light of the express statutory language and Congress's evident concern with increasing consumer protections in connection with high levels of loan originator compensation, the Bureau does not believe that it is appropriate to use its exception or adjustment authority in TILA section 105(a) or in TILA section 129C(b)(3)(B)(i) to exclude loan originator compensation entirely from points and fees for qualified mortgages and HOEPA. As discussed below, however, the Bureau is attempting to implement the points and fees

[83] *See* 2012 Loan Originator Proposal, 77 FR 55283–88.

requirements with as much sensitivity as practicable to potential impacts on the pricing of and availability of credit, anomalies and unintended consequences, and compliance burdens.

The Bureau also carefully considered comments urging it to exclude compensation paid to individual loan originators from points and fees, but ultimately concluded that such a result would be inconsistent with the plain language of the statute and could exacerbate the potential inconsistent effects of the rule on different mortgage origination channels. As noted above, many industry commenters argued that, even if loan originator compensation were not excluded altogether, at least compensation paid to individual loan originators should be excluded from points and fees. Under this approach, only payments to mortgage brokers would be included in points and fees. The commenters contended that it would be difficult to track compensation paid to individual loan originators, particularly when that compensation may be paid after consummation of the loan and that it would create substantial compliance problems. They also argued that including compensation paid to individual loan originators in points and fees would create anomalies, in which identical transactions from the consumer's perspective (*i.e.,* the same interest rate and up-front costs) could nevertheless have different points and fees because of loan originator compensation.

As explained above, the Bureau does not believe it is appropriate to use its exception authority to exclude loan originator compensation from points and fees, and even using that exception authority more narrowly to exclude compensation paid to individual loan originators could undermine Congress's apparent goal of providing stronger consumer protections in cases of high loan originator compensation. Although earlier versions of legislation focused specifically on compensation to ''mortgage brokers,'' which is consistent with existing HOEPA, the Dodd-Frank Act refers to compensation to ''mortgage originators,'' a term that is defined in detail elsewhere in the statute to include individual loan officers employed by both creditors and brokers, in addition to the brokers themselves. To the extent that Congress believed that high levels of loan originator compensation evidenced additional risk to consumers, excluding individual loan originators from consideration appears inconsistent with this policy judgment.

Moreover, the Bureau notes that using exception authority to exclude compensation paid to individual loan originators would exacerbate the differential treatment between the retail and wholesale channels concerning overhead costs. As noted above, compensation paid by the consumer or creditor to the mortgage broker necessarily will include amounts for both the mortgage broker's overhead and profit and for the compensation the mortgage broker passes on to its loan officer. Excluding individual loan officer compensation on the retail side, however, would effectively exempt creditors from counting any loan originator compensation at all toward points and fees. Thus, for transactions that would be identical from the consumer's perspective in terms of interest rate and up-front costs, the wholesale transaction could have significantly higher points and fees (because the entire payment from the creditor to the mortgage broker would be captured in points and fees), while the retail transaction might include no loan origination compensation at all in points and fees. Such a result would put brokerage firms at a disadvantage in their ability to originate qualified mortgages and put them at significantly greater risk of originating HOEPA loans. This in turn could constrict the supply of loan originators and the origination channels available to consumers to their detriment.

The Bureau recognizes that including compensation paid to individual loan originators, such as loan officers, with respect to individual transactions may impose additional burdens. For example, creditors will have to track employee compensation for purposes of complying with the rule, and the calculation of points and fees will be more complicated. However, the Bureau notes that creditors and brokers already have to monitor compensation more carefully as a result of the 2010 Loan Originator Final Rule and the related Dodd-Frank Act restrictions on compensation based on terms and on dual compensation. The Bureau also believes that these concerns can be reduced by providing clear guidance on issues such as what types of compensation are covered, when compensation is determined, and how to avoid ''double-counting'' payments that are already included in points and fees calculations. The Bureau has therefore revised the Board's proposed regulation and commentary to provide more detailed guidance, and is seeking comment in the proposal published elsewhere in the **Federal Register** today on additional guidance and potential implementation issues among other matters.

As noted above, the Bureau is revising § 1026.32(b)(1)(ii) to clarify that compensation must be counted toward the points and fees thresholds if it can be attributed to the particular transaction at the time the interest rate is set. The Bureau is also revising comment 32(b)(1)(ii)–1 to explain in general terms when compensation qualifies as loan originator compensation that must be included in points and fees. In particular, compensation paid by a consumer or creditor to a loan originator is included in the calculation of points and fees, provided that such compensation can be attributed to that particular transaction at the time the interest rate is set. The Bureau also incorporates part of proposed comment 32(b)(1)(ii)–3 into revised comment 32(b)(1)(ii)–1, explaining that loan originator compensation includes amounts the loan originator retains, and is not dependent on the label or name of any fee imposed in connection with the transaction. However, revised comment 32(b)(1)(ii)–1 does not include the example from proposed comment 32(b)(1)(ii)–3, which stated that, if a loan originator imposes a processing fee and retains the fee, the fee is loan originator compensation under § 1026.32(b)(1)(ii) whether the originator expends the fee to process the consumer's application or uses it for other expenses, such as overhead. That example may be confusing in this context because a processing fee paid to a loan originator likely would be a finance charge under § 1026.4 and would therefore already be included in points and fees under § 1026.32(b)(1)(i).

Revised comment 32(b)(1)(ii)–2.i explains that compensation, such as a bonus, commission, or an award of merchandise, services, trips or similar prizes, must be included only if it can be attributed to a particular transaction. The requirement that compensation is included in points and fees only if it can be attributed to a particular transaction is consistent with the statutory language. The Dodd-Frank Act provides that, for the points and fees tests for both qualified mortgages and high-cost mortgages, only charges that are ''in connection with'' the transaction are included in points and fees. *See* TILA sections 103(bb)(1)(A)(ii) (high-cost mortgages) and 129C(b)(2)(A)(vii) (qualified mortgages). Limiting loan originator compensation to compensation that is attributable to the transaction implements the statutory requirement that points and fees are ''in connection'' with the transaction. This limitation also makes the rule more workable. Compensation is included in points and fees only if it can be attributed to a specific transaction to facilitate compliance with the rule and avoid over-burdening creditors with complex calculations to determine, for example, the portion of a loan officer's salary that should be counted in points and fees.[84] For clarity, the Bureau has moved the discussion of the timing of loan originator compensation into new comment 32(b)(1)(ii)–3, and has added additional examples to 32(b)(1)(ii)–4, to illustrate the types and amount of compensation that should be included in points and fees.

Revised comment 32(b)(1)(ii)–2.ii explains that loan originator compensation excludes compensation that cannot be attributed to a particular transaction at the time the interest rate is set, including, for example, compensation based on the long-term performance of the loan originator's loans or on the overall quality of the loan originator's loan files. The base salary of a loan originator is also excluded, although additional compensation that is attributable to a particular transaction must be included in points and fees. The Bureau has decided to seek further comment in the concurrent proposal regarding treatment of hourly wages for the actual number of hours worked on a particular transaction. The Board's proposal would have included hourly pay for the actual number of hours worked on a particular transaction in loan originator compensation for purposes of the points and fees thresholds, and the Bureau agrees that such wages are attributable to the particular transaction. However, the Bureau is unclear as to whether industry actually tracks compensation this way in light of the administrative burdens. Moreover, while the general rule provides for calculation of loan originator compensation at the time the interest rate is set for the reasons discussed above, the actual hours of hours worked on a transaction would not be known at that time. The Bureau is therefore seeking comment on issues relating to hourly wages, including whether to require estimates of the hours to be worked between rate set and consummation.

New comment 32(b)(1)(ii)–3 explains that loan originator compensation must be included in the points and fees calculation for a transaction whenever the compensation is paid, whether before, at or after closing, as long as that compensation amount can be attributed to the particular transaction at the time the interest rate is set. Some industry commenters expressed concern that it would be difficult to determine the amount of compensation that would be paid after consummation and that creditors might have to recalculate loan originator compensation (and thus points and fees) after underwriting if, for example, a loan officer became eligible for higher compensation because other transactions had been consummated. The Bureau appreciates that industry participants need certainty at the time of underwriting as to whether transactions will exceed the points and fees limits for qualified mortgages (and for high-cost mortgages). To address this concern, the comment 32(b)(1)(ii)–3 explains that loan originator compensation should be calculated at the time the interest rate is set. The Bureau believes that the date the interest rate is set is an appropriate standard for calculating loan originator compensation. It would allow creditors to be able to calculate points and fees with sufficient certainty so that they know early in the process whether a transaction will be a qualified mortgage or a high-cost mortgage.

As noted above, several industry commenters argued that including loan originator compensation in points and fees would result in double counting. They stated that creditors often will recover loan originator compensation costs through origination charges, and these charges are already included in points and fees under § 1026.32(b)(1)(i). However, the underlying statutory provisions as amended by the Dodd-Frank Act do not express any limitation on its requirement to count loan originator compensation toward the points and fees test. Rather, the literal language of TILA section 103(bb)(4) as amended by the Dodd-Frank Act defines points and fees to include all items included in the finance charge (except interest rate), all compensation paid directly or indirectly by a consumer or creditor to a loan originator, ''and'' various other enumerated items. The use of ''and'' and the references to ''all'' compensation paid ''directly or indirectly'' and ''from any source'' suggest that compensation should be counted as it flows downstream from one party to another so that it is counted each time that it reaches a loan originator, whatever the previous source.

The Bureau believes the statute would be read to require that loan originator compensation be treated as additive to the other elements of points and fees. The Bureau believes that an automatic literal reading of the statute in all cases, however, would not be in the best interest of either consumers or industry. For instance, the Bureau does not believe that it is necessary or appropriate to count the same payment made by a consumer to a mortgage broker firm twice, simply because it is both part of the finance charge and loan originator compensation. Similarly, the Bureau does not believe that, where a payment from either a consumer or a creditor to a mortgage broker is counted toward points and fees, it is necessary or appropriate to count separately funds that the broker then passes on to its individual employees. In each case, any costs and risks to the consumer from high loan originator compensation are adequately captured by counting the funds a single time against the points and fees cap; thus, the Bureau does not believe the purposes of the statute would be served by counting some or all of the funds a second time, and is concerned that doing so could have negative impacts on the price and availability of credit.

Determining the appropriate accounting rule is significantly more complicated, however, in situations in which a consumer pays some up-front charges to the creditor and the creditor pays loan originator compensation to either its own employee or to a mortgage broker firm. Because money is fungible, tracking how a creditor spends money it collects in up-front charges versus amounts collected through the rate to cover both loan originator compensation and its other overhead expenses would be extraordinarily complex and cumbersome. To facilitate compliance, the Bureau believes it is appropriate and necessary to adopt one or more generalized rules regarding the accounting of various payments. However, the Bureau does not believe it yet has sufficient information with which to choose definitively between the additive approach provided for in the statutory language and other potential methods of accounting for payments in light of the multiple practical and complex policy considerations involved.

The potential downstream effects of different accounting methods are

[84] In contrast, the existing restrictions on particular loan originator compensation structures in § 1026.36 apply to all compensation such as salaries, hourly wages, and contingent bonuses because those restrictions apply only at the time such compensation is paid, and therefore they can be applied with certainty. Moreover, those rules also provide for different treatment of compensation that is not ''specific to, and paid solely in connection with, the transaction,'' where such a distinction is necessary for reasons of practical application of the rule. *See* comment 36(d)(2)–1 (prohibition of loan originator receiving compensation directly from consumer and also from any other person does not prohibit consumer payments where loan originator also receives salary or hourly wage).

significant. Under the additive approach where no offsetting consumer payments against creditor-paid loan originator compensation is allowed, creditors whose combined loan originator compensation and up-front charges would otherwise exceed the points and fees limits would have strong incentives to cap their up-front charges for other overhead expenses under the threshold and instead recover those expenses by increasing interest rates to generate higher gains on sale. This would adversely affect consumers who prefer a lower interest rate and higher up-front costs and, at the margins, could result in some consumers being unable to qualify for credit. Additionally, to the extent creditors responded to a ''no offsetting'' rule by increasing interest rates, this could increase the number of qualified mortgages that receive a rebuttable rather than conclusive presumption of compliance.

One alternative would be to allow all consumer payments to offset creditor-paid loan originator compensation. However, a ''full offsetting'' approach would allow creditors to offset much higher levels of up-front points and fees against expenses paid through rate before the heightened consumer protections required by the Dodd-Frank Act would apply. Particularly under HOEPA, this may raise tensions with Congress's apparent intent. Other alternatives might use a hybrid approach depending on the type of expense, type of loan, or other factors, but would involve more compliance complexity.

In light of the complex considerations, the Bureau believes it is necessary to seek additional notice and comment. The Bureau therefore is finalizing this rule without qualifying the statutory result and is proposing two alternative comments in the concurrent proposal, one of which would explicitly preclude offsetting, and the other of which would allow full offsetting of any consumer-paid charges against creditor-paid loan originator compensation. The Bureau is also proposing comments to clarify treatment of compensation paid by consumers to mortgage brokers and by mortgage brokers to their individual employees. The Bureau is seeking comment on all aspects of this issue, including the market impacts and whether adjustments to the final rule would be appropriate. In addition, the Bureau is seeking comment on whether it would be helpful to provide for additional adjustment of the rules or additional commentary to clarify any overlaps in definitions between the points and fees provisions in this rulemaking and the HOEPA rulemaking and the provisions that the Bureau is separately finalizing in connection with the Bureau's 2012 Loan Originator Compensation Proposal.

Finally, comment 32(b)(1)(ii)–4 includes revised versions of examples in proposed comment 32(b)(1)(ii)–2, as well as additional examples to provide additional guidance regarding what compensation qualifies as loan originator compensation that must be included in points and fees. These examples illustrate when compensation can be attributed to a particular transaction at the time the interest rate is set. New comment 32(b)(1)(ii)–5 adds an example explaining how salary is treated for purposes of loan originator compensation for calculating points and fees.

32(b)(1)(iii)

TILA section 103(aa)(4)(C) provides that points and fees include certain real estate-related charges listed in TILA section 106(e) and is implemented in § 1026.32(b)(1)(iii). The Dodd-Frank Act did not amend TILA section 103(aa)(4)(C) (but did renumber it as section 103(bb)(4)(C)). Although the Board indicated in the Supplementary Information that it was not proposing any changes, proposed § 226.32(b)(1)(iii) would have added the phrase ''payable at or before closing of the mortgage'' loan and would have separated the elements into three new paragraphs (A) through (C). Thus, proposed § 226.32(b)(1)(iii) would have included in points and fees ''all items listed in § 226.4(c)(7) (other than amounts held for future payment of taxes) payable at or before closing of the mortgage loan, unless: (A) The charge is reasonable; (B) the creditor receives no direct or indirect compensation in connection with the charge; and (C) the charge is not paid to an affiliate of the creditor.'' The Board noted that the statute did not exclude these charges if they were payable after closing and questioned whether such a limitation was necessary because these charges could reasonably be viewed as charges that by definition are payable only at or before closing. As noted in the section-by-section analysis of § 1026.32(b)(1), the Board requested comment on whether there are any other types of fees that should be included in points and fees only if they are payable at or before closing.

The Board noted that during outreach creditors had raised concerns about including in points and fees real-estate related fees paid to an affiliate of the creditor, such as an affiliated title company. Although these fees always have been included in points and fees for high-cost loans, creditors using affiliated title companies were concerned they would have difficulty meeting the lower threshold for points and fees for qualified mortgages. The Board, however, did not propose to exempt fees paid to creditor-affiliated settlement service providers, noting that Congress appeared to have rejected excluding such fees from points and fees.

Industry commenters criticized the Board's proposed treatment of fees paid to affiliates as overbroad. Industry commenters argued that a creditor's affiliation with a service provider, such as a title insurance agency, does not have any impact on the consumer's ability to repay a loan. They maintained that studies over the past two decades have shown that title services provided by affiliated businesses are competitive in cost compared to services provided by unaffiliated businesses. They contended that the rule should instead focus solely on whether the fee is bona fide.

These commenters also argued that the largest real estate-related charge, title insurance fees, are often either mandated by State law or required to be filed with the relevant state authority and do not vary. Regardless of whether the State sets the rate or requires that the rate be filed, these commenters argued that there are so few insurers that rates tend to be nearly identical among providers.

These commenters also argued that including fees to affiliates would negatively affect consumers. They claimed that the inclusion of fees paid to affiliates would cause loans that would otherwise be qualified mortgages to exceed the points and fees cap, resulting in more expense to the creditor, which would be passed through to consumers in the form of higher interest rates or fees, or in more denials of credit. They also claimed that the proposal would harm consumers by reducing competition among settlement service providers and by eliminating operational efficiencies. One industry trade association reported that some of its members with affiliates would discontinue offering mortgages, which would reduce competition among creditors, especially for creditors offering smaller loans, since these loans would be most affected by the points and fees cap. They claimed that treating affiliated and unaffiliated providers differently would incentivize creditors to use unaffiliated third-party service providers to stay within the qualified mortgage points and fees cap.

Several industry commenters noted that RESPA permits affiliated business arrangements and provides protections for consumers, including a prohibition against requiring that consumers use affiliates, a requirement to disclose affiliation to consumers, and a limitation that compensation include only return on ownership interest. These commenters argued that charges paid to affiliates should be excluded from points and fees as long the RESPA requirements are satisfied. Several industry commenters objected to the requirement that charges be ''reasonable'' to be excluded from points and fees. They argued that the requirement was vague and that it would be difficult for a creditor to judge whether a third-party charge met the standard. Several commenters also argued that the Dodd-Frank Act provision permitting exclusion of certain bona fide third-party charges should apply rather than the three-part test for items listed in § 1026.4(c)(7). *See* TILA section 129C(b)(2)(C)(i).

Two consumer advocates commented on this aspect of the proposal. They supported including in points and fees all fees paid to any settlement service provider affiliated with the creditor.

The Bureau is adopting § 226.32(b)(1)(iii) as proposed but renumbered as § 1026.32(b)(1)(iii). TILA section 103(bb)(4) specifically mandates that fees paid to and retained by affiliates of the creditor be included in points and fees. The Bureau acknowledges that including fees paid to affiliates in points and fees could make it more difficult for creditors using affiliated service providers to stay under the points and fees cap for qualified mortgages and that, as a result, creditors could be disincented from using affiliated service providers. This is especially true with respect to affiliated title insurers because of the cost of title insurance. On the other hand, despite RESPA's regulation of fees charged by affiliates, concerns have nonetheless been raised that fees paid to an affiliate pose greater risks to the consumer, since affiliates of a creditor may not have to compete in the market with other providers of a service and thus may charge higher prices that get passed on to the consumer. The Bureau believes that Congress weighed these competing considerations and made a deliberate decision not to exclude fees paid to affiliates. This approach is further reflected throughout title XIV, which repeatedly amended TILA to treat fees paid to affiliates as the equivalent to fees paid to a creditor or loan originator. *See, e.g.,* Dodd-Frank Act sections 1403, 1411, 1412, 1414, and 1431. For example, as noted above, TILA section 129C(b)(2)(C)(i), as added by section 1412 of the Dodd-Frank Act, provides that for purposes of the qualified mortgage points and fees test, bona fide third-party charges are excluded other than charges ''retained by * * * an affiliate of the creditor or mortgage originator.'' Similarly, TILA section 129B(c)(2)(B)(ii), added by section 1403 of the Dodd-Frank Act, restricts the payment of points and fees but permits the payment of bona fide third-party charges unless those charges are ''retained by * * * an affiliate of the creditor or originator.'' In light of these considerations, the Bureau does not believe there is sufficient justification to use its exception authority in this instance as the Bureau cannot find, given Congress's clear determination, that excluding affiliate fees from the calculation of points and fees is necessary or proper to effectuate the purposes of TILA, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.

As noted above, some commenters objected to the requirement that charges be ''reasonable.'' The Bureau notes that a ''reasonable'' requirement has been in place for many years before the Dodd-Frank Act. TILA section 103(aa)(4)(C) specifically provides that charges listed in TILA section 106(e) are included in points and fees for high-cost mortgages unless, among other things, the charge is reasonable. This requirement is implemented in existing § 1026.32(b)(1)(iii). Similarly, a charge may be excluded from the finance charge under § 1026.4(c)(7) only if it is reasonable. In the absence of any evidence that this requirement has been unworkable, the Bureau declines to alter it. The fact that a transaction for such services is conducted at arms-length ordinarily should be sufficient to make the charge reasonable. The reasonableness requirement is not intended to invite an inquiry into whether a particular appraiser or title insurance company is imposing excessive charges.

Some commenters also maintained that the provision permitting exclusion of certain bona fide third-party charges should apply rather than the three-part test for items listed in § 1026.4(c)(7). *See* TILA section 129C(b)(2)(C)(i). As discussed in more detail in the section-by-section analysis of § 1026.32(b)(1)(i)(D), the Bureau concludes that § 1026.32(b)(1)(iii), which specifically addresses exclusion of items listed in § 1026.4(c)(7), takes precedence over the more general exclusion in § 1026.32(b)(1)(i)(D).

The Board's proposed comment 32(b)(1)(iii)–1 was substantially the same as existing comment 32(b)(1)(ii)–2. It would have provided an example of the inclusion or exclusion of real-estate related charges. The Bureau did not receive substantial comment on the proposed comment. The Bureau is therefore adopting comment 32(b)(1)(ii)–1 substantially as proposed, with revisions for clarity.

32(b)(1)(iv)

As amended by section 1431 of the Dodd-Frank Act, TILA section 103(bb)(4)(D) includes in points and fees premiums for various forms of credit insurance and charges for debt cancellation or suspension coverage. The Board proposed § 226.32(b)(1)(iv) to implement this provision. The Board also proposed to revise comment 32(b)(1)(iv)–1 to reflect the revised statutory language and to add new comment 32(b)(1)(iv)–2 to clarify that ''credit property insurance'' includes insurance against loss or damage to personal property such as a houseboat or manufactured home.

Several commenters argued that proposed § 226.32(b)(1)(iv) did not accurately implement the provision in Dodd-Frank Act section 1431 that specifies that ''insurance premiums or debt cancellation or suspension fees calculated and paid in full on a monthly basis shall not be considered financed by the creditor.'' They argued that comment 32(b)(1)(iv)–1 should be revised so that it expressly excludes monthly premiums for credit insurance from points and fees, including such premiums payable in the first month. At least one industry commenter also argued that voluntary credit insurance premiums should not be included in points and fees. Consumer advocates supported inclusion of credit insurance premiums in points and fees, noting that these services can add significant costs to mortgages.

The Bureau is adopting § 226.32(b)(1)(iv) substantially as proposed, with revisions for clarity, as renumbered § 1026.32(b)(1)(iv). As revised, § 1026.32(b)(1)(iv) states that premiums or other charges for ''any other life, accident, health, or loss-of-income insurance'' are included in points and fees only if the insurance is for the benefit of the creditor. The Bureau is also adopting proposed comments 32(b)(1)(iv)–1 and –2 substantially as proposed, with revisions for clarity and consistency with terminology in Regulation Z. The Bureau is also adopting new comment 32(b)(1)(iv)–3 to clarify that premiums or other charges for ''any other life, accident, health, or loss-of-income insurance'' are included in points and fees only if the creditor is a beneficiary of the insurance.

As noted above, several commenters argued that premiums paid monthly, including the first such premium, should not be included in points and fees. The statute requires that premiums ''payable at or before closing'' be included in points and fees; it provides only that premiums ''calculated and paid in full on a monthly basis shall not be considered financed by the creditor.'' TILA section 103(bb)(4)(D). Thus, if the first premium is payable at or before closing, that payment is included in points and fees even though the subsequent monthly payments are not.

Another commenter argued that voluntary credit insurance premiums should be excluded from points and fees. However, under the current rule, voluntary credit insurance premiums are included in points and fees. In light of the fact that the Dodd-Frank Act expanded the types of credit insurance that must be included in points and fees, the Bureau does not believe it would be appropriate to reconsider whether voluntary credit insurance premiums should be included in points and fees.

32(b)(1)(v)

As added by the Dodd-Frank Act, new TILA section 103(bb)(4)(E) includes in points and fees ''the maximum prepayment penalties which may be charged or collected under the terms of the credit transaction.'' The Board's proposed § 226.32(b)(1)(v) closely tracked the statutory language, but it cross-referenced proposed § 226.43(b)(10) for the definition of ''prepayment penalty.''

Few commenters addressed this provision. One industry commenter argued that the maximum prepayment penalty should not be included in points and fees because a prepayment that triggers the penalty may never occur and thus the fee may never be assessed.

The Bureau is adopting § 226.32(b)(1)(v) substantially as proposed but renumbered as § 1026.32(b)(1)(v), with a revision to its definitional cross-reference. As revised, § 1026.32(b)(1)(v) refers to the definition of prepayment penalty in § 1026.32(b)(6)(i). With respect to the comment arguing that prepayment penalties should not be included in points and fees, the statute requires inclusion in points and fees of the maximum prepayment penalties that ''may be charged or collected.'' Thus, under the statutory language, the imposition of the charge need not be certain for the prepayment penalty to be included in points and fees. In this provision (and other provisions added by the Dodd-Frank Act, such as TILA section 129C(c)), Congress sought to limit and deter the use of prepayment penalties, and the Bureau does not believe that it would be appropriate to exercise its exception authority in a manner that could undermine that goal.

32(b)(1)(vi)

New TILA section 103(bb)(4)(F) requires that points and fees include ''all prepayment fees or penalties that are incurred by the consumer if the loan refinances a previous loan made or currently held by the same creditor or an affiliate of the creditor.'' The Board's proposed § 226.32(b)(1)(vi) would have implemented this provision by including in points and fees the total prepayment penalty, as defined in § 226.43(b)(10), incurred by the consumer if the mortgage loan is refinanced by the current holder of the existing mortgage loan, a servicer acting on behalf of the current holder, or an affiliate of either. The Board stated its belief that this provision is intended in part to curtail the practice of ''loan flipping,'' which involves a creditor refinancing an existing loan for financial gain resulting from prepayment penalties and other fees that a consumer must pay to refinance the loan—regardless of whether the refinancing is beneficial to the consumer. The Board noted that it departed from the statutory language to use the phrases ''current holder of the existing mortgage loan'' and ''servicer acting on behalf of the current holder'' in proposed § 226.32(b)(1)(vi) because, as a practical matter, these are the entities that would refinance the loan and directly or indirectly gain from associated prepayment penalties.

Few commenters addressed this provision. Two consumer groups expressed support for including these prepayment penalties in points and fees, arguing that many consumers were victimized by loan flipping and the resulting fees and charges.

The Bureau is adopting § 226.32(b)(1)(vi) substantially as proposed but renumbered as § 1026.32(b)(1)(vi). In addition to revising for clarity, the Bureau has also revised § 1026.32(b)(1)(vi) to refer to the definition of prepayment penalty in § 1026.32(b)(6)(i). Like the Board, the Bureau believes that it is appropriate for § 1026.32(b)(1)(vi) to apply to the current holder of the existing mortgage loan, the servicer acting on behalf of the current holder, or an affiliate of either. These are the entities that would refinance the loan and gain from the prepayment penalties on the previous loan. Accordingly, the Bureau is invoking its exception and adjustment authority under TILA sections 105(a) and 129C(b)(3)(B)(i). The Bureau believes that adjusting the statutory language to more precisely target the entities that would benefit from refinancing loans with prepayment penalties will more effectively deter loan flipping to collect prepayment penalties and help preserve consumers' access to safe, affordable credit. It also will lessen the compliance burden on other entities that lack the incentive for loan flipping, such as a creditor that originated the existing loan but no longer holds the loan. For these reasons, the Bureau believes that use of its exception and adjustment authority is necessary and proper under TILA section 105(a) to effectuate the purposes of TILA and to facilitate compliance with TILA and its purposes, including the purpose of assuring that consumers are offered and receive residential mortgage loans on terms that reasonably reflect their ability to repay the loans. Similarly, the Bureau finds that it is necessary, proper, and appropriate to use its authority under TILA section 129C(b)(3)(B)(i) to revise and subtract from statutory language. This use of authority ensures that responsible, affordable mortgage credit remains available to consumers in a manner consistent with and effectuates the purpose of TILA section 129C, referenced above, and facilitates compliance with section 129C of TILA.

32(b)(2)

Proposed Provisions Not Adopted

As noted in the section-by-section analysis of § 1026.32(b)(1)(ii) above, section 1431(c) of the Dodd-Frank Act amended TILA to require that all compensation paid directly or indirectly by a consumer or a creditor to a ''mortgage originator'' be included in points and fees for high-cost mortgages and qualified mortgages. As also noted above, the Board's 2011 ATR Proposal proposed to implement this statutory change in proposed § 226.32(b)(1)(ii) using the term ''loan originator,'' as defined in existing § 1026.36(a)(1), rather than the statutory term ''mortgage originator.'' In turn, the Board proposed new § 226.32(b)(2) to exclude from points and fees compensation paid to certain categories of persons specifically excluded from the definition of ''mortgage originator'' in amended TILA section 103, namely employees of a retailer of manufactured homes under certain circumstances, certain real estate brokers, and servicers.

The Bureau is not adopting proposed § 226.32(b)(2). The Bureau is amending the definition of ''loan originator'' § 1026.36(a)(1) and the associated commentary to incorporate the statutory exclusion of these persons from the definition. Accordingly, to the extent these persons are excluded from the definition of loan originator compensation, their compensation is not loan originator compensation that must be counted in points and fees, and the exclusions in proposed § 226.32(b)(2) are no longer necessary.

Instead, in the 2013 HOEPA Final Rule, the Bureau is finalizing the definition of points and fees for HELOCs in § 1026.32(b)(2). Current § 1026.32(b)(2), which contains the definition of ''affiliate,'' is being renumbered as § 1026.32(b)(5).

32(b)(3) Bona Fide Discount Point

32(b)(3)(i) Closed-End Credit

The Dodd-Frank Act defines the term ''bona fide discount points'' as used in § 1026.32(b)(1)(i)(E) and (F), which, as discussed above, permit exclusion of ''bona fide discount points'' from points and fees for qualified mortgages. TILA section 129C(b)(2)(C)(iii) defines the term ''bona fide discount points'' as ''loan discount points which are knowingly paid by the consumer for the purpose of reducing, and which in fact result in a bona fide reduction of, the interest rate or time-price differential applicable to the mortgage.'' TILA section 129C(b)(2)(C)(iv) limits the types of discount points that may be excluded from ''points and fees'' to those for which ''the amount of the interest rate reduction purchased is reasonably consistent with established industry norms and practices for secondary market transactions.''

Proposed § 226.43(e)(3)(iv) would have implemented these provisions by defining the term ''bona fide discount point'' as ''any percent of the loan amount'' paid by the consumer that reduces the interest rate or time-price differential applicable to the mortgage loan by an amount based on a calculation that: (1) Is consistent with established industry practices for determining the amount of reduction in the interest rate or time-price differential appropriate for the amount of discount points paid by the consumer; and (2) accounts for the amount of compensation that the creditor can reasonably expect to receive from secondary market investors in return for the mortgage loan.

The Board's proposal would have required that the creditor be able to show a relationship between the amount of interest rate reduction purchased by a discount point and the value of the transaction in the secondary market. The Board observed that, based on outreach with representatives of creditors and GSEs, the value of a rate reduction in a particular mortgage transaction on the secondary market is based on many complex factors, which interact in a variety of complex ways. The Board noted that these factors may include, among others:

- The product type, such as whether the loan is a fixed-rate or adjustable-rate mortgage, or has a 30-year term or a 15-year term.
- How much the MBS market is willing to pay for a loan at that interest rate and the liquidity of an MBS with loans at that rate.
- How much the secondary market is willing to pay for excess interest on the loan that is available for capitalization outside of the MBS market.
- The amount of the guaranty fee required to be paid by the creditor to the investor.

The Board indicated that it was offering a flexible proposal because of its concern that a more prescriptive interpretation would be operationally unworkable for most creditors and would lead to excessive legal and regulatory risk. In addition, the Board also noted that, due to the variation in inputs described above, a more prescriptive rule likely would require continual updating, creating additional compliance burden and potential confusion.

The Board also noted a concern that small creditors such as community banks that often hold loans in portfolio rather than sell them on the secondary market may have difficulty complying with this requirement. The Board therefore requested comment on whether it would be appropriate to provide any exemptions from the requirement that the interest rate reduction purchased by a ''bona fide discount point'' be tied to secondary market factors.

Many industry commenters criticized the second prong of the Board's proposal, which would have required that the interest rate reduction account for the amount of compensation that the creditor can reasonably expect to receive from secondary market investors in return for the mortgage loan. Several industry commenters argued that this test would be complex and difficult to apply and that, if challenged, it would be difficult for creditors to prove that the calculation was done properly. Two industry commenters noted that creditors do not always sell or plan to sell loans in the secondary market at the time of origination and so would not know what compensation they would receive on the secondary market. Several industry commenters emphasized that the secondary market test would be impracticable for creditors holding loans in portfolio. Consumer groups did not comment on this issue.

As noted above, the Bureau is consolidating the exclusions for certain bona fide third-party charges and bona fide discount points in § 1026.32(b)(1)(i)(D) through (F). As a result, the Bureau is adopting proposed § 226.43(e)(3)(iv), with the revision discussed below, as renumbered § 1026.32(b)(3)(i). In the 2013 HOEPA Final Rule, the Bureau is adopting a definition of bona fide discount point for open-end credit in § 1026.32(b)(3)(ii).

After carefully considering the comments, the Bureau is modifying the definition of ''bona fide discount point.'' Specifically, the Bureau believes it would be difficult, if not impossible, for many creditors to account for the secondary market compensation in calculating interest rate reductions. This is particularly true for loans held in portfolio. Therefore, the Board is removing from § 1026.32(b)(3)(i) the requirement that interest rate reductions take into account secondary market compensation. Instead, as revised, § 1026.32(b)(3)(i) requires only that the calculation of the interest rate reduction be consistent with established industry practices for determining the amount of reduction in the interest rate or time-price differential appropriate for the amount of discount points paid by the consumer.

The Bureau finds that removing the secondary market component of the ''bona fide'' discount point definition is necessary and proper under TILA section 105(a) to effectuate the purposes of and facilitate compliance with TILA. Similarly, the Bureau finds that it is necessary and proper to use its authority under TILA section 129C(b)(3)(B)(i) to revise and subtract from the criteria that define a qualified mortgage by removing the secondary market component from the bona fide discount point definition. It will provide creditors sufficient flexibility to demonstrate that they are in compliance with the requirement that, to be excluded from points and fees, discount points must be bona fide. In clarifying the definition, it also will facilitate the use of bona fide discount points by consumers to help create the appropriate combination of points and rate for their financial situation, thereby helping ensure that consumers are offered and receive residential mortgage loan on terms that reasonably reflect their ability to repay the loans and that responsible, affordable mortgage credit remains available to consumers in a manner consistent with the purposes of TILA as provided in TILA section 129C.

To provide some guidance on how creditors may comply with this requirement, the Bureau is adding new comment 32(b)(3)(i)–1. This comment explains how creditors can comply with ''established industry practices'' for calculating interest rate reductions. Specifically, comment 32(b)(3)(i)–1 notes that one way creditors can satisfy this requirement is by complying with established industry norms and practices for secondary mortgage market transactions. Comment 32(b)(3)(i)–1 then provides two examples. First a creditor may rely on pricing in the to-be-announced (TBA) market for MBS to establish that the interest rate reduction is consistent with the compensation that the creditor could reasonably expect to receive in the secondary market. Second, a creditor could comply with established industry practices, such as guidelines from Fannie Mae or Freddie Mac that prescribe when an interest rate reduction from a discount point is considered bona fide. However, because these examples from the secondary market are merely illustrations of how a creditor could comply with the ''established industry practices'' requirement for bona fide interest rate reduction, creditors, and in particular creditors that retain loans in portfolio, will have flexibility to use other approaches for complying with this requirement.

32(b)(4) Total Loan Amount

32(b)(4)(i) Closed-End Credit

As added by section 1412 of the Dodd-Frank Act, TILA section 129C(b)(2)(A)(vii) defines a ''qualified mortgage'' as a mortgage for which, among other things, ''the total points and fees * * * payable in connection with the loan do not exceed 3 percent of the total loan amount.'' For purposes of implementing the qualified mortgage provisions, the Board proposed to retain existing comment 32(a)(1)(ii)–1 explaining the meaning of the term ''total loan amount,'' with certain minor revisions discussed below, while also seeking comment on an alternative approach.

The proposal would have revised the ''total loan amount'' calculation under current comment 32(a)(1)(ii)–1 to account for charges added to TILA's definition of points and fees by the Dodd-Frank Act. Under Regulation Z for purposes of applying the existing points and fees trigger for high-cost loans, the ''total loan amount'' is calculated as the amount of credit extended to or on behalf of the consumer, minus any financed points and fees. Specifically, under current comment 32(a)(1)(ii)–1, the ''total loan amount'' is calculated by ''taking the amount financed, as determined according to § 1026.18(b), and deducting any cost listed in § 1026.32(b)(1)(iii) and § 1026.32(b)(1)(iv) that is both included as points and fees under § 1026.32(b)(1) and financed by the creditor.'' Section 1026.32(b)(1)(iii) and (b)(1)(iv) pertain to ''real estate-related fees'' listed in § 1026.4(c)(7) and premiums or other charges for credit insurance or debt cancellation coverage, respectively.

The Board proposed to revise this comment to cross-reference additional financed points and fees described in proposed § 226.32(b)(1)(vi) as well. This addition would have required a creditor also to deduct from the amount financed any prepayment penalties that are incurred by the consumer if the mortgage loan refinances a previous loan made or currently held by the creditor refinancing the loan or an affiliate of the creditor—to the extent that the prepayment penalties are financed by the creditor. As a result, the 3 percent limit on points and fees for qualified mortgages would have been based on the amount of credit extended to the consumer without taking into account any financed points and fees.

The Board's proposal also would have revised one of the commentary's examples of the ''total loan amount'' calculation. Specifically, the Board proposed to revise the example of a $500 single premium for optional ''credit life insurance'' used in comment 32(b)(1)(i)–1.iv to be a $500 single premium for optional ''credit unemployment insurance.'' The Board stated that this change was proposed because, under the Dodd-Frank Act, single-premium credit insurance—including credit life insurance—is prohibited in covered transactions except for certain limited types of credit unemployment insurance. *See* TILA section 129C(d). The Board requested comment on the proposed revisions to the comment explaining how to calculate the ''total loan amount,'' including whether additional guidance is needed.

The Board also requested comment on whether to streamline the calculation to ensure that the ''total loan amount'' would include all credit extended other than financed points and fees. Specifically, the Board solicited comment on whether to revise the calculation of ''total loan amount'' to be the ''principal loan amount'' (as defined in § 226.18(b) and accompanying commentary), minus charges that are points and fees under § 226.32(b)(1) and are financed by the creditor. The Board explained that the purpose of using the ''principal loan amount'' instead of the ''amount financed'' would be to streamline the calculation to facilitate compliance and to ensure that no charges other than financed points and fees are excluded from the ''total loan amount.'' [85] In general, the revised calculation would have yielded a larger ''total loan amount'' to which the percentage points and fees thresholds would have to be applied than would the proposed (and existing) ''total loan amount'' calculation, because only financed points and fees and no other financed amounts would be excluded. Thus, creditors in some cases would be able to charge more points and fees on the same loan under the alternative outlined by the Board than under either the proposed or existing rule.

In the 2012 HOEPA Proposal, the Bureau proposed the following for organizational purposes: (1) To move the existing definition of ''total loan amount'' for closed-end mortgage loans from comment 32(a)(1)(ii)–1 to proposed § 1026.32(b)(6)(i); and (2) to move the examples showing how to calculate the total loan amount for closed-end mortgage loans from existing comment 32(a)(1)(ii)–1 to proposed comment 32(b)(6)(i)–1. The Bureau proposed to specify that the calculation applies to closed-end mortgage loans because the Bureau also proposed to define ''total loan amount'' separately for open-end credit plans. The Bureau also proposed to amend the definition of ''total loan amount'' in a manner similar to the Board's alternative proposal described above. The Bureau indicated this proposed revision would streamline the total loan amount calculation to facilitate compliance and would be sensible in light of the more inclusive definition of the finance charge proposed in the Bureau's 2012 TILA–RESPA Integration Proposal.

Few commenters addressed the Board's proposal regarding total loan amount. Several industry commenters recommended that the alternative method of calculating total loan amount be used because it would be easier to calculate. At least two industry commenters recommended that, for simplicity, the amount recited in the note be used for calculating the permitted points and fees.

After reviewing the comments, the Bureau is following the 2012 HOEPA

[85] Specifically, under the alternative approach, prepaid finance charges would not be deducted from the principal loan amount. Only financed points and fees would be deducted.

Proposal and moving the definition of total loan amount into the text of the rule in § 1026.32(b)(4)(i). In 2013 HOEPA Final Rule, the Bureau is adopting a definition of total loan amount for open-end credit in § 1026.32(b)(4)(ii). The examples showing how to calculate the total loan amount are moved to comment 32(b)(4)(i)–1. However, the Bureau has concluded that, at this point, the current approach to calculating the total loan amount should remain in place. Creditors are familiar with the method from using it for HOEPA points and fees calculations. Moreover, as noted above, the Bureau is deferring action on the more inclusive definition of the finance charge proposed in the Bureau's 2012 TILA–RESPA Integration Proposal. If the Bureau expands the definition of the finance charge, the Bureau will at the same time consider the effect on coverage thresholds that rely on the finance charge or the APR.

32(b)(5)

The final rule renumbers existing § 1026.32(b)(2) defining the term ''affiliate'' as § 1026.32(b)(5) for organizational purposes.

32(b)(6) Prepayment Penalty

The Dodd-Frank Act's Amendments to TILA Relating to Prepayment Penalties

Sections 1431 and 1432 of the Dodd-Frank Act (relating to high-cost mortgages) and section 1414 of the Dodd-Frank Act (relating to qualified mortgages) amended TILA to restrict and, in many cases, prohibit a creditor from imposing prepayment penalties in dwelling-secured credit transactions. The Dodd-Frank Act restricted prepayment penalties in three main ways.

First, as the Board discussed in its 2011 ATR Proposal, the Dodd-Frank Act added new TILA section 129C(c)(1) relating to qualified mortgages, which generally provides that a covered transaction (*i.e.,* in general, a closed-end, dwelling-secured credit transaction) may include a prepayment penalty only if it; (1) Is a qualified mortgage, to be defined by the Board, (2) has an APR that cannot increase after consummation, and (3) is not a higher-priced mortgage loan. The Board proposed to implement TILA section 129C(c)(1) in § 226.43(g)(1) and to define the term prepayment penalty in § 226.43(b)(10). Under new TILA section 129C(c)(3), moreover, even loans that meet the statutorily prescribed criteria (i.e., fixed-rate, non-higher-priced qualified mortgages) are capped in the amount of prepayment penalties that may be charged, starting at three percent in the first year after consummation and decreasing annually by increments of one percentage point thereafter so that no penalties may be charged after the third year. The Board proposed to implement TILA section 129C(c)(3) in § 226.43(g)(2).

Second, section 1431(a) of the Dodd-Frank Act amended TILA section 103(bb)(1)(A)(iii) to provide that a credit transaction is a high-cost mortgage if the credit transaction documents permit the creditor to charge or collect prepayment fees or penalties more than 36 months after the transaction closing or if such fees or penalties exceed, in the aggregate, more than two percent of the amount prepaid. Moreover, under amended TILA section 129(c)(1), high-cost mortgages are prohibited from having a prepayment penalty. Accordingly, any prepayment penalty in excess of two percent of the amount prepaid on any closed end mortgage would both trigger and violate the rule's high-cost mortgage provisions. The Bureau's 2012 HOEPA Proposal proposed to implement these requirements with several minor clarifications in § 1026.32(a)(1)(iii). *See* 77 FR 49090, 49150 (Aug. 15, 2012).

Third, both qualified mortgages and most closed-end mortgage loans and open-end credit plans secured by a consumer's principal dwelling are subject to additional limitations on prepayment penalties through the inclusion of prepayment penalties in the definition of points and fees for qualified mortgages and high-cost mortgages. See the section-by-section analysis of proposed § 226.32(b)(1)(v) and (vi); 77 FR 49090, 49109–10 (Aug. 15, 2012).

Taken together, the Dodd-Frank Act's amendments to TILA relating to prepayment penalties mean that most closed-end, dwelling-secured transactions: (1) May provide for a prepayment penalty only if the transaction is a fixed-rate, qualified mortgage that is neither high-cost nor higher-priced under §§ 1026.32 and 1026.35; (2) may not, even if permitted to provide for a prepayment penalty, charge the penalty more than three years following consummation or in an amount that exceeds two percent of the amount prepaid; and (3) may be required to limit any penalty even further to comply with the points and fees limitations for qualified mortgages or to stay below the points and fees trigger for high-cost mortgages.

In the interest of lowering compliance burden and to provide additional clarity for creditors, the Bureau has elected to define prepayment penalty in a consistent manner for purposes of all of the Dodd-Frank Act's amendments. This definition is located in § 1026.32(b)(6). New § 1026.43(b)(10) cross-references this prepayment definition to provide consistency.

TILA establishes certain disclosure requirements for transactions for which a penalty is imposed upon prepayment, but TILA does not define the term ''prepayment penalty.'' The Dodd-Frank Act also does not define the term. TILA section 128(a)(11) requires that the transaction-specific disclosures for closed-end consumer credit transactions disclose a ''penalty'' imposed upon prepayment in full of a closed-end transaction, without using the term ''prepayment penalty.'' 15 U.S.C. 1638(a)(11).[86] Comment 18(k)(1)–1 clarifies that a ''penalty'' imposed upon prepayment in full is a charge assessed solely because of the prepayment of an obligation and includes, for example, ''interest'' charges for any period after prepayment in full is made and a minimum finance charge.

The Board's 2011 ATR Proposal proposed to implement the Dodd-Frank Act's prepayment penalty-related amendments to TILA for qualified mortgages by defining ''prepayment penalty'' for most closed-end, dwelling-secured transactions in new § 226.43(b)(10), and by cross-referencing proposed § 226.43(b)(10) in the proposed joint definition of points and fees for qualified and high-cost mortgages in § 226.32(b)(1)(v) and (vi). The definition of prepayment penalty proposed in the Board's 2011 ATR Proposal differed from the Board's prior proposals and existing guidance in the following respects: (1) Proposed § 226.43(b)(10) defined prepayment penalty with reference to a payment of ''all or part of'' the principal in a transaction covered by the provision, while § 1026.18(k) and associated commentary and the Board's 2009 Closed-End Proposal and 2010 Mortgage Proposal referred to payment ''in full;'' (2) the examples provided omitted reference to a minimum finance charge and loan guarantee fees; and (3) proposed § 226.43(b)(10) did not incorporate, and the Board's 2011 ATR Proposal did not otherwise address, the language in § 1026.18(k)(2) and associated commentary regarding

[86] Also, TILA section 128(a)(12) requires that the transaction-specific disclosures state that the consumer should refer to the appropriate contract document for information regarding certain loan terms or features, including ''prepayment * * * penalties.'' 15 U.S.C. 1638(a)(12). In addition, TILA section 129(c) limits the circumstances in which a high-cost mortgage may include a ''prepayment penalty.'' 15 U.S.C. 1639(c).

disclosure of a rebate of a precomputed finance charge, or the language in § 1026.32(b)(6) and associated commentary concerning prepayment penalties for high-cost mortgages.

The Board proposal generally received support from industry commenters and consumer advocates for accurately implementing section 129C(c) by using a plain language definition of prepayment penalty. Many commenters, particularly consumer groups, supported a rule that eliminates or tightly restricts the availability of prepayment penalties. Some industry commenters, however, cautioned the Bureau against implementing an overbroad definition of prepayment penalty, citing primarily a concern over consumers' access to credit. At least one commenter argued that a prepayment penalty ban should be more narrowly focused on the subprime loan market, noting that the proposal affected prepayment penalties on a wider variety of products. Other industry commenters expressed a concern about the Board's approach to the monthly interest accrual amortization method, as discussed in more detail below as part of the discussion of comment 32(b)(6)–1.

The Bureau adopts the definition of prepayment penalty under § 1026.32(b)(6) largely as proposed by the Board in order to create a clear application of the term prepayment penalty that is consistent with the definitions proposed in the Bureau's 2012 TILA–RESPA Proposal (which itself draws from the definition adopted in the Bureau's 2013 HOEPA Final Rule). However, the Bureau adds to § 1026.32(b)(6) an explicit exclusion from the definition of prepayment penalty for a waived bona fide third-party charge that the creditor imposes if the consumer, sooner than 36 months after consummation, pays all of a covered transaction's principal before the date on which the principal is due. This addition is discussed in detail below. Consistent with TILA section 129(c)(1), existing § 1026.32(d)(6), and the Board's proposed § 226.43(b)(10) for qualified mortgages, § 1026.32(b)(6)(i) provides that, for a closed-end mortgage loan, a ''prepayment penalty'' means a charge imposed for paying all or part of the transaction's principal before the date on which the principal is due, though the Bureau has added a carve-out from this definition to accommodate the repayment of certain conditionally waived closing costs when the consumer prepays in full. The Bureau adopts this definition of prepayment penalty under § 1026.32(b)(6), rather than under § 1026.43(b)(10), to facilitate compliance for creditors across rulemakings. The definition of ''prepayment penalty'' under § 1026.32(b)(6) thus will apply to prepayment penalty restrictions, as applied under § 1026.43(g). Section 1026.32(b)(6) also contains requirements and guidance related to the Bureau's 2013 HOEPA Final Rule, such as a definition of prepayment penalty that applies to open-end credit.

The Board's 2011 ATR Proposal included as an example of a prepayment penalty a fee that the creditor waives unless the consumer prepays the covered transaction. Some industry commenters contended that such conditional fee waivers should be excluded from the definition of prepayment penalties. The commenters argued that creditors imposed conditional fee waivers not to increase profit, but to ensure compensation for fixed costs associated with originating the loan. At least one commenter directed the Bureau to a 1996 National Credit Union Administration opinion letter that concluded that a conditional waiver of closing costs by a credit union was a benefit to the consumer. Other comments characterized the conditional fee waiver as a ''reimbursement,'' rather than compensation.

The Bureau finds such comments persuasive, particularly with respect to a situation in which the creditor waives a bona fide third-party charge (or charges) on condition that the consumer reimburse the creditor for the cost of that charge if the consumer prepays the loan. In such situations, the Bureau recognizes that the creditor receives no profit from imposing or collecting such charges and the Bureau believes that treating such charges as a prepayment penalty might very well have the effect of reducing consumer choice without providing any commensurate consumer benefit. In an effort to provide a sensible way to permit a creditor to protect itself from losing money paid at closing to third parties on the consumer's behalf, prior to such time as the creditor can otherwise recoup such costs through the interest rate on the mortgage loan, while balancing consumer protection interests, the Bureau has concluded that such fees should be permissible for a limited time after consummation. The Bureau thus adopts § 1032(b)(6)(i) to clarify that the term prepayment penalty does not include a waived bona fide third-party charge imposed by the creditor if the consumer pays all of a covered transaction's principal before the date on which the principal is due sooner than 36 months after consummation. The Bureau concludes that limiting the duration of the possible charge to 36 months after consummation is consistent with TILA 129C(c)(3)(D), which prohibits any prepayment penalty three years after loan consummation, while accommodating the concerns discussed above. Moreover, § 1032(b)(6)(i) excludes from the definition of prepayment penalty only those charges that a creditor imposes to recoup waived bona-fide third party charges in such cases where the consumer prepays in full. Thus, for example, if one month after loan consummation, the consumer prepays $100 of principal earlier than it is due, where the total principal is $100,000, then any fee that the creditor imposes for such prepayment is a prepayment penalty under § 1032(b)(6)(i) and such a fee is restricted in accordance with § 1026.43(g).

The Bureau believes that § 1026.32(b)(6) accurately implements TILA section 129C(c), which significantly limits the applicability and duration of prepayment penalties. Some commenters argued that restrictions on prepayment penalties should be more narrowly focused on specific products or consumers, because not all consumers need protection from the pitfalls of prepayment penalties. The Bureau agrees that prepayment penalties are not always harmful to consumers and that, in some cases, allowing a creditor to charge a prepayment penalty may lead to increased consumer choice and access to credit. Congress recognized this balance by allowing a creditor to charge a prepayment penalty only in certain circumstances, such as requiring the loan to be a qualified mortgage, under TILA section 129C(c)(1)(A), and by limiting a creditor to charging a prepayment penalty to no more than three years following consummation, under TILA section 129C(c)(3)(D). Section 1026.32(b)(6) remains faithful to that balance, with the Bureau's minor clarification with respect to waived bona fide third party charges, as described above.

The Board's 2011 ATR Proposal included several other examples of a prepayment penalty under proposed § 226.43(b)(10)(i). For clarity, the Bureau incorporates these examples as comment 32(b)(6)–1.i and ii, and the Bureau is adding comment 32(b)(6)–1.iii and iv to provide additional clarity. Likewise, the Bureau is largely adopting the Board's proposed § 226.43(b)(10)(ii), an example of what is not a prepayment penalty, as comment 32(b)(6)–3.i, as well as adding comment 32(b)(6)–3.ii.

Comment 32(b)(6)–1.i through iv gives the following examples of prepayment penalties: (1) A charge determined by treating the loan balance as outstanding for a period of time after prepayment in full and applying the interest rate to such ''balance,'' even if the charge results from interest accrual amortization used for other payments in the transaction under the terms of the loan contract; (2) a fee, such as an origination or other loan closing cost, that is waived by the creditor on the condition that the consumer does not prepay the loan; (3) a minimum finance charge in a simple interest transaction; and (4) computing a refund of unearned interest by a method that is less favorable to the consumer than the actuarial method, as defined by section 933(d) of the Housing and Community Development Act of 1992, 15 U.S.C. 1615(d).

Post-payoff interest charges. The Board proposal included as an example of a prepayment penalty in proposed § 226.43(b)(10)(i)(A) a charge determined by the creditor or servicer treating the loan balance as outstanding for a period of time after prepayment in full. Some industry commenters expressed reservations about treating this monthly interest accrual amortization method as a prepayment penalty, arguing that such a rule might cause higher resale prices in the secondary mortgage market to account for cash flow uncertainty. Other commenters noted that this calculation method is currently used by FHA to compute interest on its loans (including loans currently in Ginnie Mae pools), or that such charges were not customarily considered a prepayment penalty. Some commenters expressed concern that the rule would disrupt FHA lending.

After careful consideration of the comments received, the Bureau concludes that going forward (*e.g.,* for loans a creditor originates after the effective date), it is appropriate to designate higher interest charges for consumers based on accrual methods that treat a loan balance as outstanding for a period of time after prepayment in full as prepayment penalties under § 1026.32(b)(6) and comment 32(b)(6)–1.i. In such instances, the consumer submits a payment before it is due, but the creditor nonetheless charges interest on the portion of the principal that the creditor has already received. The Bureau believes that charging a consumer interest after the consumer has repaid the principal is the functional equivalent of a prepayment penalty. Comment 32(b)(6)–1.i further clarifies that ''interest accrual amortization'' refers to the method by which the amount of interest due for each period (*e.g.,* month) in a transaction's term is determined and notes, for example, that ''monthly interest accrual amortization'' treats each payment as made on the scheduled, monthly due date even if it is actually paid early or late (until the expiration of any grace period). The proposed comment also provides an example where a prepayment penalty of $1,000 is imposed because a full month's interest of $3,000 is charged even though only $2,000 in interest was earned in the month during which the consumer prepaid.

With respect to FHA practices relating to monthly interest accrual amortization, the Bureau has consulted extensively with HUD in issuing this final rule as well as the 2013 HOEPA Final Rule. Based on these consultations, the Bureau understands that HUD must engage in rulemaking to end its practice of imposing interest charges on consumers for the balance of the month in which consumers prepay in full. The Bureau further understands that HUD requires approximately 24 months to complete its rulemaking process. Accordingly, in recognition of the important role that FHA-insured credit plays in the current mortgage market and to facilitate FHA creditors' ability to comply with this aspect of the 2013 ATR and HOEPA Final Rules, the Bureau is using its authority under TILA section 105(a) to provide for optional compliance until January 15, 2015 with § 1026.32(b)(6)(i) and the official interpretation of that provision in comment 32(b)(6)–1.i regarding monthly interest accrual amortization. Specifically, § 1026.32(b)(6)(i) provides that interest charged consistent with the monthly interest accrual amortization method is not a prepayment penalty for FHA loans consummated before January 21, 2015. FHA loans consummated on or after January 21, 2015 must comply with all aspects of the final rule. The Bureau is making this adjustment pursuant to its authority under TILA section 105(a), which provides that the Bureau's regulations may contain such additional requirements, classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for all or any class of transactions as in the Bureau's judgment are necessary or proper to effectuate the purposes of TILA, prevent circumvention or evasion thereof, or facilitate compliance therewith. 15 U.S.C. 1604(a). The purposes of TILA include the purposes that apply to 129C, to assure that consumers are offered and receive residential mortgage loans on terms that reasonably reflect their ability to repay the loan. *See* 15 U.S.C. 1639b(a)(2). The Bureau believes it is necessary and proper to make this adjustment to ensure that consumers receive loans on affordable terms and to facilitate compliance with TILA and its purposes while mitigating the risk of disruption to the market. For purposes of this rulemaking, the Bureau specifically notes that the inclusion of interest charged consistent with the monthly interest accrual amortization method in the definition of prepayment penalty for purposes of determining whether a transaction is in compliance with the requirements of § 1026.43(g) applies only to transactions consummated on or after January 10, 2014; for FHA loans, compliance with this aspect of the definition of prepayment penalties is optional for transactions consummated prior to January 21, 2015.

With regard to general concerns that loans subject to these interest accrual methods may be subject to higher prices on the secondary market, the Bureau is confident that the secondary market will be able to price the increased risk of prepayment, if any, that may occur as a result of the limits that will apply to monthly interest accrual amortization-related prepayment penalties. The secondary market already does so for various other types of prepayment risk on investor pools, such as the risk of refinancing or sale of the property.

Comment 32(b)(6)–1.ii further explains the 36 month carve-out for a waived bona fide third-party charge imposed by the creditor if the consumer pays all of a covered transaction's principal before the date on which the principal is due sooner than 36 months after consummation, as included in § 1026.32(b)(6)(i). The comment explains that if a creditor waives $3,000 in closing costs to cover bona fide third party charges but the terms of the loan agreement provide that the creditor may recoup $4,500, in part to recoup waived charges, then only $3,000 that the creditor may impose to cover the waived bona fide third party charges is considered not to be a prepayment penalty, while any additional $1,500 charge for prepayment is a prepayment penalty and subject to the restrictions under § 1026.43(g). This comment also demonstrates that the only amount excepted from the definition of prepayment penalty under § 1026.32(b)(6)(i) is the actual amount that the creditor pays to a third party for a waived, bona fide charge.

Minimum finance charges; unearned interest refunds. Although longstanding Regulation Z commentary has listed a minimum finance charge in a simple interest transaction as an example of a prepayment penalty, the Board proposed to omit that example from proposed § 226.43(b)(10) because the

Board reasoned that such a charge typically is imposed with open-end, rather than closed-end, transactions. The Bureau did not receive substantial comment on this omission, but the Bureau has elected to continue using this example in comment 32(b)(6)–1.iii for consistency. Likewise, the Board did not propose to include the example of computing a refund of unearned interest by a method that is less favorable to the consumer than the actuarial method, but the Bureau is nonetheless using this example in comment 32(b)(6)–1.iv because similar language is found in longstanding Regulation Z commentary.

Examples of fees that are not prepayment penalties. The Board included in proposed § 226.43(b)(10)(ii) an example of a fee not considered a prepayment penalty. For the sake of clarity, the Bureau is moving this example into comment 32(b)(6)–2.i, rather than keep the example in the text of the regulation. The Bureau also is adding a second example in comment 32(b)(6)–2.ii.

Comment 32(b)(6)–2.i explains that fees imposed for preparing and providing documents when a loan is paid in full are not prepayment penalties when such fees are imposed whether or not the loan is prepaid or the consumer terminates the plan prior to the end of its term. Commenters did not provide substantial feedback on this example, which the Bureau has reworded slightly from the Board proposal to provide conformity and clarity.

The Board proposed omitting text from preexisting commentary on Regulation Z stating that a prepayment penalty did not include loan guarantee fees, noting that loan guarantee fees are not charges imposed for paying all or part of a loan's principal before the date on which the principal is due. The Bureau did not receive substantial comment on this omission. While the Bureau agrees with the Board's analysis, the Bureau nonetheless elects to include this example in comment 43(b)(6)–2.ii to clarify that loan guarantee fees continue to fall outside the definition of a prepayment penalty. Moreover, including this example of a fee that is not a prepayment penalty is consistent with the Bureau's efforts to streamline definitions and ease regulatory burden.

Construction-to-permanent financing. Some industry commenters advocated that, for construction-to-permanent loans, the Bureau should exclude from the definition of prepayment penalty charges levied by a creditor if a consumer does not convert the construction loan into a permanent loan with the same creditor within a specified time period. The Bureau believes that the concern expressed by these commenters that the cost of credit for these construction-to-permanent loans would increase if such charges were treated as prepayment penalties is misplaced primarily because in many cases, such charges are not, in fact, a prepayment penalty. A prepayment penalty is ''a charge imposed for paying all or part of a covered transaction's principal before the date on which the principal is due.'' First, the case where the creditor charges the consumer a fee for failing to convert a loan within a specified period after completing the repayment of a construction loan as scheduled is not a prepayment penalty; the fee is not assessed for an early payment of principal, but rather for the consumer's failure to take an action upon scheduled repayment of principal. Second, the case where a consumer does convert the construction loan to a permanent loan in a timely manner, but incurs a fee for converting the loan with another creditor, is also likely not prepayment penalty. While such cases depend highly on contractual wording, in the example above, the consumer is charged a fee not for his early payment of principal, but rather for his use of another creditor. Third, the case where the creditor charges the consumer a fee for converting the construction loan to a permanent loan earlier than specified by agreement, even with the same creditor, likely is a prepayment penalty. While this example is not the same as the hypothetical described by most commenters, who expressed concern if a consumer does not convert the construction loan into a permanent loan with the same creditor within a specified time period, this is an example of a prepayment penalty, as the creditor has imposed a charge for paying all or part of a covered transaction's principal before the date on which the principal was due. As the above examples demonstrate, whether a construction-to-permanent loan contains a prepayment penalty is fact-specific, and the Bureau has decided that adding a comment specifically addressing such loans would not be instructive. The Bureau sees no policy reason to generally exclude fees specific to construction-to-permanent loan from the definition of prepayment penalty and its statutory limits. The Bureau was not presented with any evidence that the risks inherent in construction-to-permanent loans could not be priced by creditors through alternative means, such as the examples described above, via interest rate, or charging closing costs. The Bureau also notes that, because of the scope of the rule, described in the section-by-section analysis of § 1026.43(a), as well as the prepayment penalty restrictions, described in the section-by-section analysis of § 1026.43(g), construction-to-permanent loans cannot be qualified mortgages, and thus under § 1026.43(g)(1)(ii)(B) cannot include a prepayment penalty. Construction-to-permanent loans are discussed in more detail in the section-by-section analysis of § 1026.43(a).

Open-end credit. The Bureau is concurrently adopting comments 32(b)(6)–3 and –4 to clarify its approach to prepayment penalties with respect to open-end credit. As the Board's 2011 ATR Proposal did not address open-end credit plans, the Bureau is not clarifying prepayment penalties with respect to open-end credit plans in this final rule. Instead, guidance is provided in comments 32(b)(6)–3 and –4, which the Bureau is adopting in the concurrent 2013 HOEPA Final Rule.

Section 1026.43 Minimum Standards for Transactions Secured by a Dwelling

43(a) Scope

Sections 1411, 1412 and 1414 of the Dodd-Frank Act add new TILA section 129C, which requires creditors to determine a consumer's ability to repay a ''residential mortgage loan'' and establishes new rules and prohibitions on prepayment penalties. Section 1401 of the Dodd-Frank Act adds new TILA section 103(cc),[87] which defines ''residential mortgage loan'' to mean, with some exceptions, any consumer credit transaction secured by a mortgage, deed of trust, or other equivalent consensual security interest on ''a dwelling or on residential real property that includes a dwelling.'' TILA section 103(v) defines ''dwelling'' to mean a residential structure or mobile home which contains one- to four-family housing units, or individual units of condominiums or cooperatives. Thus, a ''residential mortgage loan'' is a dwelling-secured consumer credit transaction, regardless of whether the consumer credit transaction involves a home purchase, refinancing, home equity loan, first lien or subordinate lien, and regardless of whether the dwelling is a principal residence, second home, vacation home (other than a timeshare residence), a one- to four-unit residence, condominium, cooperative, mobile home, or manufactured home.

[87] Two TILA subsections designated 103(cc) exist due to a discrepancy in the instructions given by the Dodd-Frank Act. *See* Dodd-Frank Act sections 1100A and 1401.

However, the Dodd-Frank Act specifically excludes from the term ''residential mortgage loan'' an open-end credit plan or an extension of credit secured by an interest in a timeshare plan, for purposes of the repayment ability and prepayment penalty provisions under TILA section 129C, among other provisions. *See* TILA section 103(cc)(5); *see also* TILA section 129C(i) (providing that timeshare transactions are not subject to TILA section 129C). Further, the repayment ability provisions of TILA section 129C(a) do not apply to reverse mortgages or temporary or ''bridge'' loans with a term of 12 months or less, including a loan to purchase a new dwelling where the consumer plans to sell another dwelling within 12 months. *See* TILA section 129C(a)(8). The repayment ability provisions of TILA section 129C(a) also do not apply to consumer credit transactions secured by vacant land. *See* TILA section 103(cc)(5) and 129C(a)(1).

TILA Section 103(cc) defines ''residential mortgage loan'' to mean a consumer credit transaction secured by a mortgage or equivalent consensual security interest ''on a dwelling or on residential real property that includes a dwelling.'' Under TILA and Regulation Z, the term ''dwelling'' means a residential structure with one to four units, whether or not the structure is attached to real property, and includes a condominium or cooperative unit, mobile home, and trailer, if used as a residence. *See* 15 U.S.C. 1602(v), § 1026.2(a)(19). To facilitate compliance by using consistent terminology throughout Regulation Z, the proposal used the term ''dwelling,'' as defined in § 1026.2(a)(19), and not the phrase ''residential real property that includes a dwelling.'' Proposed comment 43(a)–2 clarified that, for purposes of proposed § 226.43, the term ''dwelling'' would include any real property to which the residential structure is attached that also secures the covered transaction.

Proposed § 226.43(a) generally defined the scope of the ability-to-repay provisions to include any consumer credit transaction that is secured by a dwelling, other than home equity lines of credit, mortgage transactions secured by an interest in a timeshare plan, or for certain provisions reverse mortgages or temporary loans with a term of 12 months or less. Proposed comment 43(a)–1 clarified that proposed § 226.43 would not apply to an extension of credit primarily for a business, commercial, or agricultural purpose and cross-referenced the existing guidance on determining the primary purpose of an extension of credit in commentary on § 1026.3.

Numerous commenters requested additional exemptions from coverage beyond the statutory exemptions listed at proposed § 226.43(a)(1) through (3). The Bureau received requests for exemptions from the rule for seller-financed transactions, loans secured by non-primary residences, community development loans, downpayment assistance loans, loans eligible for purchase by GSEs, and housing stabilization refinances. The requested exemptions related to community development loans, downpayment assistance loans, and housing stabilization refinances are not being included in this final rule, but are addressed in the Bureau's proposed rule regarding amendments to the ability-to-repay requirements, published elsewhere in today's **Federal Register**. The requested exemptions that are not being included in the rule and are not being addressed in today's concurrent proposal are discussed immediately below.

The Bureau received numerous letters from individuals concerned that the rule would cover individual home sellers who finance the buyer's purchase, either through a loan or an installment sale. However, because the definition of ''creditor'' for mortgages generally covers only persons who extend credit secured by a dwelling more than five times in a calendar year, the overwhelming majority of individual seller-financed transactions will not be covered by the rule. Those creditors who self-finance six or more transactions in a calendar year, whether through loans or installment sales, will need to comply with the ability-to-repay provisions of § 1026.43, just as they must comply with other relevant provisions of Regulation Z.

An association of State bank regulators suggested that the scope of the ability-to-repay requirements be limited to owner-occupied primary residences, stating that ability to repay on vacation homes and investment properties should be left to an institution's business judgment. The Bureau believes it is not appropriate or necessary to exercise its exception authority to change the scope of the provision in this way for several reasons. First, as discussed in proposed comment 43(a)–1, loans that have a business purpose [88] are not covered by TILA, and so would not be covered by the ability-to-repay provisions as proposed and adopted. Investment purpose loans are considered to be business purpose loans. Second, vacation home loans are consumer credit transactions that can have marked effects on a consumer's finances. If a consumer is unable to repay a mortgage on a vacation home, the consumer will likely suffer severe financial consequences and the spillover effects on property values and other consumers in the affected area can be substantial as well. Third, the Bureau understands that default rates on vacation homes are generally higher than those on primary residences, and an exemption could increase this disparity.

For the reasons discussed below, the general scope provision and the statutory exemptions in § 1026.43(a)(1) through (3)(ii) are adopted substantially as proposed, with minor changes as discussed in the relevant sections below, and the addition of § 1026.43(a)(3)(iii) to provide an exemption for the construction phase of a construction-to-permanent loan.

The general scope provision at § 1026.43(a) now includes language making clear that real property attached to a dwelling will be considered a part of the dwelling for purposes of compliance with § 1026.43. Although as discussed above similar language was included in the official commentary in the proposed rule, the Bureau believes this important legal requirement should be part of the regulatory text.

Comment 43(a)–1 now includes a reference to § 1026.20(a), which describes different types of changes to an existing loan that will not be treated as refinancings, to make clear that creditors may rely on that section in determining whether or not § 1026.43 will apply to a particular change to an existing loan.

43(a)(1)

The Board's proposal included an exemption from the scope of section 226.43 for ''[a] home equity line of credit subject to § 226.5b,'' [89] which implemented the exclusion of HELOCs from coverage in the statutory definition of ''residential mortgage loan.'' Dodd-Frank Act section 1401. The Bureau received two comments asking that the HELOC exemption be reconsidered. The commenters stated that HELOCs had contributed to the crisis in the mortgage market and that failure to include them in the ability-to-repay rule's coverage would likely lead to more consumer abuse and systemic problems.

The Bureau notes that Congress specifically exempted open-end lines of credit from the ability-to-repay

[88] 12 CFR 1026.3(a).

[89] The Regulation Z section on HELOCs has been relocated and is now at 12 CFR 1026.40.

requirements, even though the Dodd-Frank Act extends other consumer protections to such loans, including the requirements for high-cost mortgages under HOEPA. The Bureau also notes that home equity lines of credit have consistently had lower delinquency rates than other forms of consumer credit.[90] Furthermore, the requirements contained in the Dodd-Frank Act with respect to assessing a consumer's ability to repay a residential mortgage, and the regulations the Bureau is adopting thereunder, were crafted to apply to the underwriting of closed-end loans and are not necessarily transferrable to underwriting for an open-end line of credit secured by real estate. In light of these considerations, the Bureau does not believe there is sufficient justification to find it necessary or proper to use its adjustment and exception authority to expand the ability-to-repay provisions to HELOCs at this time. However, as discussed in detail below, the Bureau is adopting the Board's proposal to require creditors to consider and verify contemporaneous HELOCs in addition to other types of simultaneous loans for the purpose of complying with the ability-to-repay provisions. See the section-by-section analysis of § 1026.43(b)(12) below. In addition, the final rule includes the Board's proposed anti-evasion provision, which forbids the structuring of credit that does not meet the definition of open-end credit as an open-end plan in order to evade the requirements of this rule. *See* § 1026.43(h). Accordingly, § 1026.43(a)(1) is adopted as proposed, with the embedded citation updated. However, the Bureau intends to monitor the HELOC exemption through its supervision function and may revisit the issue as part of its broader review of the ability-to-repay rule under section 1022(d) of the Dodd-Frank Act, which requires the Bureau to publish an assessment of a significant rule or order not later than five years after its effective date.

43(a)(2)

The Bureau did not receive comments on the statutory timeshare exemption included in proposed § 226.43(a)(2). Accordingly, the Bureau is adopting § 1026.43(a)(2) as proposed.

[90] *See* Fed. Reserve Bank of N.Y., *Quarterly Report on Household Debt and Credit,* at 9 (Nov. 2012), *available at http://www.newyorkfed.org/research/national_economy/householdcredit/DistrictReport_Q32012.pdf.*

43(a)(3)

43(a)(3)(i)

Proposed § 226.43(a)(3)(i) created an exemption from the ability-to-repay requirements in § 226.43(c) through (f) for reverse mortgages, as provided in the statute. The Bureau did not receive comments on this exemption.[91] Accordingly, the Bureau is adopting § 1026.43(a)(3)(i) as proposed.

43(a)(3)(ii)

Proposed § 226.43(a)(3)(ii) provided an exemption from the ability-to-repay requirements in § 226.43(c) through (f) for ''[a] temporary or 'bridge' loan with a term of 12 months or less, such as a loan to finance the purchase of a new dwelling where the consumer plans to sell a current dwelling within 12 months or a loan to finance the initial construction of a dwelling.'' Furthermore, proposed comment 43(a)–3 provided that, ''[w]here a temporary or bridge loan is renewable, the loan term does not include any additional period of time that could result from a renewal provision.'' The Board solicited comment on whether a decision to treat renewals in this manner would lead to evasion of the rule. The statute includes the one-year exemption implemented in the proposed rule but does not specifically address renewals. TILA section 129C(a)(8), 15 U.S.C. 1639c(a)(8).

Generally, commenters did not specifically address the proposal's request for comment on renewals of short-term financing; however, one industry commenter stated that the statutory one-year limitation would interfere with construction loans, which often require more than a year to complete. The Bureau understands that construction loans often go beyond a single year. Although the comment did not specify that disregarding potential renewals would alleviate this concern, the Bureau believes that disregarding renewals would facilitate compliance and prevent unwarranted restrictions on access to construction loans.

Commenters did not respond to the Board's query about whether or not disregarding renewals of transactions with one-year terms would lead to evasion of the rule. Upon further analysis, the Bureau believes that this concern does not warrant changing the proposed commentary. However, the Bureau intends to monitor the issue through its supervision function and to revisit the issue as part of its broader review of the ability-to-repay rule under section 1022(d) of the Dodd-Frank Act, which requires the Bureau to conduct an assessment of significant rules five years after they are adopted.

[91] Comments were received regarding the possible description of a reverse mortgage qualified mortgage, and they are discussed below. These commenters did not discuss or question the general exemption from the ability-to-repay rule.

One industry trade association commented on the wording of the temporary financing exemption, suggesting that the inclusion of the two examples, bridge loans and construction loans, would create uncertainty as to whether the exemption would apply to temporary financing of other types. However, the Bureau believes further clarification is not required because the exemption applies to any temporary loan with a term of 12 months or less, and the examples are merely illustrative. The Bureau is aware of and provides clarifying examples of certain common loan products that are temporary or ''bridge'' loans. The commenter did not note other common types of temporary loan products. The Bureau further believes that the rule permits other types of temporary financing as long as the loan satisfies the requirements of the exemption.

Accordingly, § 1026.43(a)(3)(ii) and associated commentary are adopted substantially as proposed.

43(a)(3)(iii)

The Bureau also received comments requesting clarification on how the temporary financing exemption would apply to construction-to-permanent loans, *i.e.,* construction financing that will be permanently financed by the same creditor. Typically, such loans have a short construction period, during which payments are made of interest only, followed by a fully amortizing permanent period, often an additional 30 years. Because of this hybrid form, the loans do not appear to qualify for the temporary financing exemption, nor would they be qualified mortgages because of the interest-only period and the fact that the entire loan term will often slightly exceed 30 years. However, such loans may have significant consumer benefits because they avoid the inconvenience and expense of a second closing, and also avoid the risk that permanent financing will be unavailable when the construction loan is due.

The Bureau notes that existing § 1026.17(c)(6)(ii) provides that construction-to-permanent loans may be disclosed as either a single transaction or as multiple transactions at the creditor's option. Consistent with that provision, the Bureau is using its adjustment and exception authority to allow the construction phase of a construction-to-permanent loan to be exempt from the ability-to-repay requirements as a temporary loan; however, the permanent phase of the loan is subject to § 1026.43. Because the permanent phase is subject to § 1026.43, it may be a qualified mortgage if it satisfies the appropriate requirements.

As amended by the Dodd-Frank Act, TILA section 105(a), 15 U.S.C. 1604(a), directs the Bureau to prescribe regulations to carry out the purposes of TILA, and provides that such regulations may contain additional requirements, classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for all or any class of transactions that the Bureau judges are necessary or proper to effectuate the purposes of TILA, to prevent circumvention or evasion thereof, or to facilitate compliance therewith. The main purpose of section 129C is articulated in section 129B(a)(2)—''to assure that consumers are offered and receive residential mortgage loans on terms that reasonably reflect their ability to repay the loans and that are not unfair, deceptive or abusive.'' Creditors' ability to continue originating construction-to-permanent loans in a cost effective manner will help to ensure that consumers are offered and receive loans on terms that reasonably reflect their ability to repay. The construction-to-permanent product avoids the possibility of a consumer being unable to repay a construction loan, because the permanent financing is already part of the contract. Without the ability to treat the permanent financing as a qualified mortgage, and the construction phase as exempt, it is not clear how many creditors would continue to offer such loans, especially in the short term. In addition, consumers will benefit from the potentially lower costs associated with qualified mortgages. In addition to effectuating the purpose of ensuring ability to repay, this exemption will greatly facilitate compliance for creditors providing this product.

Proposed comment 43(a)(3)–1 provided that, where a temporary or ''bridge'' loan is renewable, the loan term does not include any additional period of time that could result from a renewal provision. The Bureau is adding comment 43(a)(3)–2 to make clear that if a construction-to-permanent loan is treated as multiple transactions in regard to compliance with the ability-to-repay requirements, and the initial one-year construction phase is renewable, the loan term of the construction phase does not include any additional period of time that could result from a renewal of that construction phase that is one year or less in duration. Comment 43(a)(3)–2 also makes clear that if the construction phase of a construction-to-permanent loan is treated as exempt, the permanent financing phase may be a qualified mortgage if it meets the appropriate requirements.

Accordingly, § 1026.43(a)(3)(iii) and comment 43(a)(3)–2 are added to this final rule.

43(b) Definitions

43(b)(1)

The definition of ''covered transaction'' restates the scope of the rule, discussed above, which implements the statutory term ''residential mortgage loan'' defined at TILA § 103(cc)(5). The Bureau did not receive any comments specifically on this provision and is adopting it as proposed in § 1026.43(b)(1). For clarity, the Bureau has added comment 43(b)(1)–1 explaining that the term ''covered transaction'' restates the scope of the rule as described in § 1026.43(a).

43(b)(2)

TILA section 129C(a)(3) requires that ''[a] creditor shall determine the ability of the consumer to repay using a payment schedule that fully amortizes the loan over the term of the loan.'' In implementing this provision, the proposed rule defined a ''fully amortizing payment'' as ''a periodic payment of principal and interest that will fully repay the loan amount over the loan term.'' The term ''fully amortizing payment'' is used in the general ''payment calculation'' provision in § 1026.43(c)(5)(i)(B), which requires the use of ''[m]onthly, fully amortizing payments that are substantially equal.'' The Bureau has determined that the definition of ''fully amortizing payment'' enables accurate implementation of the payment calculation process envisioned by the statute, and no comments focused on or questioned this definition. Accordingly, § 1026.43(b)(2) is adopted as proposed.

43(b)(3)

TILA section 129C(a)(6)(D) provides that, for purposes of making the repayment ability determination required under TILA section 129C(a), the creditor must calculate the monthly payment on the mortgage obligation based on several assumptions, including that the monthly payment be calculated using the fully indexed rate at the time of loan closing, without considering the introductory rate. *See* TILA section 129C(a)(6)(D)(iii). TILA section 129C(a)(7) defines the term ''fully indexed rate'' as ''the index rate prevailing on a residential mortgage loan at the time the loan is made plus the margin that will apply after the expiration of any introductory interest rates.''

The term ''fully indexed rate'' appeared in proposed § 226.43(c)(5), which implemented TILA section 129C(a)(6)(D)(iii) and provided the payment calculation rules for covered transactions. The term also appeared in proposed § 226.43(d)(5), which provided special rules for creditors that refinance a consumer from a non-standard mortgage to a standard mortgage.

Proposed § 226.43(b)(3) defined the term ''fully indexed rate'' as ''the interest rate calculated using the index or formula at the time of consummation and the maximum margin that can apply at any time during the loan term.'' This proposed definition was consistent with the statutory language of TILA sections 129C(a)(6)(D)(iii) and 129C(a)(7), but revised certain text to provide clarity. First, for consistency with current Regulation Z and to facilitate compliance, the proposal replaced the phrases ''at the time of the loan closing'' in TILA section 129C(a)(6)(D)(iii) and ''at the time the loan is made'' in TILA section 129C(a)(7) with the phrase ''at the time of consummation'' for purposes of identifying the fully indexed rate. The Board interpreted these statutory phrases to have the same meaning as the phrase ''at the time of consummation.'' See current § 1026.2(a)(7), defining the term ''consummation'' for purposes of Regulation Z requirements as ''the time that a consumer becomes contractually obligated on a credit transaction.''

In requiring that the fully indexed rate be determined using the specified index at consummation, the Board was concerned that the possible existence of loans that use more than one index could complicate this determination. Given the increasing relevance of market indices, the Board solicited comment on whether loan products currently exist that base the interest rate on a specific index at consummation, but then base subsequent rate adjustments on a different index, and whether further guidance addressing how to calculate the fully indexed rate for such loan products would be needed.

The proposed rule interpreted the statutory reference to the margin that will apply ''after the expiration of any introductory interest rates'' as a reference to the maximum margin that can apply ''at any time during the loan term.'' The Bureau agrees with this interpretation, because the statutory use of the plural ''rates'' modified by the all-inclusive term ''any'' clearly indicates not only that something more than the initial introductory rate is meant, but that ''any'' preliminary rate should be disregarded. In addition, the statutory term itself, ''*fully* indexed rate,'' appears to require such a reading. Referencing the entire loan term as the relevant period of time during which the creditor must identify the maximum margin that can occur under the loan makes the phrase ''after the expiration of any introductory interest rates'' unnecessary and allows for simplicity and consistency with new TILA section 103(bb), the high cost mortgage provision.

Because the proposal required that the creditor use the ''maximum'' margin that can apply when determining the fully indexed rate, the creditor would be required to take into account the largest margin that could apply under the terms of the legal obligation. The approach of using the maximum margin that can apply at any time during the loan term is consistent with the statutory language contained in TILA section 103(bb), as amended by section 1431 of the Dodd-Frank Act, which defines a high-cost mortgage. This statutory provision provides that, for purposes of the definition of a ''high-cost mortgage'' under HOEPA, for a mortgage with an interest rate that varies solely in accordance with an index, the annual percentage rate must be based on ''the interest rate determined by adding the index rate in effect on the date of consummation of the transaction to the *maximum margin* permitted at any time during the loan agreement.'' [92] Furthermore, although the Board was not aware of any current loan products that possess more than one margin that may apply over the loan term, the Board proposed this clarification to address the possibility that creditors may create products that permit different margins to take effect at different points throughout the loan term. The proposal solicited comment on this approach.

The proposed definition of ''fully indexed rate'' was also generally consistent with the definition of ''fully indexed rate'' as used in the MDIA Interim Final Rule,[93] and with the Federal banking agencies' use of the term ''fully indexed rate'' in the 2006 Nontraditional Mortgage Guidance and 2007 Subprime Mortgage Statement.

Proposed comment 43(b)(3)–1 noted that in some adjustable-rate transactions, creditors may set an initial interest rate that is not determined by the index or formula used to make later interest rate adjustments. This proposed comment explained that this initial rate charged to consumers will sometimes be lower than the rate would be if it were calculated using the index or formula at consummation (*i.e.,* a ''discounted rate''); in some cases, this initial rate may be higher (*i.e.,* a ''premium rate''). The proposed comment clarified that when determining the fully indexed rate where the initial interest rate is not determined using the index or formula for subsequent interest rate adjustments, the creditor must use the interest rate that would have applied had the creditor used such index or formula plus margin at the time of consummation. The proposed comment further clarified that this means, in determining the fully indexed rate, the creditor must *not* take into account any discounted or premium rate. (In addition, to facilitate compliance, this comment directed creditors to commentary that addresses payment calculations based on the greater of the fully indexed rate or ''premium rate'' for purposes of the repayment ability determination under proposed § 226.43(c)). *See* final rule § 1026.43(c)(5)(i)(A) and comment 43(c)(5)(i)–2.)

Proposed comment 43(b)(3)–1 differed from guidance on disclosure requirements in current comment 17(c)(1)–10.i, which provides that in cases where the initial interest rate is not calculated using the index or formula for later rate adjustments, the creditor should disclose a composite annual percentage rate that reflects both the initial rate and the fully indexed rate. The Board believed the different approach taken in proposed comment 43(b)(3)–1 was required by the statutory language and was appropriate in the present case where the purpose of the statute is to determine whether the consumer can repay the loan according to its terms, including any potential increases in required payments. TILA section 129B(a)(2), 15 U.S.C 1639b(a)(2).

Proposed comment 43(b)(3)–2 further clarified that if the contract provides for a delay in the implementation of changes in an index value or formula, the creditor need not use the index or formula in effect at consummation, and provides an illustrative example. This proposed comment was consistent with current guidance in Regulation Z regarding the use of the index value at the time of consummation where the contract provides for a delay. See comments 17(c)(1)–10.i and 18(s)(2)(iii)(C)–1, which address the fully indexed rate for purposes of disclosure requirements.

Proposed comment 43(b)(3)–3 explained that the creditor must determine the fully indexed rate without taking into account any periodic interest rate adjustment caps that may limit how quickly the fully indexed rate may be reached at any time during the loan term under the terms of the legal obligation. As the proposal noted, the guidance contained in proposed comment 43(b)(3)–3 differed from guidance contained in current comment 17(c)(1)–10.iii, which states that, when disclosing the annual percentage rate, creditors should give effect to periodic interest rate adjustment caps.

Nonetheless, the Board believed the approach in proposed comment 43(b)(3)–3 was consistent with, and required by, the statutory language that states that the fully indexed rate must be determined without considering any introductory rate and by using the margin that will apply after expiration of any introductory interest rates. *See* TILA section 129C(a)(6)(D)(iii) and (7). In addition, the Board noted that the proposed definition of fully indexed rate, and its use in the proposed payment calculation rules, was designed to assess whether the consumer has the ability to repay the loan according to its terms. TILA section 129B(a)(2), 15 U.S.C 1639b(a)(2). This purpose differs from the principal purpose of disclosure requirements, which is to help ensure that consumers avoid the uninformed use of credit. TILA section 102(a), 15 U.S.C. 1601(a). Furthermore, the guidance contained in proposed comment 43(b)(3)–3 was consistent with the Federal banking agencies' use of the term fully indexed rate in the 2006 Nontraditional Mortgage Guidance and 2007 Subprime Mortgage Statement.

Proposed comment 43(b)(3)–4 clarified that when determining the fully indexed rate, a creditor may choose, in its sole discretion, to take into account the lifetime maximum interest rate provided under the terms of the legal obligation. This comment explained, however, that where the creditor chooses to use the lifetime maximum interest rate, and the loan agreement provides a range for the maximum interest rate, the creditor must use the highest rate in that range as the maximum interest rate. In allowing creditors to use the lifetime maximum interest rate provided under

[92] Previous to the passage of the Dodd-Frank Act, the annual percentage rate used for this determination was calculated the same way as for the rest of the Truth in Lending Act, pursuant to § 1026.14.

[93] *See* 2010 MDIA Interim Final Rule, 75 FR 58470, 58484 (Sept. 24, 2010) (defines fully indexed rate as ''the interest rate calculated using the index value and margin''); *see also* 75 FR 81836 (Dec. 29, 2010) (revising the MDIA Interim Final Rule).

the terms of the obligation, the Board was apparently interested in simplifying compliance and benefiting consumers by encouraging reasonable lifetime interest rate caps. In doing so, the Board was apparently reading its proposed definition of fully indexed rate to allow the maximum margin that can apply at any time during the loan term to refer to the maximum margin as determined at consummation. In other words, when the index value is determined at consummation, the maximum margin that can apply at any time during the loan term will be the difference between the lifetime interest rate cap and that index value. Consequently, adding the index value at consummation to that maximum margin, as required by the fully indexed rate definition, will yield the lifetime interest rate cap as the fully indexed rate.

Commenters generally did not focus specifically on the definition of ''fully indexed rate'' and associated commentary proposed by the Board, or provide examples of loans with more than one index or more than one margin. An organization representing state bank regulators supported the use of the maximum margin that can apply at any time during the loan term, suggesting that it would prevent evasion. (Some commenter groups did urge the Bureau to use its adjustment authority to require creditors to use a rate higher than the fully indexed rate in assessing a consumer's ability to repay; these comments are discussed below in the section-by-section analysis of § 1026.43(c)(5)(i)). The Bureau is adopting the rule and commentary largely as proposed, with some modifications for clarity. Specifically, the Bureau decided to include language in the definition that will make clear that the index used in determining the fully indexed rate is the index that will apply after the loan is recast, so that any index that might be used earlier in determining an initial or intermediate rate would not be used. This new language is included for clarification only, and does not change the intended meaning of the proposed definition.

In the proposed rule, the Board noted that the statutory construct of the payment calculation rules, and the requirement to calculate payments based on the fully indexed rate, apply to all loans that are subject to the ability-to-repay provisions, including loans that do not base the interest rate on an index and therefore, do not have a fully indexed rate. Specifically, the statute states that ''[f]or purposes of making *any* determination under this *subsection,* a creditor shall calculate the monthly payment amount for principal and interest on *any residential mortgage loan* by assuming'' several factors, including the fully indexed rate, as defined in the statute (emphasis added). *See* TILA section 129C(a)(6)(D). The statutory definition of ''residential mortgage loan'' includes loans with variable-rate features that are not based on an index or formula, such as step-rate mortgages. *See* TILA section 103(cc); *see also* proposed § 226.43(a), which addressed the proposal's scope, and proposed § 226.43(b)(1), which defined ''covered transaction.'' However, because step-rate mortgages do not have a fully indexed rate, it was unclear what interest rate the creditor should assume when calculating payment amounts for the purpose of determining the consumer's ability to repay the covered transaction.

As discussed above, the proposal interpreted the statutory requirement to use the ''margin that can apply at any time after the expiration of any introductory interest rates'' to mean that the creditor must use the ''maximum margin that can apply at any time during the loan term'' when determining the fully indexed rate. Accordingly, consistent with this approach, the proposal clarified in proposed comment 43(b)(3)–5 that where there is no fully indexed rate because the interest rate offered in the loan is not based on, and does not vary with, an index or formula, the creditor must use the maximum interest rate that may apply at any time during the loan term. Proposed comment 43(b)(3)–5 provided illustrative examples of how to determine the maximum interest rate for a step-rate and a fixed-rate mortgage.

The Board believed this approach was appropriate because the purpose of TILA section 129C is to require creditors to assess whether the consumer can repay the loan according to its terms, including any potential increases in required payments. TILA section 129B(a)(2), 15 U.S.C 1639b(a)(2). Requiring creditors to use the maximum interest rate would help to ensure that consumers could repay their loans. However, the Board was also concerned that by requiring creditors to use the maximum interest rate in a step-rate mortgage, the monthly payments used to determine the consumer's repayment ability might be overstated and potentially restrict credit availability. Therefore, the Board solicited comment on this approach, and whether authority under TILA sections 105(a) and 129B(e) should be used to provide an exception for step-rate mortgages, possibly requiring creditors to use the maximum interest rate that occurs in only the first 5 or 10 years, or some other appropriate time horizon.

The Bureau received few comments on the use of the maximum interest rate that may apply at any time during the loan term for step-rate mortgages. A consumer group and a regulatory reform group stated that this method was better and more protective of consumers than using a seven- or ten-year horizon. An organization representing state bank regulators suggested that the Bureau use a five-year horizon, provided that the loan has limits on later rate increases. An industry trade association suggested that the maximum rate only be applied to the balance remaining when that maximum rate is reached.

The Bureau believes that the proposal's method of using the maximum interest rate that may apply at any time during the loan term for step-rate mortgages is appropriate. This approach most closely approximates the statutorily required fully indexed rate because it employs the highest rate ascertainable at consummation, as does the fully indexed rate, and it applies that rate to the entire original principal of the loan, as the calculation in § 1026.43(c)(5)(i) does with the fully indexed rate. In addition, this method most effectively ensures the consumer's ability to repay the loan.

For the reasons stated above, § 1026.43(b)(3) is adopted substantially as proposed, with the clarification discussed above specifying that the index used in determining the fully indexed rate is the index that will apply after the loan is recast. Issues regarding the use of the fully indexed rate in the payment calculations required by § 1026.43(c)(5) are discussed in the section-by-section analysis of that section below.

43(b)(4)

The Dodd-Frank Act added TILA section 129C(a)(6)(D)(ii)(II), which provides that a creditor making a balloon-payment loan with an APR at or above certain thresholds must determine ability to repay ''using the contract's repayment schedule.'' The thresholds required by the statute are 1.5 or more percentage points above the average prime offer rate (APOR) for a comparable transaction for a first lien, and 3.5 or more percentage points above APOR for a subordinate lien. These thresholds are the same as those used in the Board's 2008 HOEPA Final Rule [94] to designate a new category of ''higher-priced mortgage loans'' (HPMLs), which was amended by the Board's 2011 Jumbo Loans Escrows Final Rule to

[94] 73 FR 44522 (July 30, 2008).

include a separate threshold for jumbo loans for purposes of certain escrows requirements.[95] Implementing these thresholds for use with the payment underwriting determination for balloon-payment mortgages, the proposed rule defined a ''higher-priced covered transaction'' as one in which the annual percentage rate (APR) ''exceeds the average prime offer rate (APOR) for a comparable transaction as of the date the interest rate is set by 1.5 or more percentage points for a first-lien covered transaction, or by 3.5 or more percentage points for a subordinate-lien covered transaction.'' As explained further below and provided for in the statute, the designation of certain covered transactions as higher-priced affects the ability-to-repay determination for balloon-payment mortgages, and requires that those higher-priced transactions be analyzed using the loan contract's full repayment schedule, including the balloon payment. § 1026.43(c)(5)(ii)(A)(*2*).

Proposed comment 43(b)(4)–1 provided guidance on the term ''average prime offer rate.'' Proposed comment 43(b)(4)–2 stated that the table of average prime offer rates published by the Board would indicate how to identify the comparable transaction for a higher-priced covered transaction. Proposed comment 43(b)(4)–3 clarified that a transaction's annual percentage rate is compared to the average prime offer rate as of the date the transaction's interest rate is set (or ''locked'') before consummation. This proposed comment also explained that sometimes a creditor sets the interest rate initially and then resets it at a different level before consummation, and clarified that in these cases, the creditor should use the last date the interest rate is set before consummation.

The Board explained in its proposed rule that it believed the ability-to-repay requirements for higher-priced balloon-payment loans was meant to apply to the subprime market, but that use of the annual percentage rate could lead to prime loans being exposed to this test. For this reason, the Board was concerned that the statutory formula for a higher-priced covered transaction might be over-inclusive. Accordingly, the Board solicited comment on whether the ''transaction coverage rate'' (TCR) should be used for this determination, instead of the annual percentage rate. 76 FR 27412. The TCR had previously been proposed in conjunction with a more inclusive version of the APR, in order to avoid having the more inclusive, hence higher, APRs trigger certain requirements unnecessarily. The TCR includes fewer charges, and the Board's 2011 Escrows Proposal proposed to use it in the threshold test for determining application of those requirements. 76 FR 11598, 11626–11627 (Mar. 2, 2011).

The only comment substantively discussing the possible substitution of the TCR for the APR was strongly opposed to the idea, stating that it would create unnecessary compliance difficulty and costs. The Bureau has determined that possible transition to a TCR standard will implicate several rules and is not appropriate at the present time. However, the issue will be considered further as part of the Bureau's TILA/RESPA rulemaking. *See* 77 FR 51116, 51126 (Aug. 23, 2012).

The Board also solicited comment on whether or not to provide a higher threshold for jumbo balloon-payment mortgages or for balloon-payment mortgages secured by a residence that is not the consumer's principal dwelling, e.g., a vacation home. 76 FR 27412. The Board requested this information due to its belief that higher interest rates charged for these loans might render them unavailable without the adjustment. The margin above APOR suggested for first-lien jumbo balloon-payment mortgages was 2.5 percentage points.

Two industry commenters supported the higher threshold for jumbo loans, arguing that the current thresholds would interfere with credit accessibility. One of these commenters also stated that the higher threshold should be available for all balloon-payment mortgages. No commenters discussed the non-principal-dwelling threshold.

Many other commenters objected strongly to the statutory requirement, implemented in the proposed rule, that the balloon payment be considered in applying the ability-to-repay requirements to higher-priced covered transaction balloon-payment mortgages. These industry commenters felt that the percentage point thresholds were too low, and that many loans currently being made would become unavailable. They did not, however, submit sufficient data to help the Bureau assess these claims. Other commenters, including several consumer protection advocacy organizations, argued that the higher-priced rule would be helpful in ensuring consumers' ability to repay their loans.

The Bureau has evaluated the proposed definition of ''higher-priced covered transaction'' not only in relation to its use in the payment determination for balloon-payment mortgages, but also in the light of its application in other provisions of the final rule. For example, as discussed below, the final rule varies the strength of the presumption of compliance for qualified mortgages. A qualified mortgage designated as a higher-priced covered transaction will be presumed to comply with the ability-to repay-provision at § 1026.43(c)(1), but will not qualify for the safe harbor provision. *See* § 1026.43(e)(1)(ii) and (i).

Specifically, the Bureau has considered whether to adopt a different threshold to define high price mortgage loans for jumbo loans than for other loans. The Bureau notes that the Board expressly addressed this issue in its 2008 HOEPA Final Rule and concluded not to do so. The Board explained that although prime jumbo loans have always had somewhat higher rates than prime conforming loans, the spread has been quite volatile.[96] The Board concluded that it was sounder to err on the side of being over-inclusive than to set a higher threshold for jumbo loans and potentially fail to include subprime jumbo loans.[97] The Bureau is persuaded by the Board's reasoning.

The Bureau recognizes that in the Dodd-Frank Act Congress, in requiring creditors to establish escrows accounts for certain transactions and in requiring appraisals for certain transactions based upon the interest rate of the transactions, did establish a separate threshold for jumbo loans. The Bureau is implementing that separate threshold in its 2013 Escrows Final Rule which is being issued contemporaneously with this final rule. However, the Bureau also notes that in the ability-to-repay provision of the Dodd-Frank Act, Congress mandated underwriting rules for balloon-payment mortgages which vary based upon the pricing of the loan, and in doing so Congress followed the thresholds adopted by the Board in its 2008 HOEPA Final Rule and did not add a separate threshold for jumbo loans. The fact that the Act uses the Board's criteria in the ability to repay context lends further support to the Bureau's decision to use those criteria as well in defining higher-priced loans under the final rule.

Accordingly, the Bureau is not providing for a higher threshold for jumbo or non-principal dwelling balloon-payment mortgages at this time. In regard to the possibility of a higher threshold for non-principal dwellings such as vacation homes, the Bureau understands that such products have historically been considered to be at higher risk of default than loans on

[95] *See* 76 FR 11319 (Mar. 2, 2011).

[96] *See* 73 FR 44537 (July 30, 2008)

[97] *Id.*

principal dwellings. Therefore, any difference in rates is likely driven by the repayment risk associated with the product, and a rule meant to ensure a consumer's ability to repay the loan should not provide an exemption under these circumstances. And further, the Bureau did not receive and is not aware of any data supporting such an exemption.

The Bureau does not believe that these decisions regarding jumbo and non-principal-dwelling balloon-payment mortgages are likely to create any credit accessibility problems. In this final rule at § 1026.43(f), the Bureau is adopting a much wider area in which institutions that provide credit in rural or underserved areas may originate qualified mortgages that are balloon-payment loans than did the proposed rule. Because these are the areas in which balloon-payment loans are considered necessary to preserve access to credit, and higher-priced balloon-payment mortgages in these areas can meet the criteria for a qualified mortgage and thus will not have to include the balloon payment in the ability-to-repay evaluation, access to necessary balloon-payment mortgages will not be reduced.

Accordingly, § 1026.43(b)(4) is adopted as proposed. The associated commentary is amended with revisions to update information and citations.

43(b)(5)

The proposed rule defined ''loan amount'' as ''the principal amount the consumer will borrow as reflected in the promissory note or loan contract.'' This definition implemented the statutory language requiring that the monthly payment be calculated assuming that ''the loan proceeds are fully disbursed on the date of consummation of the loan.'' Dodd-Frank Act section 1411(a)(2), TILA section 129C(a)(6)(D)(i). The term ''loan amount'' was used in the proposed definition of ''fully amortizing payment'' in § 226.43(b)(2), which was then used in the general ''payment calculation'' at § 226.43(c)(5)(i)(B). The payment calculation required the use of payments that pay off the loan amount over the actual term of the loan.

The statute further requires that creditors assume that the loan amount is ''fully disbursed on the date of consummation of the loan.'' *See* TILA Section 129C(a)(6)(D)(i). The Board recognized that some loans do not disburse the entire loan amount to the consumer at consummation, but may, for example, provide for multiple disbursements up to an amount stated in the loan agreement. *See* current § 1026.17(c)(6), discussing multiple-advance loans and comment 17(c)(6)–2 and –3. In these cases, the loan amount, as reflected in the promissory note or loan contract, does not accurately reflect the amount disbursed at consummation. Thus, to reflect the statutory requirement that the creditor assume the loan amount is fully disbursed at consummation, the Board clarified that creditors must use the entire loan amount as reflected in the loan contract or promissory note, even where the loan amount is not fully disbursed at consummation. Proposed comment 43(b)(5)–1 provided an illustrative example and stated that generally, creditors should rely on § 1026.17(c)(6) and associated commentary regarding treatment of multiple-advance and construction loans that would be covered by the ability-to-repay requirements (*i.e.,* loans with a term greater than 12 months). See § 1026.43(a)(3) discussing scope of coverage and term length.

The Board specifically solicited comment on whether further guidance was needed regarding determination of the loan amount for loans with multiple disbursements. The Bureau did not receive comments on the definition of ''loan amount'' or its application to loans with multiple disbursements. The Bureau believes that the loan amount for multiple disbursement loans that are covered transactions must be determined assuming that ''the loan proceeds are fully disbursed on the date of consummation of the loan'' [98] as required by the statute and the rule, and explained in comment 43(b)(5)–1.

Accordingly, the Bureau is adopting § 1026.43(b)(5) and associated commentary as proposed.

43(b)(6)

The interchangeable phrases ''loan term'' and ''term of the loan'' appear in the ability-to-repay and qualified mortgage provisions of TILA, with no definition. *See* TILA section 129C(c)(3), 129C(a)(6)(D)(ii), 129C(b)(2)(A)(iv) and (v); 15 U.S.C. 1639c(c)(3), 1639c(a)(6)(D)(ii), 1639c(b)(2)(A)(iv) and (v). The proposed rule defined ''loan term'' as ''the period of time to repay the obligation in full.'' Proposed comment 43(b)(6)–1 clarified that the loan term is the period of time it takes to repay the loan amount in full, and provided an example. The term is used in § 1026.43(b)(2), the ''fully amortizing payment'' definition, which is then used in § 1026.43(c)(5)(i), the payment calculation general rule. It is also used in the qualified mortgage payment calculation at § 1026.43(e)(2)(iv). The Bureau did not receive any comments on this definition, and considers it to be an accurate and appropriate implementation of the statutory language. Accordingly, proposed § 1026.43(b)(6) is adopted as proposed.

43(b)(7)

The definition of ''maximum loan amount'' and the calculation for which it is used implement the requirements regarding negative amortization loans in new TILA section 129C(a)(6)(C) and (D). The statute requires that a creditor ''take into consideration any balance increase that may accrue from any negative amortization provision.''

The ''maximum loan amount'' is defined in the proposed rule as including the loan balance and any amount that will be added to the balance as a result of negative amortization assuming the consumer makes only minimum payments and the maximum interest rate is reached at the earliest possible time. The ''maximum loan amount'' is used to determine a consumer's ability to repay for negative amortization loans under § 1026.43(c)(5)(ii)(C) by taking into account any loan balance increase that may occur as a result of negative amortization. The term ''maximum loan amount'' is also used for negative amortization loans in the ''refinancing of non-standard mortgages'' provision, at § 1026.43(d)(5)(i)(C)(*3*). The proposed rule included commentary on how to calculate the maximum loan amount, with examples. *See* comment 43(b)(7)–1 through –3.

The Bureau did not receive any comments on this definition and considers it to be an accurate and appropriate implementation of the statute. Accordingly, § 1026.43(b)(7) and associated commentary are adopted as proposed.

43(b)(8)

TILA section 129C(a)(1) and (3), as added by section 1411 of the Dodd-Frank Act, requires creditors to consider and verify mortgage-related obligations as part of the ability-to-repay determination ''according to [the loan's] terms, and all applicable taxes, insurance (including mortgage guarantee insurance), and assessments.'' TILA section 129C(a)(2) provides that consumers must have ''a reasonable ability to repay the combined payments of all loans on the same dwelling according to the terms of those loans and all applicable taxes, insurance (including mortgage guarantee insurance), and assessments.'' Although the Dodd-Frank Act did not establish or

[98] Dodd-Frank Act section 1411(a)(2), TILA section 129C(a)(6)(D)(i).

define a single, collective term, the foregoing requirements recite ongoing obligations that are substantially similar to the definition of ''mortgage-related obligation'' used elsewhere in Regulation Z. Section 1026.34(a)(4)(i), which was added by the 2008 HOEPA Final Rule, defines mortgage-related obligations as expected property taxes, premiums for mortgage-related insurance required by the creditor as set forth in the relevant escrow provisions of Regulation Z, and similar expenses. Comment 34(a)(4)(i)–1 clarifies that, for purposes of § 1026.34(a)(4)(i), similar expenses include homeowners association dues and condominium or cooperative fees. Section 1026.35(b)(3)(i), which addresses escrows, states that ''premiums for mortgage-related insurance required by the creditor, [include] insurance against loss of or damage to property, or against liability arising out of the ownership or use of the property, or insurance protecting the creditor against the consumer's default or other credit loss.''

Under the Board's proposed § 226.43(b)(8), ''mortgage-related obligations'' was defined to mean property taxes; mortgage related insurance premiums required by the creditor as set forth in proposed § 226.45(b)(1); homeowners association, condominium, and cooperative fees; ground rent or leasehold payments; and special assessments. The Board's proposed definition was substantially similar to the definition under § 1026.34(a)(4)(i), with three clarifications. First, the proposed definition of mortgage-related obligations would have included a reference to ground rent or leasehold payments, which are payments made to the real property owner or leaseholder for use of the real property. Second, the proposed definition would have included a reference to ''special assessments.'' Proposed comment 43(b)(8)–1 would have clarified that special assessments include, for example, assessments that are imposed on the consumer at or before consummation, such as a one-time homeowners association fee that will not be paid by the consumer in full at or before consummation. Third, mortgage-related obligations would have referenced proposed § 226.45(b)(1), where the Board proposed to recodify the existing escrow requirement for higher-priced mortgage loans, to include mortgage-related insurance premiums required by the creditor, such as insurance against loss of or damage to property, or against liability arising out of the ownership or use of the property, or insurance protecting the creditor against the consumer's default or other credit loss. The Board solicited comment on how to address any issues that may arise in connection with homeowners association transfer fees and costs associated with loans for energy efficient improvements.

Proposed comment 43(b)(8)–1 would have clarified further that mortgage-related obligations include mortgage-related insurance premiums only if required by the creditor. This comment would have explained that the creditor need not include premiums for mortgage-related insurance that the creditor does not require, such as earthquake insurance or credit insurance, or fees for optional debt suspension and debt cancellation agreements. To facilitate compliance, this comment would have referred to commentary associated with proposed § 226.43(c)(2)(v), which sets forth the requirement to take into account any mortgage-related obligations for purposes of the repayment ability determination required under proposed § 226.43(c).

Industry commenters and consumer advocates generally supported the Board's proposed definition of mortgage-related obligations. One industry commenter opposed including community transfer fees, which are deed-based fees imposed upon the transfer of the property. This commenter was concerned that subjecting these fees to Federal law might affect existing contracts, deeds, and covenants related to these fees, which are subject to State and local regulation, as well as common law regarding the transfer of real property. The commenter also asked that special assessments not fall under the definition of mortgage-related obligations. The commenter recommended that, if special assessments are included, creditors be required to consider only current special assessments, not future special assessments. The commenter noted that, while common assessments should be included in the definition of mortgage-related obligations, the Bureau should provide guidance to creditors on the substance of questionnaires seeking information from third parties about mortgage-related obligations.

Certain consumer advocates suggested that voluntary insurance premiums be included in the definition of mortgage-related obligations. One consumer advocate explained that premiums such as these are technically voluntary, but many consumers believe them to be required, or have difficulty cancelling them if they choose to cancel them. Community advocates and several industry commenters also recommended that homeowners association dues, and similar charges, be included in the definition of mortgage-related obligations. They argued that such a requirement would further transparency in the mortgage loan origination process and would help ensure that consumers receive only credit they can reasonably expect to repay.

For the reasons discussed below, the Bureau concludes that property taxes, certain insurance premiums required by the creditor, obligations to community governance associations, such as cooperative, condominium, and homeowners associations, ground rent, and lease payments should be included in the definition of mortgage-related obligations. These obligations are incurred in connection with the mortgage loan transaction but are in addition to the obligation to repay principal and interest. Thus, the cost of these obligations should be considered with the obligation to repay principal and interest for purposes of determining a consumer's ability to repay. Further, the Bureau believes that the word 'assessments' in TILA section 129C is most appropriately interpreted to refer to all obligations imposed on consumers in connection with ownership of the dwelling or real property, such as ground rent, lease payments, and, as discussed in detail below, obligations to community governance associations, whether denominated as association dues, special assessments, or otherwise. While the provision adopted by the Bureau is substantially similar to the provision proposed, the Bureau was persuaded by the comment letters that additional clarity and guidance is required. The Bureau is especially sensitive to the fact that many of the loans that will be subject to the ability-to-repay rules may be made by small institutions, which are often unable to devote substantial resources to analysis of regulatory compliance.

To address the concerns and feedback raised in the comment letters, the Bureau has revised § 1026.43(b)(8) and related commentary in two ways. First, the language of § 1026.43(b)(8) is being modified to add additional clarity. As adopted, § 1026.43(b)(8) refers to premiums and similar charges identified in § 1026.4(b)(5), (7), (8), or (10), if required by the creditor, instead of the proposed language, which referred to ''mortgage-related insurance.'' Second, the commentary is being significantly expanded to provide additional clarification and guidance.

As adopted, § 1026.43(b)(8) defines ''mortgage-related obligations'' to mean property taxes; premiums and similar charges identified in § 1026.4(b)(5), (7), (8), or (10) that are required by the creditor; fees and special assessments imposed by a condominium, cooperative, or homeowners association; ground rent; and leasehold payments. As proposed, comment 43(b)(8)–1 discussed all components of the proposed definition. To provide further clarity, the final rule splits the content of proposed comment 43(b)(8)–1 into four separate comments, each of which provides additional guidance. As adopted by the Bureau, comment 43(b)(8)–1 contains general guidance and a cross-reference to § 1026.43(c)(2)(v), which contains the requirement to take into account any mortgage-related obligations for purposes of determining a consumer's ability to repay.

The multitude of requests for additional guidance and clarification suggests that additional clarification of the meaning of ''property tax'' is needed. Comment 43(b)(8)–2 further clarifies that § 1026.43(b)(8) includes obligations that are functionally equivalent to property taxes, even if such obligations follow a different naming convention. For example, governments may establish independent districts with the authority to impose recurring levies on properties within the district to fund a special purpose, such as a local development bond district, water district, or other public purpose. These recurring levies may have a variety of names, such as taxes, assessments, or surcharges. Comment 43(b)(8)–2 clarifies that obligations such as these are property taxes based on the character of the obligation, as opposed to the name of the obligation, and therefore are mortgage-related obligations.

Most comments supported the inclusion of insurance premiums in the ability-to-repay determination. However, the Bureau believes that some modifications to the proposed ''mortgage-related insurance premium'' language are appropriate. The Bureau is persuaded that additional clarification and guidance is important, and the Bureau is especially sensitive to concerns related to regulatory complexity. The Bureau has determined that the proposed language should be clarified by revising the text to refer to the current definition of finance charge under § 1026.4. The components of the finance charge are long-standing parts of Regulation Z. Explicitly referring to existing language should facilitate compliance. Therefore, § 1026.43(b)(8) defines mortgage-related obligations to include all premiums or other charges related to protection against a consumer's default, credit loss, collateral loss, or similar loss as identified in § 1026.4(b)(5), (7), (8), or (10) except, as explained above, those premiums or charges that that are not required by the creditor. Comment 43(b)(8)–3 also contains illustrative examples of this definition. For example, if Federal law requires flood insurance to be obtained in connection with the mortgage loan, the flood insurance premium is a mortgage-related obligation for purposes of § 1026.43(b)(8).

Several commenters stated that insurance premiums and similar charges should be included in the determination even if the creditor does not require them in connection with the loan transaction. The Bureau has carefully considered these arguments, but has determined that insurance premiums and similar charges should not be considered mortgage-related obligations if such premiums and charges are not required by the creditor and instead have been voluntarily purchased by the consumer. The Bureau acknowledges that obligations such as these are usually paid from a consumer's monthly income and, in a sense, affect a consumer's ability to repay. But the consumer is free to cancel recurring obligations such as these at any time, provided they are truly voluntary. Thus, they are not ''obligations'' in the sense required by section 129C(a)(3) of TILA. The Bureau shares the concern raised by several commenters that unscrupulous creditors may mislead consumers into believing that these charges are not optional or cannot be cancelled. However, the Bureau does not believe that altering the ability-to-repay calculation for all is the appropriate method for combatting the harmful actions of a few. The Bureau believes that the better course of action is to exclude such premiums and charges from the definition of mortgage-related obligations only if they are truly voluntary, and is confident that violations of this requirement will be apparent in specific cases from the facts. Also, in the scenarios described by commenters where consumers are misled into believing that such charges are required, the premium or charge would not be voluntary for purposes of the definition of finance charge under § 1026.4(d), and would therefore be a mortgage-related obligation for the purposes of § 1026.43(b)(8). Therefore, comment 43(b)(8)–3 clarifies that insurance premiums and similar charges identified in § 1026.4(b)(5), (7), (8), or (10) that are not required by the creditor and that the consumer purchases voluntarily are not mortgage-related obligations for purposes of § 1026.43(b)(8). For example, if a creditor does not require earthquake insurance to be obtained in connection with the mortgage loan, but the consumer voluntarily chooses to purchase such insurance, the earthquake insurance premium is not a mortgage-related obligation for purposes of § 1026.43(b)(8). Or, if a creditor requires a minimum amount of coverage for homeowners' insurance and the consumer voluntarily chooses to purchase a more comprehensive amount of coverage, the portion of the premium allocated to the minimum coverage is a mortgage-related obligation for the purposes of § 1026.43(b)(8), while the portion of the premium allocated to the more comprehensive coverage voluntarily purchased by the consumer is not a mortgage-related obligation for the purposes of § 1026.43(b)(8). However, if the consumer purchases non-required insurance or similar coverage at consummation without having requested the specific non-required insurance or similar coverage and without having agreed to the premium or charge for the specific non-required insurance or similar coverage prior to consummation, the premium or charge is not voluntary for purposes of § 1026.43(b)(8) and is a mortgage-related obligation.

Several commenters supported the inclusion of mortgage insurance in the definition of mortgage-related obligations. The Bureau also has received several informal requests for guidance regarding the meaning of the term ''mortgage insurance'' in the context of certain disclosures required by Regulation Z. The Bureau has decided to clarify this issue with respect to the requirements of § 1026.43. Thus, comment 43(b)(8)–4 clarifies that § 1026.43(b)(8) includes all premiums or similar charges for coverage protecting the creditor against the consumer's default or other credit loss in the determination of mortgage-related obligations, whether denominated as mortgage insurance, guarantee insurance, or otherwise, as determined according to applicable State or Federal law. For example, monthly ''private mortgage insurance'' payments paid to a non-governmental entity, annual ''guarantee fee'' payments required by a Federal housing program, and a quarterly ''mortgage insurance'' payment paid to a State agency administering a housing program are all mortgage-related obligations for purposes of § 1026.43(b)(8). Comment

43(b)(8)–4 also clarifies that § 1026.43(b)(8) includes these charges in the definition of mortgage-related obligations if the creditor requires the consumer to pay them, even if the consumer is not legally obligated to pay the charges under the terms of the insurance program. Comment 43(b)(8)–4 also contains several other illustrative examples.

Several comment letters stressed the importance of including homeowners association dues and similar obligations in the determination of ability to repay. These letters noted that, during the subprime crisis, the failure to account for these obligations led to many consumers qualifying for mortgage loans that they could not actually afford. The Bureau agrees with these assessments. Recurring financial obligations payable to community governance associations, such as homeowners association dues, should be taken into consideration in determining whether a consumer has the ability to repay the obligation. While several comment letters identified practical problems with including obligations such as these in the calculation, these issues stemmed from difficulties that may arise in calculating, estimating, or verifying these obligations, rather than whether the obligations should be included in the ability-to-repay calculation. Based on this feedback, § 1026.43(b)(8) includes obligations to a homeowners association, condominium association, or condominium association in the determination of mortgage-related obligations. The Bureau has addressed the concerns related to difficulties in calculating, estimating, or verifying such obligations in the commentary to § 1026.43(c)(2)(v) and (c)(3).

One comment letter focused extensively on community transfer fees, which are deed-based fees imposed upon the transfer of the property. The Bureau recognizes that this topic is complex and is often the subject of special requirements imposed at the State and local level. However, the Bureau does not believe that the requirements of § 1026.43 implicate these complex issues. The narrow question is whether such obligations should be considered mortgage-related obligations for purposes of determining the consumer's ability to repay. The Bureau agrees with the argument, advanced by several commenters, that the entirety of the consumer's ongoing obligations should be included in the determination. A responsible determination of the consumer's ability to repay requires an accounting of such obligations, whether the purpose of the obligation is to satisfy the payment of a community transfer fee or traditional homeowners association dues. As with other obligations owed to condominium, cooperative, or homeowners associations discussed above, the Bureau believes that the practical problems with these obligations relate to when such obligations should be included in the determination of the consumer's ability to repay, rather than whether the obligations should be considered mortgage-related obligations. Therefore, the Bureau has addressed the concerns related to these obligations in the commentary to § 1026.43(c)(2)(v) and (c)(3).

In response to the request for feedback in the 2011 ATR Proposal, several commenters addressed the proposed treatment of special assessments. Unlike community transfer fees, which are generally identified in the deed or master community plan, creditors may encounter difficulty determining whether special assessments exist. However, as with similar charges discussed above, these concerns relate to determining the consumer's monthly payment for mortgage-related obligations, rather than whether these charges should be considered mortgage-related obligations. Special assessments may be significant and may affect the consumer's ability to repay a mortgage loan. Thus, the Bureau has concluded that special assessments should be included in the definition of mortgage-related obligations under § 1026.43(b)(8) and has addressed the concerns raised by commenters related to calculating, estimating, or verifying these obligations in the commentary to § 1026.43(c)(2)(v) and (c)(3).

New comment 43(b)(8)–5 explains that § 1026.43(b)(8) includes in the evaluation of mortgage-related obligations premiums and similar charges identified in § 1026.4(b)(5), (7), (8), or (10) that are required by the creditor. These premiums and similar charges are mortgage-related obligations regardless of whether the premium or similar charge is excluded from the finance charge pursuant to § 1026.4(d). For example, a premium for insurance against loss or damage to the property written in connection with the credit transaction is a premium identified in § 1026.4(b)(8). If this premium is required by the creditor, the premium is a mortgage-related obligation pursuant to § 1026.43(b)(8), regardless of whether the premium is excluded from the finance charge pursuant to § 1026.4(d)(2). Commenters did not request this guidance specifically, but the Bureau believes that this comment is needed to provide additional clarity.

43(b)(9)

TILA section 129C(b)(2)(C) generally defines ''points and fees'' for a qualified mortgage to have the same meaning as in TILA section 103(bb)(4), which defines points and fees for the purpose of determining whether a transaction exceeds the HOEPA points and fees threshold. Proposed § 226.43(b)(9) would have provided that ''points and fees'' has the same meaning as in § 226.32(b)(1). The Bureau adopts this provision as renumbered § 1026.43(b)(9).

43(b)(10)

Sections 1414, 1431, and 1432 of the Dodd-Frank Act amended TILA to restrict, and in many cases, prohibit a creditor from imposing prepayment penalties in dwelling-secured credit transactions. TILA does not, however, define the term ''prepayment penalty.'' In an effort to address comprehensively prepayment penalties in a fashion that eases compliance burden, as discussed above, the Bureau is defining prepayment penalty in § 1026.43(b)(10) by cross-referencing § 1026.32(b)(6). For a full discussion of the Bureau's approach to defining prepayment penalties, see § 1026.32(b)(6), its commentary, and the section-by-section analysis of those provisions above.

43(b)(11)

TILA in several instances uses the term ''reset'' to refer to the time at which the terms of a mortgage loan are adjusted, usually resulting in higher required payments. For example, TILA section 129C(a)(6)(E)(ii) states that a creditor that refinances a loan may, under certain conditions, ''consider if the extension of new credit would prevent a likely default should the original mortgage reset and give such concerns a higher priority as an acceptable underwriting practice.'' 15 U.S.C. 1639c(a)(6)(E)(ii). The legislative history further indicates that, for adjustable-rate mortgages with low, fixed introductory rates, Congress understood the term ''reset'' to mean the time at which low introductory rates convert to indexed rates, resulting in ''significantly higher monthly payments for homeowners.'' [99]

Outreach conducted prior to issuance of the proposed rule indicated that the term ''recast'' is typically used in reference to the time at which fully amortizing payments are required for interest-only and negative amortization loans and that the term ''reset'' is more

[99] *See* Comm. on Fin. Servs., Report on H.R. 1728, Mortgage Reform and Anti-Predatory Lending Act, H. Rept. 94, 111th Cong., at 52 (2009).

frequently used to indicate the time at which adjustable-rate mortgages with an introductory fixed rate convert to a variable rate. For simplicity and clarity, however, the Board proposed to use the term ''recast'' to cover the conversion to generally less favorable terms and higher payments not only for interest-only loans and negative amortization loans, but also for adjustable-rate mortgages.

Proposed § 226.43(b)(11) defined the term ''recast,'' which was used in two provisions of proposed § 226.43: (1) Proposed § 226.43(c)(5)(ii) regarding certain required payment calculations that creditors must consider in determining a consumer's ability to repay a covered transaction; and (2) proposed § 226.43(d) regarding payment calculations required for refinancings that are exempt from the ability-to-repay requirements in § 226.43(c).

Specifically, proposed § 226.43(b)(11) defined the term ''recast'' as follows: (1) For an adjustable-rate mortgage, as defined in § 1026.18(s)(7)(i),[100] the expiration of the period during which payments based on the introductory interest rate are permitted under the terms of the legal obligation; (2) for an interest-only loan, as defined in § 1026.18(s)(7)(iv),[101] the expiration of the period during which interest-only payments are permitted under the terms of the legal obligation; and (3) for a negative amortization loan, as defined in § 1026.18(s)(7)(v),[102] the expiration of the period during which negatively amortizing payments are permitted under the terms of the legal obligation.

Proposed comment 43(b)(11)–1 explained that the date on which the ''recast'' occurs is the due date of the last monthly payment based on the introductory fixed rate, the last interest-only payment, or the last negatively amortizing payment, as applicable. Proposed comment 43(b)(11)–1 also provided an illustration showing how to determine the date of the recast.

Commenters did not focus specifically on the definition of ''recast,'' except that an association of State bank regulators agreed with the benefit of using a single term for the shift to higher payments for adjustable-rate, interest-only, and negative amortization loans.

The Bureau considers the proposed provision to be an accurate and appropriate implementation of the statute. Accordingly, the Bureau is adopting proposed § 226.43(b)(11) as proposed, in renumbered § 1026.43(b)(11).

43(b)(12)

New TILA section 129C(a)(2) provides that ''if a creditor knows, or has reason to know, that 1 or more residential mortgage loans secured by the same dwelling will be made to the same consumer,'' that creditor must make the ability-to-repay determination for ''the combined payments of all loans on the same dwelling according to the terms of those loans and all applicable taxes, insurance (including mortgage guarantee insurance), and assessments.'' This section, entitled ''multiple loans,'' follows the basic ability-to-repay requirements for a single loan, in new TILA section 129C(a)(1).

The proposed rule implemented the main requirement of the ''multiple loans'' provision by mandating in proposed § 226.43(c)(2)(iv) that a creditor, in making its ability-to-repay determination on the primary loan, take into account the payments on any ''simultaneous loan'' about which the creditor knows or has reason to know. ''Simultaneous loan'' was defined in proposed § 226.43(b)(12) as ''another covered transaction or home equity line of credit subject to § 226.5b[103] that will be secured by the same dwelling and made to the same consumer at or before consummation of the covered transaction.'' Thus, although the statute referred only to closed-end ''residential mortgage loans,'' the Board proposed to expand the requirement to include consideration of simultaneous HELOCs. The proposed definition did not include pre-existing mortgage obligations, which would be considered as ''current debt obligations'' under § 1026.43(c)(2)(vi).

The Board chose to include HELOCs in the definition of ''simultaneous loan'' because it believed that new TILA section 129C(a)(2) was meant to help ensure that creditors account for the increased risk of consumer delinquency or default on the covered transaction where more than one loan secured by the same dwelling is originated concurrently. The Board believed that this increased risk would be present whether the other mortgage obligation was a closed-end credit obligation or a HELOC. For these reasons, and several others explained in detail below, the Board proposed to use its exception and adjustment authority under TILA section 105(a) to include HELOCs within the scope of new TILA section 129C(a)(2). 76 FR 27417–27418. Because one of the main reasons for including HELOCs was the likelihood of a consumer drawing on the credit line to provide the down payment in a purchase transaction, the Board solicited comment on whether this exception should be limited to purchase transactions.

TILA section 105(a), as amended by section 1100A of the Dodd-Frank Act, authorized the Board, and now the Bureau, to prescribe regulations to carry out the purposes of TILA and Regulation Z, to prevent circumvention or evasion, or to facilitate compliance. 15 U.S.C. 1604(a). The inclusion of HELOCs was further supported by the Board's authority under TILA section 129B(e) to condition terms, acts or practices relating to residential mortgage loans that the Board found necessary or proper to effectuate the purposes of TILA. 15 U.S.C. 1639b(e). One purpose of the statute is set forth in TILA section 129B(a)(2), which states that ''[i]t is the purpose[] of * * * [S]ection 129C to assure that consumers are offered and receive residential mortgage loans on terms that reasonably reflect their ability to repay the loans.'' 15 U.S.C. 1639b. For the reasons stated below, the Board believed that requiring creditors to consider simultaneous loans that are HELOCs for purposes of TILA section 129C(a)(2) would help to ensure that consumers are offered, and receive, loans on terms that reasonably reflect their ability to repay.

First, the Board proposed in § 226.43(c)(2)(vi) that the creditor must consider current debt obligations in determining a consumer's ability to repay a covered transaction. Consistent with current § 1026.34(a)(4), proposed § 226.43(c)(2)(vi) would not have distinguished between pre-existing closed-end and open-end mortgage obligations. The Board believed consistency required that it take the same approach when determining how to consider mortgage obligations that come into existence concurrently with a first-lien loan as would be taken for pre-existing mortgage obligations, whether the first-lien is a purchase or non-purchase transaction (*i.e.,* refinancing). Including HELOCs in the proposed definition of ''simultaneous loan'' for purposes of TILA section 129C(a)(2) was

[100] ''The term ''adjustable-rate mortgage'' means a transaction secured by real property or a dwelling for which the annual percentage rate may increase after consummation.'' 12 CFR 1026.18(s)(7)(i).

[101] ''The term ''interest-only'' means that, under the terms of the legal obligation, one or more of the periodic payments may be applied solely to accrued interest and not to loan principal; an ''interest-only loan'' is a loan that permits interest-only payments.'' 12 CFR 1026.18(s)(7)(iv).

[102] ''[T]he term ''negative amortization'' means payment of periodic payments that will result in an increase in the principal balance under the terms of the legal obligation; the term ''negative amortization loan'' means a loan, other than a reverse mortgage subject to section 1026.33, that provides for a minimum periodic payment that covers only a portion of the accrued interest, resulting in negative amortization.'' 12 CFR 1026.18(s)(7)(v).

[103] The Board's § 226.5b was recodified in the Bureau's Regulation Z as § 1026.40.

also considered generally consistent with current comment 34(a)(4)–3, and the 2006 Nontraditional Mortgage Guidance regarding simultaneous second-lien loans.[104]

Second, data indicate that where a subordinate loan is originated concurrently with a first-lien loan to provide some or all of the down payment (*i.e.,* a ''piggyback loan''), the default rate on the first-lien loan increases significantly, and in direct correlation to increasing combined loan-to-value ratios.[105] The data does not distinguish between ''piggyback loans'' that are closed-end or open-end credit transactions, or between purchase and non-purchase transactions. However, empirical evidence demonstrates that approximately 60 percent of consumers who open a HELOC concurrently with a first-lien loan borrow against the line of credit at the time of origination,[106] suggesting that in many cases the HELOC may be used to provide some, or all, of the down payment on the first-lien loan.

The Board recognized that consumers have varied reasons for originating a HELOC concurrently with the first-lien loan, for example, to reduce overall closing costs or for the convenience of having access to an available credit line in the future. However, the Board believed concerns relating to HELOCs originated concurrently for savings or convenience, and not to provide payment towards the first-lien home purchase loan, might be mitigated by the Board's proposal to require that a creditor consider the periodic payment on the simultaneous loan based on the actual amount drawn from the credit line by the consumer. *See* proposed § 226.43(c)(6)(ii), discussing payment calculation requirements for simultaneous loans that are HELOCs. Still, the Board recognized that in the case of a non-purchase transaction (*e.g.,* a refinancing) a simultaneous loan that is a HELOC might be unlikely to be originated and drawn upon to provide payment towards the first-lien loan, except perhaps towards closing costs. Thus, the Board solicited comment on whether it should narrow the requirement to consider simultaneous loans that are HELOCs to apply only to purchase transactions.

Third, in developing this proposal Board staff conducted outreach with a variety of participants that consistently expressed the view that second-lien loans significantly impact a consumer's performance on the first-lien loan, and that many second-lien loans are HELOCs. One industry participant explained that the vast majority of ''piggyback loans'' it originated were HELOCs that were fully drawn at the time of origination and used to assist in the first-lien purchase transaction. Another outreach participant stated that HELOCs make up approximately 90 percent of its simultaneous loan book-of-business. Industry outreach participants generally indicated that it is a currently accepted underwriting practice to include HELOCs in the repayment ability assessment on the first-lien loan, and generally confirmed that the majority of simultaneous liens considered during the underwriting process are HELOCs. For these reasons, the Board proposed to use its authority under TILA sections 105(a) and 129B(e) to broaden the scope of TILA section 129C(a)(2), and accordingly proposed to define the term ''simultaneous loan'' to include HELOCs.

Proposed comment 43(b)(12)–1 clarified that the definition of ''simultaneous loan'' includes any loan that meets the definition, whether made by the same creditor or a third-party creditor, and provides an illustrative example of this principle.

Proposed comment 43(b)(12)–2 further clarified the meaning of the term ''same consumer,'' and explained that for purposes of the definition of ''simultaneous loan,'' the term ''same consumer'' would include any consumer, as that term is defined in § 1026.2(a)(11), that enters into a loan that is a covered transaction and also enters into another loan (*e.g.,* a second-lien covered transaction or HELOC) secured by the same dwelling. This comment further explained that where two or more consumers enter into a legal obligation that is a covered transaction, but only one of them enters into another loan secured by the same dwelling, the ''same consumer'' includes the person that has entered into both legal obligations. The Board believed this comment would reflect statutory intent to include any loan that could impact the consumer's ability to repay the covered transaction according to its terms (*i.e.,* to require the creditor to consider the combined payment obligations of the consumer(s) obligated to repay the covered transaction). *See* TILA § 129C(a)(2).

Both industry and consumer advocate commenters overwhelmingly supported inclusion of HELOCs as simultaneous loans, with only one industry commenter objecting. The objecting commenter stated that there was no persuasive policy argument for deviating from the statute, but did not provide any reason to believe that concurrent HELOCs are less relevant to an assessment of a consumer's ability to repay than concurrent closed-end second liens. As explained in the proposed rule, most industry participants are already considering HELOCs in the underwriting of senior-lien loans on the same property. 76 FR 27418.

For the reasons set forth by the Board and discussed above, the Bureau has determined that inclusion of HELOCs in the definition of simultaneous loans is an appropriate use of its TILA authority to make adjustments and additional requirements.

TILA section 105(a), as amended by section 1100A of the Dodd-Frank Act, authorizes the Bureau to prescribe regulations that may contain such additional requirements, classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for all or any class of transactions, as in the judgment of the Bureau are necessary or proper to effectuate the purposes of TILA, to prevent circumvention or evasion of TILA, or to facilitate compliance with TILA. 15 U.S.C. 1604(a). The Bureau finds that the inclusion of HELOCs is necessary and proper to effectuate the purposes of TILA. The inclusion of HELOCs is further supported by the Bureau's authority under TILA section 129B(e) to condition terms, acts or practices relating to residential mortgage loans that the Bureau finds necessary or proper to effectuate the purposes of TILA. 15 U.S.C. 1639b(e). TILA section 129B(a)(2) states that ''[i]t is the purpose[] of * * * [S]ection 129C to assure that consumers are offered and receive residential mortgage loans on terms that reasonably reflect their ability to repay the loans.'' 15 U.S.C. 1639b. Inclusion of HELOCs as simultaneous loans will help to carry out this purpose of TILA by helping to ensure that consumers receive loans on affordable terms, as further explained above.

Accordingly, the Bureau is adopting § 1026.43(b)(12) and associated commentary as proposed, with clarifying edits to ensure that simultaneous loans scheduled after

[104] *See* 2006 Nontraditional Mortgage Guidance, 71 FR 58609, 58614 (Oct. 4, 2006).

[105] Kristopher Gerardi et al., *Making Sense of the Subprime Crisis,* Brookings Papers on Econ. Activity (Fall 2008), at 40 tbl.3.

[106] The Board conducted independent analysis using data obtained from the FRBNY Consumer Credit Panel to determine the proportion of piggyback HELOCs taken out in the same month as the first-lien loan that have a draw at the time of origination. Data used was extracted from credit record data in years 2003 through 2010. *See* Donghoon Lee and Wilbert van der Klaauw, *An Introduction to the FRBNY Consumer Credit Panel* (Fed. Reserve Bd. Of N.Y.C., Staff Rept. No. 479, 2010), available at *http://data.newyorkfed.org/research/staff_reports/sr479.pdf* (providing further description of the database).

consummation will be considered in determining ability to repay.

43(b)(13)

TILA section 129C(a)(1) requires that a creditor determine a consumer's repayment ability using ''verified and documented information,'' and TILA section 129C(a)(4) specifically requires the creditor to verify a consumer's income or assets relied on to determine repayment ability using a consumer's tax return or ''third-party documents'' that provide reasonably reliable evidence of the consumer's income or assets, as discussed in detail below in the section-by-section analysis of § 1026.43(c)(3) and (4). The Board proposed to define the term ''third-party record'' to mean: (1) A document or other record prepared or reviewed by a person other than the consumer, the creditor, any mortgage broker, as defined in § 1026.36(a)(2), or any agent of the creditor or mortgage broker; (2) a copy of a tax return filed with the Internal Revenue Service or a state taxing authority; (3) a record the creditor maintains for an account of the consumer held by the creditor; or (4) if the consumer is an employee of the creditor or the mortgage broker, a document or other record regarding the consumer's employment status or income. The Board explained that, in general, a creditor should refer to reasonably reliable records prepared by or reviewed by a third party to verify repayment ability under TILA section 129C(a), a principle consistent with verification requirements previously outlined under the Board's 2008 HOEPA Final Rule. *See* § 1026.34(a)(4)(ii).

Commenters generally supported the Board's broad definition of a third-party record as a reasonable definition that allows a creditor to use a wide variety of documents and sources, while ensuring that the consumer does not remain the sole source of information. Some consumer advocates, however, cautioned the Bureau against relying upon tax records to provide a basis for verifying income history, pursuant to amended TILA section 129C(a)(4)(A), to avoid penalizing consumers who may not have access to accurate tax records. The Bureau does not address comments with respect to consumers who may not maintain accurate tax records because the definition provided in 1026.43(b)(13) of third-party record merely ensures that a creditor may use any of a wide variety of documents, including tax records, as a method of income verification without mandating their use. Rather than rely solely on tax records, for example, a creditor might look to other third-party records for verification purposes, including the creditor's records regarding a consumer's savings account held by the creditor, which qualifies as a third-party record under § 1026.43(b)(13)(iii), or employment records for a consumer employed by the creditor, which qualifies as a third-party record under § 1026.43(b)(13)(iv).

The Board proposed comment 43(b)(13)–1 to clarify that third-party records would include records transmitted or viewed electronically, for example, a credit report prepared by a consumer reporting agency and transmitted or viewed electronically. The Bureau did not receive significant feedback on the proposed comment and is adopting the comment largely as proposed. The Bureau is clarifying that an electronic third-party record should be transmitted electronically, such as via email or if the creditor is able to click on a secure hyperlink to access a consumer's credit report. The Bureau is making this slight clarification to convey that mere viewing of a record, without the ability to capture or maintain the record, would likely be problematic with respect to record retention under § 1026.25(a) and (c). While it seems unlikely that an electronic record could be viewed without being transmitted as well, the Bureau is making this alteration to avoid any confusion.

The Bureau is adopting the remaining comments to 43(b)(13) largely as proposed by the Board. These comments did not elicit significant public feedback. Comment 43(b)(13)–1 assures creditors that a third-party record may be transmitted electronically. Comment 43(b)(13)–2 explains that a third-party record includes a form a creditor provides to a third party for providing information, even if the creditor completes parts of the form unrelated to the information sought. Thus, for example, a creditor may send a Webform, or mail a paper form, created by the creditor, to a consumer's current employer, on which the employer could check a box that indicates that the consumer works for the employer. The creditor may even elect to fill in the creditor's name, or other portions of the form, so long as those portions are unrelated to the information that the creditor seeks to verify, such as income or employment status.

Comment 43(b)(13)(i)–1 clarifies that a third-party record includes a document or other record prepared by the consumer, the creditor, the mortgage broker, or an agent of the creditor or mortgage broker, if the record is reviewed by a third party. For example, a profit-and-loss statement prepared by a self-employed consumer and reviewed by a third-party accountant is a third-party record under § 1026.43(b)(13)(i). The Bureau is including comment 43(b)(13)(i)–1 to explain how some first-party records, *e.g.,* documents originally prepared by the consumer, may become third-party records by virtue of an appropriate, disinterested third-party's review or audit. It is the third party review, the Bureau believes, that provides reasonably reliable evidence of the underlying information in the document, just as if the document were originally prepared by the third party. Moreover, this clarification allows the creditor to consult a wider variety of documents in its determination of a consumer's ability to repay. Creditors should be cautioned not to assume, however, that merely because a document is a third-party record as defined by § 1026.43(b)(13), and the creditor uses the information provided by that document to make a determination as to whether the consumer will have a reasonable ability to repay the loan according to its terms, that the creditor has satisfied the requirements of this rule. The creditor also must make a reasonable and good faith determination at or before consummation that the consumer will have a reasonable ability, at the time of consummation, to repay the loan according to its terms. For a full discussion of the Bureau's approach to this determination, see § 1026.43(c)(1), its commentary, and the section-by-section analysis of those provisions below.

Finally, comment 43(b)(13)(iii)–1 clarifies that a third-party record includes a record that the creditor maintains for the consumer's account. Such examples might include records of a checking account, savings account, and retirement account that the consumer holds, or has held, with the creditor. Comment 43(b)(13)(iii)–1 also provides the example of a creditor's records for an account related to a consumer's outstanding obligations to the creditor, such as the creditor's records for a first-lien mortgage to a consumer who applies for a subordinate-lien home equity loan. This comment helps assure industry that such records are a legitimate basis for determining a consumer's ability to repay, and/or for verifying income and assets because it is unlikely to be in a creditor's interest to falsify such records for purposes of satisfying § 1026.43(b)(13), as falsifying records would violate the good faith requirement of § 1026.43(c)(1). In addition, this comment should help assure creditors that the rule does not inhibit a creditor's ability to ''cross-sell'' products to consumers, by avoiding placing the creditor at a disadvantage with respect to verifying a consumer's information by virtue of the creditor's existing relationship with the consumer.

43(c) Repayment Ability

As enacted by the Dodd-Frank Act, TILA section 129C(a)(1) provides that no creditor may make a residential mortgage loan unless the creditor makes a reasonable and good faith determination, based on verified and documented information, that, at the time the loan is consummated, the consumer has a reasonable ability to repay the loan according to its terms and all applicable taxes, insurance, and assessments. TILA section 129C(a)(2) extends the same requirement to a combination of multiple residential mortgage loans secured by the same dwelling where the creditor knows or has reason to know that such loans will be made to the same consumer. TILA sections 129C(a)(3) and (a)(4) specify factors that must be considered in determining a consumer's ability to repay and verification requirements for income and assets considered as part of that determination. Proposed § 226.43(c) would have implemented TILA section 129C(a)(1) through (4) in a manner substantially similar to the statute.

Proposed § 226.43(c)(1) would have implemented the requirement in TILA section 129C(a)(1) that creditors make a reasonable and good faith determination that a consumer will have a reasonable ability to repay the loan according to its terms. Proposed § 226.43(c)(2) would have required creditors to consider the following factors in making a determination of repayment ability, as required by TILA section 129C(a)(1) through (3): the consumer's current or reasonably expected income or assets (other than the property that secures the loan); the consumer's employment status, if the creditor relies on employment income; the consumer's monthly payment on the loan; the consumer's monthly payment on any simultaneous loan that the creditor knows or has reason to know will be made; the consumer's monthly payment for mortgage-related obligations; the consumer's current debt obligations; and the consumer's monthly debt-to-income ratio or residual income. Proposed § 226.43(c)(3) would have required that creditors verify the information they use in making an ability-to-repay determination using third-party records, as required by TILA section 129C(a)(1). Proposed § 226.43(c)(4) would have specified methods for verifying income and assets as required by TILA section 129C(a)(1) and (4). Proposed § 226.43(c)(5) and (6) would have specified how to calculate the monthly mortgage and simultaneous loan payments required to be considered under proposed § 226.43(c)(2). Proposed § 226.43(c)(7) would have specified how to calculate the monthly debt-to-income ratio or monthly residual income required to be considered under proposed § 226.43(c)(2). As discussed in detail below, the Bureau is adopting § 1026.43(c) substantially as proposed, with various modifications and clarifications.

Proposed comment 43(c)–1 would have indicated that creditors may look to widely accepted governmental or nongovernmental underwriting standards, such as the handbook on Mortgagee Credit Analysis for Mortgage Insurance on One- to Four-Unit Mortgage Loans issued by FHA, to evaluate a consumer's ability to repay. The proposed comment would have stated that creditors may look to such standards in determining, for example, whether to classify particular inflows, obligations, or property as ''income,'' ''debt,'' or ''assets''; factors to consider in evaluating the income of a self-employed or seasonally employed consumer; or factors to consider in evaluating the credit history of a consumer who has obtained few or no extensions of traditional ''credit'' as defined in § 1026.2(a)(14). In the Supplemental Information regarding proposed comment 43(c)–1, the Board stated that the proposed rule and commentary were intended to provide flexibility in underwriting standards so that creditors could adapt their underwriting processes to a consumer's particular circumstances. The Board stated its belief that such flexibility is necessary because the rule covers such a wide variety of consumers and mortgage products.

Commenters generally supported giving creditors significant flexibility to develop and apply their own underwriting standards. However, commenters had concerns regarding the specific approach taken in proposed comment 43(c)–1. Commenters raised a number of questions about what kinds of underwriting standards might be considered widely accepted, such as whether a creditor's proprietary underwriting standards could ever be considered widely accepted. Commenters also were uncertain whether the proposed comment required creditors to adopt particular governmental underwriting standards in their entirety and requested clarification on that point. At least one commenter, an industry trade group, noted that FHA-insured loans constitute a small percentage of the mortgage market and questioned whether FHA underwriting standards therefore are widely accepted. This commenter also questioned whether it is appropriate to encourage creditors to apply FHA underwriting standards other than with respect to FHA-insured loans, as FHA programs are generally designed to make mortgage credit available in circumstances where private creditors are unwilling to extend such credit without a government guarantee. Finally, consumer group commenters asserted that underwriting standards do not accurately determine ability to repay merely because they are widely accepted and pointed to the widespread proliferation of lax underwriting standards that predated the recent financial crisis.

The Bureau believes that the Board did not intend to require creditors to use any particular governmental underwriting standards, including FHA standards, in their entirety or to prohibit creditors from using proprietary underwriting standards. The Bureau also does not believe that the Board intended to endorse lax underwriting standards on the basis that those standards may be prevalent in the mortgage market at a particular time. The Bureau therefore is adopting two new comments to provide greater clarity regarding the role of underwriting standards in ability-to-repay determinations and is not adopting proposed comment 43(c)–1.

The Bureau is concerned based on the comments received that referring creditors to widely accepted governmental and nongovernmental underwriting standards could lead to undesirable misinterpretations and confusion. The discussion of widely accepted standards in proposed comment 43(c)–1 could be misinterpreted to suggest that the underwriting standards of any single market participant with a large market share are widely accepted and therefore to be emulated. The widely accepted standard also could be misinterpreted to indicate that proprietary underwriting standards cannot yield reasonable, good faith determinations of a consumer's ability to repay because they are unique to a particular creditor and not employed throughout the mortgage market. Similarly, the widely accepted standard could be misinterpreted to encourage a creditor that lends in a limited geographic area or in a particular market niche to apply widely accepted underwriting standards that are inappropriate for that particular creditor's loans.

The Bureau also is concerned that evaluating underwriting standards based on whether they are widely accepted could have other undesirable consequences. In a market bubble or economic crisis, many creditors may change their underwriting standards in similar ways, leading to widely accepted underwriting standards becoming unreasonably lax or unreasonably tight. A regulatory directive to use underwriting standards that are widely accepted could exacerbate those effects. Also, referring creditors to widely accepted governmental and nongovernmental underwriting standards could hinder creditors' ability to respond to changing market and economic conditions and stifle market growth and positive innovation.

Finally, the Bureau is concerned that focusing on whether underwriting standards are widely accepted could distract creditors from focusing on their obligation under TILA section 129C and § 1026.43(c) to make ability-to-repay determinations that are reasonable and in good faith. The Bureau believes that a creditor's underwriting standards are an important factor in making reasonable and good faith ability-to-repay determinations. However, how those standards are applied to the individual facts and circumstances of a particular extension of credit is equally or more important.

In light of these issues, the Bureau is not adopting proposed comment 43(c)–1. Instead, the Bureau is adopting two new comments, comment 43(c)(1)–1 and comment 43(c)(2)–1. New comment 43(c)(1)–1 clarifies that creditors are permitted to develop and apply their own underwriting standards as long as those standards lead to ability-to-repay determinations that are reasonable and in good faith. New comment 43(c)(2)–1 clarifies that creditors are permitted to use their own definitions and other technical underwriting criteria and notes that underwriting guidelines issued by governmental entities such as the FHA are a source to which creditors may refer for guidance on definitions and technical underwriting criteria. These comments are discussed below in the section-by-section of § 1026.43(c)(1) and (2).

43(c)(1) General Requirement

Proposed § 226.43(c)(1) would have implemented TILA section 129C(a)(1) by providing that a creditor shall not make a loan that is a covered transaction unless the creditor makes a reasonable and good faith determination at or before consummation that the consumer will have a reasonable ability, at the time of consummation, to repay the loan according to its terms, including any mortgage-related obligations. Commenters generally agreed that creditors should not make loans to consumers unable to repay them and supported the requirement to consider ability to repay. Accordingly, § 1026.43(c)(1) is adopted substantially as proposed, with two technical and conforming changes.

As adopted, § 1026.43(c)(1) requires creditors to make a reasonable and good faith determination at or before consummation that the consumer will have a reasonable ability to repay the loan according to its terms. Section 1026.43(c)(1) as adopted omits the reference in the proposed rule to determining that a consumer has a reasonable ability ''at the time of consummation'' to repay the loan according to its terms. The Bureau believes this phrase is potentially misleading and does not accurately reflect the intent of either the Board or the Bureau. Mortgage loans are not required to be repaid at the time of consummation; instead, they are required to be repaid over months or years after consummation. Creditors are required to make a predictive judgment at the time of consummation that a consumer is likely to have the ability to repay a loan in the future. The Bureau believes that the rule more clearly reflects this requirement without the reference to ability ''at the time of consummation'' to repay the loan. The creditor's determination will necessarily be based on the consumer's circumstances at or before consummation and evidence, if any, that those circumstances are likely to change in the future. Section 1026.43(c)(1) as adopted also omits the reference in the proposed rule to mortgage-related obligations. The Bureau believes this reference is unnecessary because § 1026.43(c)(2) requires creditors to consider consumers' monthly payments for mortgage-related obligations and could create confusion because § 1026.43(c)(1) does not include references to other factors creditors must consider under § 1026.43(c)(2).

As noted above, the Bureau is adopting new comment 43(c)(1)–1, which provides guidance regarding, among other things, how the requirement to make a reasonable and good faith determination of ability to repay relates to a creditor's underwriting standards. New comment 43(c)(1)–1 replaces in part and responds to comments regarding proposed comment 43(c)–1, discussed above.

New comment 43(c)(1)–1 emphasizes that creditors are to be evaluated on whether they make a reasonable and good faith determination that a consumer will have a reasonable ability to repay as required by § 1026.43(c)(1). The comment acknowledges that § 1026.43(c) and the accompanying commentary describe certain requirements for making ability-to-repay determinations, but do not provide comprehensive underwriting standards to which creditors must adhere. As an example, new comment 43(c)(1)–1 notes that the rule and commentary do not specify how much income is needed to support a particular level of debt or how to weigh credit history against other factors.

The Bureau believes that a variety of underwriting standards can yield reasonable, good faith ability-to-repay determinations. New comment 43(c)(1)–1 explains that, so long as creditors consider the factors set forth in § 1026.43(c)(2) according to the requirements of § 1026.43(c), creditors are permitted to develop and apply their own proprietary underwriting standards and to make changes to those standards over time in response to empirical information and changing economic and other conditions. The Bureau believes this flexibility is necessary given the wide range of creditors, consumers, and mortgage products to which this rule applies. The Bureau also believes that there are no indicators in the statutory text or legislative history of the Dodd-Frank Act that Congress intended to replace proprietary underwriting standards with underwriting standards dictated by governmental or government-sponsored entities as part of the ability-to-repay requirements. The Bureau therefore believes that preserving this flexibility here is consistent with Congressional intent. The comment emphasizes that whether a particular ability-to-repay determination is reasonable and in good faith will depend not only on the underwriting standards adopted by the creditor, but on the facts and circumstances of an individual extension of credit and how the creditor's underwriting standards were applied to those facts and circumstances. The comment also states that a consumer's statement or attestation that the consumer has the ability to repay the loan is not indicative of whether the creditor's determination was reasonable and in good faith.

Concerns have been raised that creditors and others will have difficulty evaluating whether a particular ability-to-repay determination is reasonable and in good faith. Although the statute and the rule specifies certain factors that a creditor must consider in making such a determination, the Bureau does not believe that there is any litmus test that can be prescribed to determine whether a creditor, in considering those factors, arrived at a belief in the consumer's ability to repay which was both objectively reasonable and in subjective good faith. Nevertheless, new comment 43(c)(1)–1 lists considerations that may be relevant to whether a creditor who considered and verified the required factors in accordance with the rule arrived at an ability-to-repay determination that was reasonable and in good faith. The comment states that the following may be evidence that a creditor's ability-to-repay determination was reasonable and in good faith: (1) The consumer demonstrated actual ability to repay the loan by making timely payments, without modification or accommodation, for a significant period of time after consummation or, for an adjustable-rate, interest-only, or negative-amortization mortgage, for a significant period of time after recast; (2) the creditor used underwriting standards that have historically resulted in comparatively low rates of delinquency and default during adverse economic conditions; or (3) the creditor used underwriting standards based on empirically derived, demonstrably and statistically sound models.

In contrast, new comment 43(c)(1)–1 states that the following may be evidence that a creditor's ability-to-repay determination was not reasonable or in good faith: (1) The consumer defaulted on the loan a short time after consummation or, for an adjustable-rate, interest-only, or negative-amortization mortgage, a short time after recast; (2) the creditor used underwriting standards that have historically resulted in comparatively high levels of delinquency and default during adverse economic conditions; (3) the creditor applied underwriting standards inconsistently or used underwriting standards different from those used for similar loans without reasonable justification; (4) the creditor disregarded evidence that the underwriting standards it used are not effective at determining consumers' repayment ability; (5) the creditor consciously disregarded evidence that the consumer may have insufficient residual income to cover other recurring obligations and expenses, taking into account the consumer's assets other than the property securing the covered transaction, after paying his or her monthly payments for the covered transaction, any simultaneous loan, mortgage-related obligations and any current debt obligations; or (6) the creditor disregarded evidence that the consumer would have the ability to repay only if the consumer subsequently refinanced the loan or sold the property securing the loan.

New comment 43(c)(1)–1 states the Bureau's belief that all of these considerations may be relevant to whether a creditor's ability-to-repay determination was reasonable and in good faith. However, the comment also clarifies that these considerations are not requirements or prohibitions with which creditors must comply, nor are they elements of a claim that a consumer must prove to establish a violation of the ability-to-repay requirements. As an example, the comment clarifies that creditors are not required to validate their underwriting criteria using mathematical models.

New comment 43(c)(1)–1 also clarifies that these considerations are not absolute in their application; instead they exist on a continuum and may apply to varying degrees. As an example, the comment states that the longer a consumer successfully makes timely payments after consummation or recast the less likely it is that the creditor's determination of ability to repay was unreasonable or not in good faith.

Finally, new comment 43(c)(1)–1 clarifies that each of these considerations must be viewed in the context of all facts and circumstances relevant to a particular extension of credit. As an example, the comment states that in some cases inconsistent application of underwriting standards may indicate that a creditor is manipulating those standards to approve a loan despite a consumer's inability to repay. The creditor's ability-to-repay determination therefore may be unreasonable or in bad faith. However, in other cases inconsistently applied underwriting standards may be the result of, for example, inadequate training and may nonetheless yield a reasonable and good faith ability-to-repay determination in a particular case. Similarly, the comment states that although an early payment default on a mortgage will often be persuasive evidence that the creditor did not have a reasonable and good faith belief in the consumer's ability to repay (and such evidence may even be sufficient to establish a prima facie case of an ability-to-repay violation), a particular ability-to-repay determination may be reasonable and in good faith even though the consumer defaulted shortly after consummation if, for example, the consumer experienced a sudden and unexpected loss of income. In contrast, the comment states that an ability-to-repay determination may be unreasonable or not in good faith even though the consumer made timely payments for a significant period of time if, for example, the consumer was able to make those payments only by foregoing necessities such as food and heat.

The Board proposed comment 43(c)(1)–1 to clarify that a change in a consumer's circumstances after consummation of a loan, such as a significant reduction in income due to a job loss or a significant obligation arising from a major medical expense, that cannot reasonably be anticipated from the consumer's application or the records used to determine repayment ability, is not relevant to determining a creditor's compliance with the rule. The proposed comment would have further clarified that, if the application or records considered by the creditor at or before consummation indicate that there will be a change in the consumer's repayment ability after consummation, such as if a consumer's application states that the consumer plans to retire within 12 months without obtaining new employment or that the consumer will transition from full-time to part-time employment, the creditor must consider that information. Commenters generally supported proposed comment 43(c)(1)–1. Proposed comment 43(c)(1)–1 is adopted substantially as proposed and redesignated as comment 43(c)(1)–2.

The Board also proposed comment 43(c)(1)–2 to clarify that § 226.43(c)(1) does not require or permit the creditor to make inquiries or verifications prohibited by Regulation B, 12 CFR part 1002. Commenters generally supported proposed comment 43(c)(1)–2. Proposed comment 43(c)(1)–2 is adopted substantially as proposed and redesignated as comment 43(c)(1)–3.

43(c)(2) Basis for Determination

As discussed above, TILA section 129C(a)(1) generally requires a creditor to make a reasonable and good faith determination that a consumer has a reasonable ability to repay a loan and all applicable taxes, insurance, and assessments. TILA section 129C(a)(2) requires a creditor to include in that determination the cost of any other residential mortgage loans made to the same consumer and secured by the same dwelling. TILA section 129C(a)(3) enumerates several factors a creditor must consider in determining a consumer's ability to repay: credit history; current income; expected income; current obligations; debt-to-income ratio or residual income; employment status; and other financial resources other than equity in the property securing the loan.

Proposed § 226.43(c)(2) would have implemented the requirements under these sections of TILA that a creditor consider specified factors as part of a determination of a consumer's ability to repay. Proposed § 226.43(c)(2) would have required creditors to consider the following factors in making a determination of repayment ability, as required by TILA section 129C(a)(1) through (3): the consumer's current or reasonably expected income or assets, other than the dwelling that secures the loan; the consumer's employment status, if the creditor relies on employment income; the consumer's monthly payment on the loan; the consumer's monthly payment on any simultaneous loan that the creditor knows or has reason to know will be made; the consumer's monthly payment for mortgage-related obligations; the consumer's current debt obligations; the consumer's monthly debt-to-income ratio or residual income; and the consumer's credit history. As discussed in detail below, the Bureau is adopting § 1026.43(c)(2) substantially as proposed, with technical and conforming changes.

As indicated above, the Bureau also is adopting new comment 43(c)(2)–1. New comment 43(c)(2)–1 provides guidance regarding definitional and other technical underwriting issues related to the factors enumerated in § 1026.43(c)(2). New comment 43(c)(2)–1 replaces in part and responds to comments received regarding proposed comment 43(c)–1, as discussed above.

New comment 43(c)(2)–1 notes that § 1026.43(c)(2) sets forth factors creditors must consider when making the ability-to-repay determination required under § 1026.43(c)(1) and the accompanying commentary provides guidance regarding these factors. New comment 43(c)(2)–1 also notes that creditors must conform to these requirements and may rely on guidance provided in the commentary. New comment 43(c)(2)–1 also acknowledges that the rule and commentary do not provide comprehensive guidance on definitions and other technical underwriting criteria necessary for evaluating these factors in practice. The comment clarifies that, so long as a creditor complies with the provisions of § 1026.43(c), the creditor is permitted to use its own definitions and other technical underwriting criteria.

New comment 43(c)(2)–1 further provides that a creditor may, but is not required to, look to guidance issued by entities such as the FHA, VA, USDA, or Fannie Mae or Freddie Mac while operating under the conservatorship of the Federal Housing Finance Administration. New comment 43(c)(2)–1 gives several examples of instances where a creditor could refer to such guidance, such as: classifying particular inflows, obligations, and property as ''income,'' ''debt,'' or ''assets''; determining what information to use when evaluating the income of a self-employed or seasonally employed consumer; or determining what information to use when evaluating the credit history of a consumer who has few or no extensions of traditional credit. The comment emphasizes that these examples are illustrative, and creditors are not required to conform to guidance issued by these or other such entities. The Bureau is aware that many creditors have, for example, existing underwriting definitions of ''income'' and ''debt.'' Creditors are not required to modify their existing definitions and other technical underwriting criteria to conform to guidance issued by such entities, and creditors' existing definitions and other technical underwriting criteria are not noncompliant merely because they differ from those used in such guidance.

Finally, new comment 43(c)(2)–1 emphasizes that a creditor must ensure that its underwriting criteria, as applied to the facts and circumstances of a particular extension of credit, result in a reasonable, good faith determination of a consumer's ability to repay. As an example, new comment 43(c)(2)–1 states that a definition used in underwriting that is reasonable in isolation may lead to ability-to-repay determinations that are unreasonable or not in good faith when considered in the context of a creditor's underwriting standards or when adopted or applied in bad faith. Similarly, an ability-to-repay determination is not unreasonable or in bad faith merely because the underwriting criteria used included a definition that was by itself unreasonable.

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TILA section 129C(a)(3) provides that, in making the repayment ability determination, a creditor must consider, among other factors, a consumer's current income, reasonably expected income, and ''financial resources'' other than the consumer's equity in the dwelling or real property that secures loan repayment. Furthermore, under TILA section 129C(a)(9), a creditor may consider the seasonality or irregularity of a consumer's income in determining repayment ability. The Board's proposal generally mirrored TILA section 129C(a)(3), but differed in two respects.

First, proposed § 226.43(c)(2)(i) used the term ''assets'' rather than ''financial resources,'' to conform with terminology used in other provisions under TILA section 129C(a) and Regulation Z. *See, e.g.,* TILA section 129C(a)(4) (requiring that creditors consider a consumer's assets in determining repayment ability); § 1026.51(a) (requiring consideration of a consumer's assets in determining a consumer's ability to pay a credit extension under a credit card account). The Board explained that the terms ''financial resources'' and ''assets'' are synonymous as used in TILA section 129C(a), and elected to use the term ''assets'' throughout the proposal for consistency. The Bureau is adopting this interpretation as well, as part of its effort to streamline regulations and reduce compliance burden, and uses the term ''assets'' throughout Regulation Z.

Second, the Board's proposal provided that a creditor may not look to the value of the dwelling that secures the covered transaction, instead of providing that a creditor may not look to the consumer's equity in the dwelling, as provided in TILA section 129C(a). The Bureau received comments expressing concern that the Board had proposed dispensing with the term ''equity.'' These comments protested that the Board had assumed that congressional concern was over the foreclosure value of the home, rather than protecting all homeowners, including those who may have low home values. The commenters' concerns are likely misplaced, however, as the Board's language provides, if anything, broader protection for homeowners. TILA section 129C(a)(3) is intended to address the risk that a creditor will consider the amount that could be obtained through a foreclosure sale of the dwelling, which may exceed the amount of the consumer's equity in the dwelling. For example, the rule addresses the situation in which, several years after consummation, the value of a consumer's home has decreased significantly. The rule prohibits a creditor from considering, at or before consummation, any value associated with this home, even in the event that the ''underwater'' home is sold at foreclosure. The rule thus avoids the situation in which the creditor might assume that rising home values might make up the difference should the consumer be unable to make full mortgage payments, and therefore the rule is more protective of consumers because the rule forbids the creditor from considering any value associated with the dwelling whether the consumer's equity stake in the dwelling is large or small.

The Bureau is adopting the Board's proposal, providing that a creditor may not look to the value of the dwelling that secures the covered transaction, instead of providing that a creditor may not look to the consumer's equity in the dwelling, as provided in TILA section 129C(a). The Bureau is making this adjustment pursuant to its authority under TILA section 105(a), which provides that the Bureau's regulations may contain such additional requirements, classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for all or any class of transactions as in the Bureau's judgment are necessary or proper to effectuate the purposes of TILA, prevent circumvention or evasion thereof, or facilitate compliance therewith. 15 U.S.C. 1604(a). The purposes of TILA include the purposes that apply to 129C, to assure that consumers are offered and receive residential mortgage loans on terms that reasonably reflect their ability to repay the loan. *See* 15 U.S.C. 1639b(a)(2). As further explained above, the Bureau believes it is necessary and proper to make this adjustment to ensure that consumers receive loans on affordable terms and to facilitate compliance with TILA and its purposes.

The Board proposed comment 43(c)(2)(i)–1 to clarify that a creditor may base a determination of repayment ability on current or reasonably expected income from employment or other sources, assets other than the dwelling that secures the covered transaction, or both. The Bureau did not receive significant comment on the proposal and has adopted the Board's proposed comment. In congruence with the Bureau's adoption of the phrase ''value of the dwelling'' in § 1026.43(c)(2)(i), instead of the consumer's equity in the dwelling, as originally provided in TILA section 129C(a), comment 43(c)(2)(i)–1 likewise notes that the creditor may not consider the dwelling that secures the transaction as an asset in any respect. This comment is also consistent with comment 43(a)–2, which further clarifies that the term ''dwelling'' includes the value of the real property to which the dwelling is attached, if the real property also secures the covered transaction. Comment 43(c)(2)(i)–1 also provides examples of types of income the creditor may consider, including salary, wages, self-employment income, military or reserve duty income, tips, commissions, and retirement benefits; and examples of assets the creditor may consider, including funds in a savings or checking account, amounts vested in a retirement account, stocks, and bonds. The Bureau did not receive significant comment on the proposal and has adopted the Board's proposed comment. The Bureau notes that there may be assets other than those listed in comment 43(c)(2)(i)–1 that a creditor may consider; the Bureau does not intend for the list to be exhaustive, but merely illustrative.

The Board proposed comment 43(c)(2)(i)–2 to explain that, if a creditor bases its determination of repayment ability entirely or in part on a consumer's income, the creditor need consider only the income necessary to support a determination that the consumer can repay the covered transaction. The Bureau did not receive significant comment and has adopted the Board's comment largely as proposed. This comment clarifies that a creditor need not document and verify every aspect of the consumer's income, merely enough income to support the creditor's good faith determination. For example, if a consumer earns income from a full-time job and a part-time job and the creditor reasonably determines that the consumer's income from the full-time job is sufficient to repay the covered transaction, the creditor need not consider the consumer's income from the part-time job. Comment 43(c)(2)(i)–2 also cross-references comment 43(c)(4)–1 for clarity.

The Board proposed comment 43(c)(2)(i)–3 to clarify that the creditor may rely on the consumer's reasonably expected income either in addition to or instead of current income. This comment is similar to existing comment 34(a)(4)(ii)–2, which describes a similar income test for high-cost mortgages under § 1026.34(a)(4).[107] This consistency should serve to reduce compliance burden for creditors. The Bureau did not receive significant comment on the proposal and is adopting the Board's comment as proposed. Comment 43(c)(2)(i)–3 further explains that, if a creditor relies on expected income, the expectation that the income will be available for repayment must be reasonable and verified with third-party records that provide reasonably reliable evidence of the consumer's expected income. Comment 43(c)(2)(i)–3 also gives examples of reasonably expected income, such as expected bonuses verified with documents demonstrating past bonuses or expected salary from a job verified with a written statement from an employer stating a specified salary. As the Board has previously stated, in some cases a covered transaction may have a likely payment increase that would not be affordable at the consumer's income at the time of consummation. A creditor may be able to verify a reasonable expectation of an increase in the consumer's income that will make the higher payment affordable to the consumer. *See* 73 FR 44522, 44544 (July 30, 2008).

TILA section 129C(a)(9) provides that a creditor may consider the seasonality or irregularity of a consumer's income in determining repayment ability. Accordingly, the Board proposed comment 43(c)(2)(i)–4 to clarify that a creditor reasonably may determine that a consumer can make periodic loan payments even if the consumer's income, such as self-employment or agricultural employment income, is seasonal or irregular. The Bureau received little comment on this proposal, although at least one consumer advocate expressed concern that creditors might interpret the rule to allow for a creditor to differentiate among types of income. Specifically, the commenter expressed concern that some creditors might differentiate types of income, for example salaried income as opposed to disability payments, and that these creditors might require the consumer to produce a letter stating that the disability income was guaranteed for a specified period. The Bureau understands these concerns, and cautions creditors not to overlook the requirements imposed by the Equal Credit Opportunity Act, implemented by the Bureau under Regulation B. *See* 15 U.S.C. 1601 *et seq.;* 12 CFR 1002.1 *et seq.* For example, 12 CFR 1002.6(b)(2) prohibits a creditor from taking into account whether an applicant's income derives from any public assistance program. The distinction here is that 43(c)(2)(i)–4 permits the creditor to consider the regularity of the consumer's income, but such consideration must be based on the consumer's income history, not based on the source of the income, as both a consumer's wages or a consumer's receipt of public assistance may or may not be irregular. The Bureau is adopting this comment largely as proposed, as the concerns discussed above are largely covered by Regulation B. Comment 43(c)(2)(i)–4 states that, for example, if the creditor determines that the income

[107] The Bureau has proposed revising comment 34(a)(4)(ii)–2, though not in a manner that would affect the ''reasonably expected income'' aspect of the comment. *See* 77 FR 49090, 49153 (Aug. 15, 2012). The Bureau is concurrently finalizing the 2012 HOEPA Proposal.

a consumer receives a few months each year from, for example, selling crops or from agricultural employment is sufficient to make monthly loan payments when divided equally across 12 months, then the creditor reasonably may determine that the consumer can repay the loan, even though the consumer may not receive income during certain months.

Finally, the Bureau is adding new comment 43(c)(2)(i)–5 to further clarify, in the case of joint applicants, the consumer's current or reasonably expected income or assets basis of the creditor's ability-to-repay determination. This comment is similar in approach to the Board's proposed comment 43(c)(4)–2, discussed below, however, proposed comment 43(c)(4)–2 discussed the verification of income in the case of joint applicants. The Bureau is adding comment 43(c)(2)(i)–5 to clarify the creditor's basis for making an ability-to-repay determination for joint applicants. Comment 43(c)(2)(i)–5 explains that when two or more consumers apply for an extension of credit as joint obligors with primary liability on an obligation, § 1026.43(c)(i) does not require the creditor to consider income or assets that are not needed to support the creditor's repayment ability determination. Thus, the comment explains that if the income or assets of one applicant are sufficient to support the creditor's repayment ability determination, then the creditor is not required to consider the income or assets of the other applicant.

43(c)(2)(ii)

TILA section 129C(a)(3) requires that a creditor consider a consumer's employment status in determining the consumer's repayment ability, among other requirements. The Board proposal implemented this requirement in proposed § 226.43(c)(2)(ii) and clarified that a creditor need consider a consumer's employment status only if the creditor relies on income from the consumer's employment in determining repayment ability. The Bureau did not receive significant comment on the Board's proposal and is adopting § 1026.43(c)(2)(ii) as proposed. The Bureau sees no purpose in requiring a creditor to consider a consumer's employment status in the case where the creditor need not consider the income from that employment in the creditor's reasonable and good faith determination that the consumer will have a reasonable ability to repay the loan according to its terms.

The Board proposed, and the Bureau is adopting, comment 43(c)(2)(ii)–1 to illustrate this point further. The comment states, for example, that if a creditor relies wholly on a consumer's investment income to determine the consumer's repayment ability, the creditor need not consider or verify the consumer's employment status. The proposed comment further clarifies that employment may be full-time, part-time, seasonal, irregular, military, or self-employment. Comment 43(c)(2)(ii)–1 is similar to comment 34(a)(4)–6, which discusses income, assets, and employment in determining repayment ability for high-cost mortgages.

In its proposal, the Board explained that a creditor generally must verify information relied on to determine repayment ability using reasonably reliable third-party records, but may verify employment status orally as long as the creditor prepares a record of the oral information. The Board proposed comment 43(c)(2)(ii)–2 to add that a creditor also may verify the employment status of military personnel using the electronic database maintained by the Department of Defense (DoD) to facilitate identification of consumers covered by credit protections provided pursuant to 10 U.S.C. 987, also known as the ''Talent Amendment.'' [108] The Board solicited comment on whether creditors needed additional flexibility in verifying the employment status of military personnel, such as by verifying the employment status of a member of the military using a Leave and Earnings Statement. As this proposed comment was designed to provide clarification for creditors with respect to verifying a consumer's employment, this proposed comment is discussed in the section-by-section analysis of § 1026.43(c)(3) below.

43(c)(2)(iii)

Proposed § 226.43(c)(2)(iii) implemented the requirements under new TILA section 129C(a)(1) and (3), in part, by requiring that the creditor consider the consumer's monthly payment on the covered transaction, calculated in accordance with proposed § 226.43(c)(5), for purposes of determining the consumer's repayment ability. Proposed comment 43(c)(2)(iii)–1 clarified the regulatory language and made clear that mortgage-related obligations must also be considered.

The Bureau did not receive comments on this provision. Accordingly, the Bureau is adopting § 1026.43(c)(2)(iii) as proposed. Comment 43(c)(2)(iii)–1 has been edited to remove the reference to mortgage-related obligations as potentially confusing. The monthly payment for mortgage-related obligations must be considered under § 1026.43(c)(2)(v).

43(c)(2)(iv)

Proposed § 226.43(c)(2)(iv) implemented the requirements under new TILA section 129C(a)(2), in part, by requiring that the creditor consider ''the consumer's monthly payment on any simultaneous loan that the creditor knows or has reason to know will be made, calculated in accordance with'' proposed § 226.43(c)(6), for purposes of determining the consumer's repayment ability. As explained above in the section-by-section analysis of § 1026.43(b)(12), ''simultaneous loan'' is defined, in the proposed and final rules, to include HELOCs.

Proposed comment 43(c)(2)(iv)–1 clarified that for purposes of the repayment ability determination, a simultaneous loan includes any covered transaction or HELOC that will be made to the same consumer at or before consummation of the covered transaction and secured by the same dwelling that secures the covered transaction. This comment explained that a HELOC that is a simultaneous loan that the creditor knows or has reason to know about must be considered in determining a consumer's ability to repay the covered transaction, even though the HELOC is not a covered transaction subject to § 1026.43.

Proposed comment 43(c)(2)(iv)–3 clarified the scope of timing and the meaning of the phrase ''at or before consummation'' with respect to simultaneous loans that the creditor must consider for purposes of proposed § 226.43(c)(2)(iv). Proposed comment 43(c)(2)(iv)–4 provided guidance on the verification of simultaneous loans.

The Bureau received several industry comments on the requirement, in the regulation and the statute, that the creditor consider any simultaneous loan it ''knows or has reason to know'' will be made. The commenters felt that the standard was vague, and that it would be difficult for a creditor to understand when it ''has reason to know'' a simultaneous loan will be made.

The Board provided guidance on the ''knows or has reason to know'' standard in proposed comment 43(c)(2)(iv)–2. This comment provided that, in regard to ''piggyback'' second-lien loans, the creditor complies with the standard if it follows policies and procedures that are designed to

[108] The Talent Amendment is contained in the John Warner National Defense Authorization Act. *See* Public Law 109–364, 120 Stat. 2083, 2266 (2006); 72 FR 50580, 5088 (Aug. 31, 2007) (discussing the DoD database in a final rule implementing the Talent Amendment). Currently, the DoD database is available at *https://www.dmdc.osd.mil/appj/mla/*.

determine whether at or before consummation that the same consumer has applied for another credit transaction secured by the same dwelling. The proposed comment provided an example in which the requested loan amount is less than the home purchase price, indicating that there is a down payment coming from a different funding source. The creditor's policies and procedures must require the consumer to state the source of the down payment, which must be verified. If the creditor determines that the source of the down payment is another extension of credit that will be made to the same consumer and secured by the same dwelling, the creditor knows or has reason to know of the simultaneous loan. Alternatively, if the creditor has verified information that the down payment source is the consumer's existing assets, the creditor would be under no further obligation to determine whether a simultaneous loan will be extended at or before consummation.

The Bureau believes that comment 43(c)(2)(iv)–2 provides clear guidance on the ''knows or has reason to know'' standard, with the addition of language clarifying that the creditor is not obligated to investigate beyond reasonable underwriting policies and procedures to determine whether a simultaneous loan will be extended at or before consummation of the covered transaction.

The Bureau considers the provision to be an accurate and appropriate implementation of the statute. Proposed § 226.43(c)(2)(iv) and associated commentary are adopted substantially as proposed, in renumbered § 1026.43(c)(2)(iv), with the addition of the language discussed above to comment 43(c)(2)(iv)–2 and other minor clarifying changes. Comment 43(c)(2)(iv)–3 now includes language making clear that if the consummation of the loan transaction is extended past the traditional closing, any simultaneous loan originated after that traditional closing may still be interpreted as having occurred ''at'' consummation. In addition, as discussed below, comment 43(c)(2)(iv)–4, *Verification of simultaneous loans,* has been grouped with other verification comments, in comment 43(c)(3)–4.

43(c)(2)(v)

As discussed above, TILA section 129C(a)(1) and (3) requires creditors to consider and verify mortgage-related obligations as part of the ability-to-repay determination ''according to [the loan's] terms, and all applicable taxes, insurance (including mortgage guarantee insurance), and assessments.'' Section 1026.34(a)(4), which was added by the 2008 HOEPA Final Rule, also requires creditors to consider mortgage-related obligations in assessing repayment ability. See the section-by-section analysis of § 1026.43(b)(8) for a discussion of the Bureau's interpretation of ''mortgage-related obligations'' and the definition adopted in the final rule.

The Board proposed to require creditors to consider the consumer's monthly payment for mortgage-related obligations as part of the repayment ability determination. Proposed comment 43(c)(2)(v)–1 explained that mortgage-related obligations must be included in the creditor's determination of repayment ability regardless of whether the amounts are included in the monthly payment or whether there is an escrow account established.

Proposed comment 43(c)(2)(v)–2 clarified that, in considering mortgage-related obligations that are not paid monthly, the creditor may look to widely accepted governmental or non-governmental standards to determine the pro rata monthly payment amount. The Board solicited comment on operational difficulties creditors may encounter when complying with this monthly requirement, and whether additional guidance was necessary.

Proposed comment 43(c)(2)(v)–3 explained that estimates of mortgage-related obligations should be based upon information known to the creditor at the time the creditor underwrites the mortgage obligation. This comment explained that information is known if it is ''reasonably available'' to the creditor at the time of underwriting the loan, and cross-referenced current comment 17(c)(2)(i)–1 for guidance regarding ''reasonably available.'' Proposed comment 43(c)(2)(v)–3 further clarified that, for purposes of determining repayment ability under proposed § 226.43(c), the creditor would not need to project potential changes.

Proposed comment 43(c)(2)(v)–4 stated that creditors must make the repayment ability determination required under proposed § 226.43(c) based on information verified from reasonably reliable records. This comment explained that guidance regarding verification of mortgage-related obligations could be found in proposed comments 43(c)(3)–1 and –2, which discuss verification using third-party records.

The Board solicited comment on any special concerns regarding the requirement to document certain mortgage-related obligations, for example, ground rent or leasehold payments, or special assessments. The Board also solicited comment on whether it should provide that the HUD–1 or –1A or a successor form could serve as verification of mortgage-related obligations reflected by the form, where a legal obligation exists to complete the form accurately.

Industry commenters and consumer advocates generally supported including consideration and verification of mortgage-related obligations in the ability-to-repay determination. Several industry commenters asked that the Bureau provide creditors more flexibility in considering and verifying mortgage-related obligations. They suggested that a reasonable and good faith determination be deemed sufficient, rather than use of all underwriting standards in any particular government or non-government handbook. Community banks asserted that flexible standards were necessary to meet their customers' needs. Some consumer advocates suggested that creditors be permitted to draw on only widely accepted standards that have been validated by experience or sanctioned by a government agency.

Some industry commenters asked for more guidance on how to calculate pro rata monthly payment amounts and estimated property taxes. One industry commenter asked that creditors be permitted to use pro rata monthly payment amounts for special assessments, not quarterly or yearly amounts. The commenter requested that estimates of common assessments be permitted. This commenter also recommended that creditors be permitted to verify the amount of common assessments with information provided by the consumer. One commenter noted that verification using HUD–1 forms should be permitted because there is a legal obligation to complete the HUD–1 accurately.

The Bureau is adopting the rule as proposed. For the reasons discussed below, the Bureau concludes that a creditor should consider the consumer's monthly payment for mortgage-related obligations in determining the consumer's ability to repay, pursuant to § 1026.43(c)(1). As commenters confirmed, obligations related to the mortgage may affect the consumer's ability to satisfy the obligation to make recurring payments of principal and interest. The Bureau also agrees with the argument raised by many commenters that the failure to account consistently for these obligations during the subprime crisis harmed many consumers. Thus, the Bureau has determined that it is appropriate to adopt § 1026.43(c)(2)(v) as proposed. However, the Bureau believes that additional guidance will facilitate compliance. As explained below, the Bureau has expanded on the proposed commentary language to provide additional clarity and illustrative examples.

The final version of comment 43(c)(2)(v)–1 is substantially similar to the language as proposed. As discussed under § 1026.43(b)(8) above, the Bureau is revising the language related to insurance premiums to provide additional clarity. The modifications to the language in proposed comment 43(c)(2)(v)–1 conform to the language adopted under § 1026.43(b)(8) and the related commentary. Furthermore, the final version of comment 43(c)(2)(v)-1 contains additional explanation regarding the determination of the consumer's monthly payment, and provides additional illustrative examples to clarify further the requirements of § 1026.43(c)(2)(v). For example, assume that a consumer will be required to pay mortgage insurance premiums, as defined by § 1026.43(b)(8), on a monthly, annual, or other basis after consummation. Section 1026.43(c)(2)(v) includes these recurring mortgage insurance payments in the evaluation of the consumer's monthly payment for mortgage-related obligations. However, if the consumer will incur a one-time fee or charge for mortgage insurance or similar purposes, such as an up-front mortgage insurance premium imposed at consummation, § 1026.43(c)(2)(v) does not include this up-front mortgage insurance premium in the evaluation of the consumer's monthly payment for mortgage-related obligations.

As discussed under § 1026.43(b)(8) above, several commenters discussed the importance of including homeowners association dues and similar obligations in the determination of ability to repay. These commenters argued, and the Bureau agrees, that recurring financial obligations payable to community governance associations, such as homeowners association dues, should be taken into consideration in determining whether a consumer has the ability to repay the obligation. The Bureau recognizes the practical problems that may arise with including obligations such as these in the evaluation of the consumer's monthly payment for mortgage-related obligations. Commenters identified issues stemming from difficulties which may arise in calculating, estimating, and verifying these obligations. Based on this feedback, the Bureau has determined that additional clarification is necessary. As adopted, comment 43(c)(2)(v)–2 clarifies that creditors need not include payments to community governance associations if such obligations are fully satisfied at or before consummation by the consumer. This comment further clarifies that § 1026.43(c)(2)(v) does not require the creditor to include these payments in the evaluation of the consumer's monthly payment for mortgage-related obligations if the consumer does not pay the fee directly at or before consummation, and instead finances the obligation. In these cases, the financed obligation will be included in the loan amount, and is therefore already included in the determination of ability to repay pursuant to § 1026.43(c)(2)(iii). However, if the consumer incurs the obligation and will satisfy the obligation with recurring payments after consummation, regardless of whether the obligation is escrowed, § 1026.43(c)(2)(v) requires the creditor to include the obligation in the evaluation of the consumer's monthly payment for mortgage-related obligations. The Bureau has also addressed the concerns raised by commenters related to calculating, estimating, and verifying these obligations in comments 43(c)(2)(v)–4 and –5 and 43(c)(3)–5, respectively.

As discussed under § 1026.43(b)(8) above, one comment letter focused extensively on community transfer fees. The Bureau agrees with the argument, advanced by several commenters, that the entirety of the consumer's ongoing obligations should be included in the determination. A responsible determination of the consumer's ability to repay requires an accounting of such obligations, whether the purpose of the obligation is to satisfy the payment of a community transfer fee or traditional homeowners association dues. An obligation that is not paid in full at or before consummation must be paid after consummation, which may affect the consumer's ability to repay ongoing obligations. Thus, comment 43(c)(2)(v)–2 clarifies that community transfer fees are included in the determination of the consumer's monthly payment for mortgage-related obligations if such fees are paid on a recurring basis after consummation. Additionally, the Bureau believes that a creditor is not required to include community transfer fees that are imposed on the seller, as many community transfer fees are, in the ability-to-repay calculation.

In response to the request for feedback in the proposed rule, several commenters addressed the proposed treatment of special assessments. Unlike community transfer fees, which are generally identified in the deed or master community plan, creditors may encounter difficulty determining whether special assessments exist. Special assessments are often imposed in response to some urgent or unexpected need. Consequently, neither the creditor nor the community governance association may be able to predict the frequency and magnitude of special assessments. However, this difficulty does not exist for special assessments that are known at the time of underwriting. Known special assessments, which the buyer must pay and which may be significant, may affect the consumer's ability to repay the obligation. Thus, comment 43(c)(2)(v)–3 clarifies that the creditor must include special assessments in the evaluation of the consumer's monthly payment for mortgage-related obligations if such fees are paid by the consumer on a recurring basis after consummation, regardless of whether an escrow is established for these fees. For example, if a homeowners association imposes a special assessment that the consumer will have to pay in full at or before consummation, § 1026.43(c)(2)(v) does not include the special assessment in the evaluation of the consumer's monthly payment for mortgage-related obligations. Section 1026.43(c)(2)(v) does not require a creditor to include special assessments in the evaluation of the consumer's monthly payment for mortgage-related obligations if the special assessments are imposed as a one-time charge. For example, if a homeowners association imposes a special assessment that the consumer will have to satisfy in one payment, § 1026.43(c)(2)(v) does not include this one-time special assessment in the evaluation of the consumer's monthly payment for mortgage-related obligations. However, if the consumer will pay the special assessment on a recurring basis after consummation, regardless of whether the consumer's payments for the special assessment are escrowed, § 1026.43(c)(2)(v) requires the creditor to include this recurring special assessment in the evaluation of the consumer's monthly payment for mortgage-related obligations. Comment 43(c)(2)(v)–3 also includes several other examples illustrating this requirement.

The Bureau agrees that clear and detailed guidance regarding determining pro rata monthly payments of mortgage-related obligations should be provided. However, the Bureau believes that it is important to strike a balance between providing clear guidance and providing creditors with the flexibility to serve the evolving mortgage market. The comments identified significant concerns with the use of ''widely accepted governmental and non-governmental standards'' for purposes of determining the pro rata monthly payment amount for mortgage-related obligations. While commenters generally stated that ''widely accepted governmental standards'' was an appropriate standard, others commented that ''non-governmental standards'' may not be sufficiently clear. The Bureau believes that ''governmental standards'' could be relied on to perform pro rata calculations of monthly mortgage related obligations because such standards provide detailed and comprehensive guidance and are frequently revised to adapt to the needs of the evolving residential finance market. However, the comments noted that ''non-governmental standards'' is not sufficiently descriptive to illustrate clearly how to calculate pro rata monthly payments. Additionally, the Bureau believes that clear guidance is also needed to address the possibility that a particular government program may not specifically describe how to calculate pro rata monthly payment amounts for mortgage-related obligations. Thus, the Bureau believes that it is appropriate to revise and further develop the concept of ''widely accepted governmental and non-governmental standards.''

Based on this feedback, the Bureau has revised and expanded the comment clarifying how to calculate pro rata monthly mortgage obligations. As adopted, comment 43(c)(2)(v)–4 provides that, if the mortgage loan is originated pursuant to a governmental program, the creditor may determine the pro rata monthly amount of the mortgage-related obligation in accordance with the specific requirements of that program. If the mortgage loan is originated pursuant to a government program that does not contain specific standards for determining the pro rata monthly amount of the mortgage-related obligation, or if the mortgage loan is not originated pursuant to a government program, the creditor complies with § 1026.43(c)(2)(v) by dividing the total amount of a particular non-monthly mortgage-related obligation by no more than the number of months from the month that the non-monthly mortgage-related obligation last was due prior to consummation until the month that the non-monthly mortgage-related obligation next will be due after consummation. Comment 43(c)(2)(v)–4 also includes several examples which illustrate the conversion of non-monthly obligations into monthly, pro rata payments. For example, assume that a consumer applies for a mortgage loan on February 1st. Assume further that the subject property is located in a jurisdiction where property taxes are paid in arrears annually on the first day of October. The creditor complies with § 1026.43(c)(2)(v) by determining the annual property tax amount owed in the prior October, dividing the amount by 12, and using the resulting amount as the pro rata monthly property tax payment amount for the determination of the consumer's monthly payment for mortgage-related obligations. The creditor complies even if the consumer will likely owe more in the next year than the amount owed the prior October because the jurisdiction normally increases the property tax rate annually, provided that the creditor does not have knowledge of an increase in the property tax rate at the time of underwriting.

The Bureau is adopting comment 43(c)(2)(v)–5 in a form that is substantially similar to the version proposed. One industry commenter was especially concerned about estimating costs for community governance organizations, such as cooperative, condominium, or homeowners associations. This commenter noted that, because of industry concerns about TILA liability, many community governance organizations refuse to provide estimates of association expenses absent agreements disclaiming association liability. This commenter expressed concern that the ability-to-repay requirements would make community governance organizations less likely to provide estimates of association expenses, which would result in mortgage loan processing delays. The Bureau does not believe that the ability-to-repay requirements will lead to difficulties in exchanging information between creditors and associations because the ability-to-repay requirements generally apply only to creditors, as defined under § 1026.2(a)(17). However, the Bureau recognizes that consumers may be harmed if mortgage loan transactions are needlessly delayed by concerns arising from the ability-to-repay requirements. Thus, the Bureau has decided to address these concerns by adding several examples to comment 43(c)(2)(v)–5 illustrating the requirements of § 1026.43(c)(2)(v). For example, the creditor complies with § 1026.43(c)(2)(v) by relying on an estimate of mortgage-related obligations prepared by the homeowners association. In accordance with the guidance provided under comment 17(c)(2)(i)–1, the creditor need only exercise due diligence in determining mortgage-related obligations, and complies with § 1026.43(c)(2)(v) by relying on the representations of other reliable parties in preparing estimates. Or, assume that the homeowners association has imposed a special assessment on the seller, but the seller does not inform the creditor of the special assessment, the homeowners association does not include the special assessment in the estimate of expenses prepared for the creditor, and the creditor is unaware of the special assessment. The creditor complies with § 1026.43(c)(2)(v) if it does not include the special assessment in the determination of mortgage-related obligations. The creditor may rely on the representations of other reliable parties, in accordance with the guidance provided under comment 17(c)(2)(i)–1.

43(c)(2)(vi)

TILA section 129C(a)(1) and (3) requires creditors to consider ''current obligations'' as part of an ability-to-repay determination. Proposed § 226.43(c)(2)(vi) would have implemented the requirement under TILA section 129C(a)(1) and (3) by requiring creditors to consider current debt obligations. Proposed comment 43(c)(2)(vi)–1 would have specified that current debt obligations creditors must consider include, among other things, alimony and child support. The Bureau believes that it is reasonable to consider child support and alimony as ''debts'' given that the term ''debt'' is not defined in the statute. However, the Bureau understands that while alimony and child support are obligations, they may not be considered debt obligations unless and until they are not paid in a timely manner. Therefore, § 1026.43(c)(2)(vi) specifies that creditors must consider current debt obligations, alimony, and child support to clarify that alimony and child support are included whether or not they are paid in a timely manner.

Proposed comment 43(c)(2)(vi)–1 would have referred creditors to widely accepted governmental and non-governmental underwriting standards in determining how to define ''current debt obligations.'' The proposed comment would have given examples of current debt obligations, such as student loans, automobile loans, revolving debt, alimony, child support, and existing mortgages. The Board solicited comment on proposed comment 43(c)(2)(vi)–1 and on whether more specific guidance should be provided to creditors. Commenters generally supported giving creditors significant flexibility and did not encourage the Bureau to adopt more specific guidance.

Because the Bureau believes that a wide range of criteria and guidelines for considering current debt obligations will contribute to reasonable, good faith ability-to-repay determinations, comment 43(c)(2)(vi)–1 as adopted preserves the flexible approach of the Board's proposed comment. The comment gives examples of current debt obligations but does not provide an exhaustive list. The comment therefore preserves substantial flexibility for creditors to develop their own underwriting guidelines regarding consideration of current debt obligations. Reference to widely accepted governmental and non-governmental underwriting standards has been omitted, as discussed above in the section-by-section analysis of § 1026.43(c).

The Board also solicited comment on whether additional guidance should be provided regarding consideration of debt obligations that are almost paid off. Commenters generally stated that creditors should be required to consider obligations that are almost paid off only if they affect repayment ability. The Bureau agrees that many different standards for considering obligations that are almost paid off could lead to reasonable, good faith ability-to-repay determinations. As adopted, comment 43(c)(2)(vi)–1 includes additional language clarifying that creditors have significant flexibility to consider current debt obligations in light of attendant facts and circumstances, including that an obligation is likely to be paid off soon after consummation. As an example, comment 43(c)(2)(vi)–1 states that a creditor may take into account that an existing mortgage is likely to be paid off soon after consummation because there is an existing contract for sale of the property that secures that mortgage.

The Board also solicited comment on whether additional guidance should be provided regarding consideration of debt obligations in forbearance or deferral. Several commenters, including both creditors and consumer advocates, supported requiring creditors to consider obligations in forbearance or deferral. At least one large creditor objected to requiring creditors to consider such obligations in all cases. The Bureau believes that many different standards for considering obligations in forbearance or deferral could lead to reasonable, good faith determinations of ability to repay. As adopted, comment 43(c)(2)(vi)–1 therefore includes additional language clarifying that creditors should consider whether debt obligations in forbearance or deferral at the time of underwriting are likely to affect a consumer's ability to repay based on the payment for which the consumer will be liable upon expiration of the forbearance or deferral period and other relevant facts and circumstances, such as when the forbearance or deferral period will expire.

Parts of proposed comment 43(c)(2)(vi)–1 and proposed comment 43(c)(2)(vi)–2 would have provided guidance on verification of current debt obligations. All guidance regarding verification has been moved to the commentary to § 1026.43(c)(3) and is discussed below in the section-by-section analysis of that provision.

The Board solicited comment on whether it should provide guidance on consideration of current debt obligations for joint applicants. Commenters generally did not comment on consideration of current debt obligations for joint applicants. One trade association commenter stated that joint applicants should be subject to the same standards as individual applicants. Because the Bureau believes that the current debt obligations of all joint applicants must be considered to reach a reasonable, good faith determination of ability to repay, the Bureau is adopting new comment 43(c)(2)(vi)–2. New comment 43(c)(2)(vi)–2 clarifies that when two or more consumers apply for credit as joint obligors, a creditor must consider the debt obligations of all such joint applicants. The comment also explains that creditors are not required to consider the debt obligations of a consumer acting merely as surety or guarantor. Finally, the comment clarifies that the requirements of § 1026.43(c)(2)(vi) do not affect various disclosure requirements.

43(c)(2)(vii)

TILA section 129C(a)(3) requires creditors to consider the consumer's monthly debt-to-income ratio or residual income the consumer will have after paying non-mortgage debt and mortgage-related obligations, as part of the ability-to-repay determination under TILA section 129C(a)(1). This provision is consistent with the 2008 HOEPA Final Rule, which grants a creditor in a high-cost or higher-priced mortgage loan a presumption of compliance with the requirement that the creditor assess repayment ability if, among other things, the creditor considers the consumer's debt-to-income ratio or residual income. *See* § 1026.34(a)(4)(iii)(C), (b)(1). Existing comment 34(a)(4)(iii)(C)–1 provides that creditors may look to widely accepted governmental and non-governmental underwriting standards in defining ''income'' and ''debt'' including, for example, those set forth in the FHA Handbook on Mortgage Credit Analysis for Mortgage Insurance on One-to-Four Unit Mortgage Loans.

Proposed § 226.43(c)(2)(vii) would have implemented TILA section 129C(a)(3) by requiring creditors, as part of the repayment ability determination, to consider the consumer's monthly debt-to-income ratio or residual income. Proposed comment 43(c)(2)(vii)–1 would have cross-referenced § 226.43(c)(7), regarding the definitions and calculations for the monthly debt-to-income and residual income. Consistent with the 2008 HOEPA Final Rule, the proposed rule would have provided creditors flexibility to determine whether to use a debt-to-income ratio or residual income metric in assessing the consumer's repayment ability. As the Board noted, if one of these metrics alone holds as much predictive power as the two together, then requiring creditors to use both metrics could reduce credit access without an offsetting increase in consumer protection. 76 FR 27390, 27424–25 (May 11, 2011), citing 73 FR 44550 (July 30, 2008). The proposed rule did not specifically address creditors' use of both metrics if such an approach would provide incremental predictive power of assessing a consumer's repayment ability. However, as discussed above in the section-by-section analysis of § 1026.43(c), the Board's proposed comment 43(c)–1 would have provided that, in evaluating the consumer's repayment ability under § 226.43(c), creditors may look to widely accepted governmental or non-governmental underwriting standards, such as the FHA Handbook on Mortgage Credit Analysis for Mortgage Insurance on One-to-Four Unit Mortgage Loans, consistent with existing comment 34(a)(4)(iii)(C)–1.

In response to the proposed rule, industry commenters and consumer advocates generally supported including consideration of the debt-to-income ratio or residual income in the ability-to-repay determination. Several industry commenters asked that the Bureau provide creditors more flexibility in considering and verifying the debt-to-income ratio or residual income. They suggested that a reasonable and good faith determination be deemed sufficient, rather than use of all underwriting standards in any particular government or non-government handbook. Community banks asserted that flexible standards are necessary to meet their customers' needs. Some consumer advocates suggested that creditors be permitted only to draw on widely accepted standards that have been validated by experience or sanctioned by a government agency. They argued that more specific standards would help ensure safe and sound underwriting criteria, higher compliance rates, and a larger number of performing loans.

Section 1026.43(c)(2)(vii) adopts the Board's proposal by requiring a creditor making the repayment determination under § 1026.43(c)(1) to consider the consumer's monthly debt-to-income ratio or residual income, in accordance with § 1026.43(c)(7). The Bureau believes that a flexible approach to evaluating a consumer's debt-to-income ratio or residual income is appropriate because stricter guidelines may limit access to credit and create fair lending problems. Broad guidelines will provide creditors necessary flexibility to serve the whole of the mortgage market effectively and responsibly. Accordingly, the final rule sets minimum underwriting standards while providing creditors with flexibility to use their own reasonable guidelines in making the repayment ability determination required by § 1026.43(c)(1). Moreover, and as in the 2008 HOEPA Final Rule, the approach would provide creditors flexibility to determine whether to use a debt-to-income ratio or residual income, or both, in assessing a consumer's repayment ability.

As discussed above in the section-by-section analysis of § 1026.43(c), the Bureau is not finalizing the Board's proposed comment 43(c)–1 regarding the use of widely accepted governmental or non-governmental underwriting standards in evaluating the consumer's repayment ability. Instead, for the reasons discussed above, comment 43(c)(2)–1 provides that the rule and commentary permit creditors to adopt reasonable standards for evaluating factors in underwriting a loan, such as whether to classify particular inflows or obligations as ''income'' or ''debt,'' and that, in evaluating a consumer's repayment ability, a creditor may look to governmental underwriting standards. *See* section-by-section analysis of § 1026.43(c)(2).

The Bureau believes a flexible approach to evaluating debt and income is appropriate in making the repayment ability determination under § 1026.43(c). However, for the reasons discussed below, the Bureau believes a quantitative standard for evaluating a consumer's debt-to-income ratio should apply to loans that are ''qualified mortgages'' that receive a safe harbor or presumption of compliance with the repayment ability determination under § 1026.43(c). For a discussion of the quantitative debt-to-income standard that applies to qualified mortgages pursuant to § 1026.43(e)(2) and the rationale for applying a quantitative standard in the qualified mortgage space, see the section-by-section analysis of § 1026.43(e)(2).

43(c)(2)(viii)

TILA section 129C(a)(1) and (3) requires creditors to consider credit history as part of the ability-to-repay determination. Proposed § 226.43(c)(2)(viii) would have implemented the requirement under TILA section 129C(a)(1) and (3) by adopting the statutory requirement that creditors consider credit history as part of an ability-to-repay determination. Proposed comment 43(c)(2)(viii)–1 would have referred creditors to widely accepted governmental and non-governmental underwriting standards to define credit history. The proposed comment would have given examples of factors creditors could consider, such as the number and age of credit lines, payment history, and any judgments, collections, or bankruptcies. The proposed comment also would have referred creditors to credit bureau reports or to nontraditional credit references such as rental payment history or public utility payments.

Commenters generally did not object to the proposed adoption of the statutory requirement to consider credit history as part of ability-to-repay determinations. Commenters generally supported giving creditors significant flexibility in how to consider credit history. Creditors also generally supported clarifying that creditors may look to nontraditional credit references such as rental payment history or public utility payments.

Section 1026.43(c)(2)(viii) is adopted as proposed. Comment 43(c)(2)(viii)–1 as adopted substantially maintains the proposed comment's flexible approach to consideration of credit history. Comment 43(c)(2)(viii)–1 notes that ''credit history'' may include factors such as the number and age of credit lines, payment history, and any judgments, collections, or bankruptcies. The comment clarifies that the rule does not require creditors to obtain or consider a consolidated credit score or prescribe a minimum credit score that creditors must apply. The comment further clarifies that the rule does not specify which aspects of credit history a creditor must consider or how various aspects of credit history could be weighed against each other or against other underwriting factors. The comment explains that some aspects of a consumer's credit history, whether positive or negative, may not be directly indicative of the consumer's ability to repay and that a creditor therefore may give various aspects of a consumer's credit history as much or as little weight as is appropriate to reach a reasonable, good faith determination of ability to repay. The Bureau believes that this flexible approach is appropriate because of the wide range of creditors, consumers, and loans to which the rule will apply. The Bureau believes that a wide range of approaches to considering credit history will contribute to reasonable, good faith ability-to-repay determinations. As in the proposal, the comment, as adopted, clarifies that creditors may look to non-traditional credit references such as rental payment history or public utility payments, but are not required to do so. Reference to widely accepted governmental and non-governmental underwriting standards has been omitted, as discussed in the section-by-section analysis of § 1026.43(c), above.

Portions of proposed comment 43(c)(2)(viii)–1 discussed verification of credit history. All guidance regarding verification has been moved to the commentary to § 1026.43(c)(3) and is discussed below in the section-by-section analysis of that provision.

Because the Bureau believes that the credit history of all joint applicants must be considered to reach a reasonable, good faith determination of joint applicants' ability to repay, and for conformity with the commentary to § 1026.43(c)(2)(vi) regarding consideration of current debt obligations for multiple applicants, the Bureau is adopting new comment 43(c)(2)(viii)–2 regarding multiple applicants. The comment clarifies that, when two or more consumers apply jointly for credit, the creditor is required by § 1026.43(c)(2)(viii) to consider the credit history of all joint applicants. New comment 43(c)(2)(viii)–2 also clarifies that creditors are not required to consider the credit history of a consumer who acts merely as a surety or guarantor. Finally, the comment clarifies that the requirements of § 1026.43(c)(2)(viii) do not affect various disclosure requirements.

43(c)(3) Verification Using Third-Party Records

TILA section 129C(a)(1) requires that a creditor make a reasonable and good faith determination, based on ''verified and documented information,'' that a consumer has a reasonable ability to repay the covered transaction. The Board's 2008 HOEPA Final Rule required that a creditor verify the consumer's income or assets relied on to determine repayment ability and the consumer's current obligations under § 1026.34(a)(4)(ii)(A) and (C). Thus, TILA section 129C(a)(1) differs from existing repayment ability rules by requiring a creditor to verify information relied on in considering the consumer's ability to repay according to the considerations required under TILA section 129C(a)(3), which are discussed above in the section-by-section analysis of § 1026.43(c)(2).

The Board's proposal would have implemented TILA section 129C(a)(1)'s general requirement to verify a consumer's repayment ability in proposed § 226.43(c)(3), which required that a creditor verify a consumer's repayment ability using reasonably reliable third-party records, with two exceptions. Under the first exception, proposed § 226.43(c)(3)(i) provided that a creditor may orally verify a consumer's employment status, if the creditor subsequently prepares a record of the oral employment status verification. Under the second exception, proposed § 226.43(c)(3)(ii) provided that, in cases where a creditor relies on a consumer's credit report to verify a consumer's current debt obligations and the consumer's application states a current debt obligation not shown in the consumer's credit report, the creditor need not independently verify the additional debt obligation, as reported. Proposed comment 43(c)(3)–1 clarified that records a creditor uses to verify a consumer's repayment ability under proposed § 226.43(c)(3) must be specific to the individual consumer. Records regarding, for example, average incomes in the consumer's geographic location or average incomes paid by the consumer's employer would not be specific to the individual consumer and are not sufficient.

Proposed comment 43(c)(3)–2 provided that a creditor may obtain third-party records from a third-party service provider, as long as the records are reasonably reliable and specific to the individual consumer. As stated in § 1026.43(c)(3), the standard for verification is that the creditor must use ''reasonably reliable third-party records,'' which is fulfilled for reasonably reliable documents, specific to the consumer, provided by a third-party service provider. Also, proposed comment 43(c)(3)–2 clarified that a creditor may obtain third-party records, for example, payroll statements, directly from the consumer, again as long as the records are reasonably reliable.

The Board also solicited comment on whether any documents or records prepared by the consumer and not reviewed by a third party appropriately could be considered in determining repayment ability, for example, because a particular record provides information not obtainable using third-party records. In particular, the Board solicited comment on methods currently used to ensure that documents prepared by self-employed consumers (such as a year-to-date profit and loss statement for the period after the period covered by the consumer's latest income tax return, or an operating income statement prepared by a consumer whose income includes rental income) are reasonably reliable for use in determining repayment ability.

Commenters generally supported the Board's proposal to implement the Dodd-Frank Act's verification requirements. Consumer groups generally found the proposal to be an accurate implementation of the statute and posited that the proposal would provide much-needed protection for consumers. Industry commenters generally also supported the proposal, noting that most underwriters already engaged in similarly sound underwriting practices. Some industry commenters noted that verifying a consumer's employment status imposes a burden upon the consumer's employer as well, however the Bureau has concluded that the oral verification provision provided by § 1026.43(c)(3)(ii), discussed below, alleviates such concerns.

The Bureau is adopting § 1026.43(c)(3) substantially as proposed, with certain clarifying changes which are described below. The final rule also adds new comment 43(c)(3)–3. In addition, for organizational purposes, the final rule generally adopts proposed comments 43(c)(2)(iv)–4, 43(c)(2)(v)–4, 43(c)(2)(vi)–1, 43(c)(2)(viii)–1, and 43(c)(2)(ii)–2 in renumbered comments 43(c)(3)–4 through –8 with revisions as discussed below. These changes and additions to § 1026.43(c)(3) and its commentary are discussed below.

First, the final rule adds a new § 1026.43(c)(3)(i), which provides that, for purposes of § 1026.43(c)(2)(i), a creditor must verify a consumer's income or assets in accordance with § 1026.43(c)(4). This is an exception to the general rule in § 1026.43(c)(3) that a creditor must verify the information that the creditor relies on in determining a consumer's repayment ability under § 1026.43(c)(2) using reasonably reliable third-party records. Because of this new provision, proposed § 226.43(c)(3)(i) and (ii) are adopted as proposed in § 1026.43(c)(3)(ii) and (iii), with minor technical revisions. In addition, the Bureau is adopting proposed comments 43(c)(3)–1 and –2 substantially as proposed with revisions to clarify that the guidance applies to both § 1026.43(c)(3) and (c)(4).

The Bureau is adding new comment 43(c)(3)–3 to clarify that a credit report generally is considered a reasonably reliable third-party record. The Board's proposed comment 43(c)(2)(vi)–2 stated, among other things, that a credit report is deemed a reasonably reliable third-party record under proposed § 226.43(c)(3). Commenters did not address that aspect of proposed comment 43(c)(2)(vi)–2. The Bureau believes credit reports are generally reasonably reliable third-party records for verification purposes. Comment 43(c)(3)–3 also explains that a creditor is not generally required to obtain additional reasonably reliable third-party records to verify information contained in a credit report, as the report itself is the means of verification. Likewise, comment 43(c)(3)–3 explains that if information is not included in the credit report, then the credit report cannot serve as a means of verifying that information. The comment further explains, however, that if the creditor may know or have reason to know that a credit report is not reasonably reliable, in whole or in part, then the creditor complies with § 1026.43(c)(3) by disregarding such inaccurate or disputed items or reports. The creditor may also, but is not required, to obtain other reasonably reliable third-party records to verify information with respect to which the credit report, or item therein, may be inaccurate. The Bureau believes that this guidance strikes the appropriate balance between acknowledging that in many cases, a credit report is a reasonably reliable third-party record for verification and documentation for many creditors, but also that a credit report may be subject to a fraud alert, extended alert, active duty alert, or similar alert identified in 15 U.S.C. 1681c–1, or may contain debt obligations listed on a credit report is subject to a statement of dispute pursuant to 15 U.S.C. 1681i(b). Accordingly, for the reasons discussed above, the Bureau is adopting new comment 43(c)(3)–3.

As noted above, the Bureau is adopting proposed comment 43(c)(2)(iv)–4 as comment 43(c)(3)–4 for organizational purposes. The Board proposed comment 43(c)(2)(iv)–4 to explain that although a creditor could use a credit report to verify current obligations, the report would not reflect a simultaneous loan that has not yet been consummated or has just recently been consummated. Proposed comment 43(c)(2)(iv)–2 clarified that if the creditor knows or has reason to know that there will be a simultaneous loan extended at or before consummation, then the creditor may verify the simultaneous loan by obtaining third-party verification from the third-party creditor of the simultaneous loan. The proposed comment provided, as an example, that the creditor may obtain a copy of the promissory note or other written verification from the third-party creditor in accordance with widely accepted governmental or non-governmental standards. In addition, proposed comment 43(c)(2)(iv)–2 cross-referenced comments 43(c)(3)–1 and –2, which discuss verification using third-party records. The Bureau generally did not receive comment with respect to this proposed comment; however, at least one commenter supported the example that a promissory note would serve as appropriate documentation for verifying a simultaneous loan. The Bureau is adopting proposed comment 43(c)(2)(iv)–4 as comment 43(c)(3)–4 with the following amendment. For consistency with other aspects of the rule, comment 43(c)(3)–4 does not include the Board's proposed reference to widely accepted governmental or non-governmental standards.

The Board proposed comment 43(c)(2)(v)–4, which stated that creditors must make the repayment ability determination required under proposed § 226.43(c) based on information verified from reasonably reliable records. The Board solicited comment on any special concerns regarding the requirement to document certain mortgage-related obligations, for example, ground rent or leasehold payments, or special assessments. The Board also solicited comment on whether it should provide that the HUD–1 or –1A or a successor form could serve as verification of mortgage-related obligations reflected by the form, where a legal obligation exists to complete the HUD–1 or –1A accurately. To provide additional clarity, the Bureau is moving guidance that discusses verification, including proposed comment 43(c)(2)(v)–4, as part of the section-by-section analysis of, and commentary to, § 1026.43(c)(3). Additional comments from the Board's proposal with respect to mortgage-related obligations are in the section-by-section analysis of § 1026.43(c)(2)(v), above.

Industry commenters and consumer advocates generally supported including consideration and verification of mortgage-related obligations in the ability-to-repay determination. Several industry commenters asked that the Bureau provide creditors more flexibility in considering and verifying mortgage-related obligations. Several consumer advocate commenters discussed the importance of verifying mortgage-related obligations based on reliable records, noting that inadequate, or non-existent, verification measures played a significant part in the subprime crisis. Industry commenters agreed that verification was appropriate, but these commenters also stressed the importance of clear and detailed guidance. Several commenters were concerned about the meaning of ''reasonably reliable records'' in the context of mortgage-related obligations. Some commenters asked the Bureau to designate certain items as reasonably reliable, such as taxes referenced in a title report, statements of common expenses provided by community associations, or items identified in the HUD–1 or HUD–1A.

The Bureau is adopting proposed comment 43(c)(2)(v)–4 as comment 43(c)(3)–5 with revision to provide further explanation of its approach to verifying mortgage-related obligations. While the reasonably reliable standard contains an element of subjectivity, the Bureau concludes that this flexibility is necessary. The Bureau believes that it is important to craft a regulation with the flexibility to accommodate an evolving mortgage market. The Bureau determines that the reasonably reliable standard is appropriate in this context given the nature of the items that are defined as mortgage-related obligations. Thus, comment 43(c)(3)–5 incorporates by reference comments 43(c)(3)–1 and –2. Mortgage-related obligations refer to a limited set of charges, such as property taxes and lease payments, which a creditor can generally verify from an independent or objective source. Thus, in the context of mortgage-related obligations this standard provides certainty while being sufficiently flexible to adapt as underwriting practices develop over time.

To address the concerns raised by several commenters, the Bureau is providing further clarification in 43(c)(3)–5 to provide detailed guidance and several examples illustrating these requirements. For example, comment 43(c)(3)–5 clarifies that records are reasonably reliable for purposes § 1026.43(c)(2)(v) if the information in the record was provided by a governmental organization, such as a taxing authority or local government. Comment 43(c)(3)–5 also explains that a creditor complies with § 1026.43(c)(2)(v) if it relies on, for example, homeowners association billing statements provided by the seller to verify other information in a record provided by an entity assessing charges, such as a homeowners association. Comment 43(c)(3)–5 further illustrates that records are reasonably reliable if the information in the record was obtained from a valid and legally executed contract, such as a ground rent agreement. Comment 43(c)(3)–5 also clarifies that other records may be reasonably reliable if the creditor can demonstrate that the source provided the information objectively.

The Board's proposal solicited comment regarding whether the HUD–1, or similar successor document, should be considered a reasonably reliable record. The Board noted, and commenters confirmed, that the HUD–1, HUD–1A, or successor form might be a reasonably reliable record because a legal obligation exists to complete the form accurately. Although the Bureau agrees with these considerations, the Bureau does not believe that a document provided in final form at consummation, such as the HUD–1, should be used for the purposes of determining ability to repay pursuant to § 1026.43(c)(2)(v). The Bureau expects the ability-to-repay determination to be conducted in advance of consummation. It therefore may be impractical for a creditor to rely on a document that is produced in final form at, or shortly before, consummation for verification purposes. The Bureau is also concerned that real estate transactions may be needlessly disrupted or delayed if creditors delay determining the consumer's ability to repay until the HUD–1, or similar successor document, is prepared. Given these concerns, and strictly as a matter of policy, the Bureau does not wish to encourage the use of the HUD–1, or similar successor document, for the purposes of determining a consumer's ability to repay, and the Bureau is not specifically designating the HUD–1 as a reasonably reliable record in either § 1026.43(c)(2)(v) or related commentary, such as comment 43(c)(3)–5. However, the Bureau acknowledges that the HUD–1, HUD–1A, or similar successor document may comply with § 1026.43(c)(3).

The Board proposed comment 43(c)(2)(vi)–1, which discussed both consideration and verification of current debt obligations. The Bureau discusses portions of proposed comment 43(c)(2)(vi)–1, regarding consideration of current debt obligations, in the section-by-section analysis of § 1026.43(c)(2)(vi). As noted above, for organizational purposes and to provide additional clarity, however, the Bureau is moving guidance that discusses verification, including portions of proposed comment 43(c)(2)(vi)–1, as part of the commentary to § 1026.43(c)(3). With respect to verification, proposed comment 43(c)(2)(vi)–1 stated that: (1) In determining how to verify current debt obligations, a creditor may look to widely accepted governmental and nongovernmental underwriting standards; and (2) a creditor may, for example, look to credit reports, student loan statements, automobile loan statements, credit card statements, alimony or child support court orders and existing mortgage statements. Commenters did not provide the Bureau with significant comment with respect to this proposal, although at least one large bank commenter specifically urged the Bureau to allow creditors to verify current debt obligations using a credit report. For the reasons discussed below, the Bureau is adopting, in relevant part, proposed comment 43(c)(2)(vi)–1 as comment 43(c)(3)–6. The Bureau believes that the proposed guidance regarding verification using statements and orders related to individual obligations could be misinterpreted as implying that credit reports are not sufficient verification of current debt obligations and that creditors must obtain statements and other documentation pertaining to each individual obligation. Comment 43(c)(3)–6 therefore explains that a creditor is not required to further verify the existence or amount of the obligation listed in a credit report, absent circumstances described in comment 43(c)(3)–3. The Bureau believes that a credit report is a reasonably reliable third-party record and is sufficient verification of current debt obligations in most cases. The Bureau also believes that this approach is reflected in the Board's proposal. For example, proposed comment 43(c)(2)(vi)–2 stated that a credit report is a reasonably reliable third-party record; and proposed § 1026.43(c)(3)(ii) indicated that a creditor could rely on a consumer's credit report to verify a consumer's current debt obligations. Unlike proposed comment 43(c)(2)(vi)–1, comment 43(c)(3)–6 does not include reference to widely accepted governmental and nongovernmental underwriting standards for consistency with the amendments in other parts of the rule. To understand the Bureau's approach to verification standards, see the section-by-section analysis, commentary, and regulation text of § 1026.43(c) and § 1026.43(c)(1) above.

The Board proposed comment 43(c)(2)(viii)–1, which discussed both the consideration and verification of credit history. The Bureau discusses portions of proposed comment 43(c)(2)(viii)–1, those regarding consideration of credit history, in the section-by-section analysis of § 1026.43(c)(2)(viii). However, the Bureau is moving guidance on verification, including portions of proposed comment 43(c)(2)(viii)–1, to § 1026.43(c)(3) and its commentary. Regarding verification, proposed comment 43(c)(2)(viii)–1 stated that: (1) Creditors may look to widely accepted governmental and nongovernmental underwriting standards to determine how to verify credit history; and (2) a creditor may, for example, look to credit reports from credit bureaus, or other nontraditional credit references contained in third-party documents, such as rental payment history or public utility payments to verify credit history. Commenters did not object to the Board's proposed approach to verification of credit history. The Bureau is adopting this approach under comment 43(c)(3)–7 with the following exception. References to widely accepted governmental and nongovernmental underwriting standards have been removed, as discussed above in the section-by-section analysis of § 1026.43(c). Portions of proposed comment 43(c)(2)(viii)–1 regarding verification are otherwise adopted substantially as proposed in new comment 43(c)(3)–7.

The Board proposed comment 43(c)(2)(ii)–2 to clarify that a creditor also may verify the employment status of military personnel using the electronic database maintained by the DoD to facilitate identification of consumers covered by credit protections provided pursuant to 10 U.S.C. 987, also known as the ''Talent Amendment.'' [109] The Board also sought additional comment as to whether creditors needed additional flexibility in verifying the employment status of military personnel, such as by verifying the employment status of a member of the military using a Leave and Earnings Statement.

Industry commenters requested that the Bureau provide additional flexibility for creditors to verify military employment. For example, some industry commenters noted that a Leave and Earnings Statement was concrete evidence of employment status and income for military personnel and other industry commenters stated that institutions that frequently work with military personnel have built their own expertise in determining the reliability of using the Leave and Earnings Statement. These commenters argued that using a Leave and Earnings Statement is as reliable a means of verifying the employment status of military personnel as using a payroll statement to verify that employment status of a civilian.

Accordingly, the Bureau is adopting proposed comment 43(c)(2)(ii)–2 as comment 43(c)(3)–8, for organizational purposes, with the following additional clarification. Comment 43(c)(3)–8 clarifies that a creditor may verify military employment by means of a military Leave and Earnings Statement. Therefore, comment 43(c)(3)–8 provides that a creditor may verify the employment status of military personnel by using either a military Leave and Earnings Statement or by using the electronic database maintained by the DoD.

The Board solicited comment on whether a creditor might appropriately verify a consumer's repayment ability using any documents or records prepared by the consumer and not reviewed by a third party, perhaps because a particular record might provide information not obtainable using third-party records. The Bureau did not receive sufficient indication that such records would qualify as reasonably reliable and has thus not added additional regulatory text or commentary to allow for the use of such records. However, a creditor using reasonable judgment nevertheless may determine that such information is useful in verifying a consumer's ability to repay. For example, the creditor may consider and verify a self-employed consumer's income from the consumer's 2013 income tax return, and the consumer then may offer an unaudited year-to-date profit and loss statement that reflects significantly lower expected income in 2014. The creditor might reasonably use the lower 2014 income figure as a more conservative method of underwriting. However, should the unverified 2014 income reflect significantly greater income than the income tax return showed for 2013, a creditor instead would verify this information in accordance with § 1026.43(c)(4).

43(c)(4) Verification of Income or Assets

TILA section 129C(a)(4) requires that a creditor verify amounts of income or assets that a creditor relied upon to determine repayment ability by reviewing the consumer's Internal Revenue Service (IRS) Form W–2, tax returns, payroll statements, financial

[109] *See* supra note 105.

institution records, or other third-party documents that provide reasonably reliable evidence of the consumer's income or assets. TILA section 129C(a)(4) further provides that, in order to safeguard against fraudulent reporting, any consideration of a consumer's income history must include the verification of income using either (1) IRS transcripts of tax returns; or (2) an alternative method that quickly and effectively verifies income documentation by a third-party, subject to rules prescribed by the Board, and now the Bureau. TILA section 129C(a)(4) is similar to existing § 1026.34(a)(4)(ii)(A), adopted by the Board's 2008 HOEPA Final Rule, although TILA section 129C(a)(4)(B) provides for the alternative methods of third-party income documentation (other than use of an IRS tax-return transcript) to be both ''reasonably reliable'' and to ''quickly and effectively'' verify a consumer's income. The Board proposed to implement TILA section 129C(a)(4)(B), adjusting the requirement to (1) require the creditor to use reasonably reliable third-party records, consistent with TILA section 129C(a)(4), rather than the ''quickly and effectively'' standard of TILA section 129C(a)(4)(B); and (2) provide examples of reasonably reliable records that a creditor can use to efficiently verify income, as well as assets. As discussed in the Board's proposal, the Board proposed these adjustments pursuant to its authority under TILA sections 105(a) and 129B(e). The Board believed that considering reasonably reliable records effectuates the purposes of TILA section 129C(a)(4), is an effective means of verifying a consumer's income, and helps ensure that consumers are offered and receive loans on terms that reasonably reflect their repayment ability.

Industry and consumer group commenters generally supported proposed § 226.43(c)(4) because the proposal would permit a creditor to use a wide variety of documented income and/or asset verification methods, while maintaining the appropriate goal of ensuring accurate verification procedures. Some commenters requested that the Bureau allow a creditor to underwrite a mortgage based on records maintained by a financial institution that show an ability to repay. Specifically, commenters raised concerns with respect to customers who may not have certain documents, such as IRS Form W–2, because of their employment or immigration status. The Bureau expects that § 1026.43(c)(4) provides that the answer to such concerns is self-explanatory; a creditor need not, by virtue of the requirements of § 1026.43(c)(4), require a consumer to produce an IRS Form W–2 in order to verify income. Some industry commenters argued that the Bureau should also permit creditors to verify information for certain applicants, such as the self-employed, by using non-third party reviewed documents, arguing it would reduce costs for consumers. The Bureau does not find such justification to be persuasive, as other widely available documents, such as financial institution records or tax records, could easily serve as means of verification without imposing significant cost to the consumer or creditor. See also the discussion of comment 43(b)(13)(i)–1, addressing third-party records.

Some industry commenters advocated, in addition, that creditors be allowed to employ broader, faster sources of income verification, such as internet-based tools that employ aggregate employer data, or be allowed to rely on statistically qualified models to estimate income or assets. The Bureau, however, believes that permitting creditors to use statistical models or aggregate data to verify income or assets would be contrary to the purposes of TILA section 129C(a)(4). Although the statute uses the words ''quickly and effectively,'' these words cannot be read in isolation, but should instead be read in context of the entirety of TILA section 129C(a)(4). As noted above, the Bureau believes that TILA section 129C(a)(4) is primarily intended to safeguard against fraudulent reporting and inaccurate underwriting, rather than accelerate the process of verifying a consumer's income, as the statute specifically notes that a creditor must verify a consumer's income history ''[i]n order to safeguard against fraudulent reporting.'' The Bureau further believes that permitting the use of aggregate data or non-individualized estimates would undermine the requirements to verify a consumer's income and to determine a consumer's ability to repay. Rather, the Bureau believes that the statute requires verification of the amount of income or assets relied upon using evidence of an individual's income or assets.

For substantially the same reasons stated in the Board's proposal, the Bureau is adopting proposed § 226.43(c)(4) and its accompanying commentary substantially as proposed in renumbered § 1026.43(c)(4), with revisions for clarity. Accordingly, the Bureau is implementing TILA section 129C(a)(4) in § 1026.43(c)(4), which provides that a creditor must verify the amounts of income or assets it relies on to determine a consumer's ability to repay a covered transaction using third-party records that provide reasonably reliable evidence of the consumer's income or assets. Section 1026.43(c)(4) further provides a list of illustrative examples of methods of verifying a consumer's income or asserts using reasonably reliable third-party records. Such examples include: (1) Copies of tax returns the consumer filed with the IRS or a State taxing authority; (2) IRS Form W–2s or similar IRS forms for reporting wages or tax withholding; (3) payroll statements, including military Leave and Earnings Statements; (4) financial institution records; (5) records from the consumer's employer or a third party that obtained consumer-specific income information from the consumer's employer; (6) records from a government agency stating the consumer's income from benefits or entitlements, such as a ''proof of income'' letter issued by the Social Security Administration; (7) check cashing receipts; and (8) receipts from a consumer's use of funds transfer services. The Bureau also believes that by providing such examples of acceptable records, the Bureau enables creditors to quickly and effectively verify a consumer's income, as provided in TILA section 129C(a)(4)(B).

Comment 43(c)(4)–1 clarifies that under § 1026.43(c)(4), a creditor need verify only the income or assets relied upon to determine the consumer's repayment ability. Comment 43(c)(4)–1 also provides an example where the creditor need not verify a consumer's annual bonus because the creditor relies on only the consumer's salary to determine the consumer's repayment ability. This comment also clarifies that comments 43(c)(3)–1 and –2, discussed above, are instructive with respect to income and asset verification.

Comment 43(c)(4)–2 clarifies that, if consumers jointly apply for a loan and each consumer lists his or her income or assets on the application, the creditor need verify only the income or assets the creditor relies on to determine repayment ability. Comment 43(c)(2)(i)–5, discussed above, may also be instructive in cases of multiple applicants.

Comment 43(c)(4)–3 provides that a creditor may verify a consumer's income using an IRS tax-return transcript that summarizes the information in the consumer's filed tax return, another record that provides reasonably reliable evidence of the consumer's income, or both. Comment 43(c)(4)–3 also clarifies that a creditor may obtain a copy of an IRS tax-return transcript or filed tax return from a service provider or from the consumer, and the creditor need not obtain the copy directly from the IRS or other taxing authority. For additional guidance, Comment 43(c)(4)–3 cross-references guidance on obtaining records in comment 43(c)(3)–2.

Finally, comment 43(c)(4)(vi)–1 states that an example of a record from a Federal, State, or local government agency stating the consumer's income from benefits or entitlements is a ''proof of income letter'' (also known as a ''budget letter,'' ''benefits letter,'' or ''proof of award letter'') from the Social Security Administration.

As discussed above, the Bureau is adopting § 1026.43(c)(4) as enabling creditors to quickly and effectively verify a consumer's income, as provided in TILA section 129C(a)(4)(B). In addition, for substantially the same rationale as discussed in the Board's proposal, the Bureau is adopting § 1026.43(c)(4) using its authority under TILA section 105(a) to prescribe regulations to carry out the purposes of TILA. One of the purposes of TILA section 129C is to assure that consumers are offered and receive covered transactions on terms that reasonably reflect their ability to repay the loan. *See* TILA section 129B(a)(2). The Bureau believes that a creditor consulting reasonably reliable records is an effective means of verifying a consumer's income and helps ensure that consumers are offered and receive loans on terms that reasonably reflect their repayment ability. The Bureau further believes that TILA section 129C(a)(4) is intended to safeguard against fraudulent or inaccurate reporting, rather than to accelerate the creditor's ability to verify a consumer's income. Indeed, the Bureau believes that there is a risk that requiring a creditor to use quick methods to verify the consumer's income would undermine the effectiveness of the ability-to-repay requirements by sacrificing thoroughness for speed. The Bureau believes instead that requiring the use of reasonably reliable records effectuates the purposes of TILA section 129C(a)(4) without suggesting that creditors must obtain records or complete income verification within a specific period of time. The Bureau is adopting the examples of reasonably reliable records, proposed by the Board, that a creditor may use to efficiently verify income or assets, because the Bureau believes that it will facilitate compliance by providing clear guidance to creditors.

The Bureau notes that the Board proposal solicited comment on whether it should provide an affirmative defense for a creditor that can show that the amounts of the consumer's income or assets that the creditor relied upon in determining the consumer's repayment ability were not materially greater than the amounts the creditor could have verified using third-party records at or before consummation. Such an affirmative defense, while not specified under TILA, would be consistent with the Board's 2008 HOEPA Final Rule. *See* § 1026.34(a)(4)(ii)(B).[110] Consumer group commenters generally opposed an affirmative defense, arguing that such an allowance would essentially gut the income and asset verification requirement provided by the rule. Other commenters noted that providing an affirmative defense might result in confusion, and possible litigation, over what the term ''material'' may mean, and that a rule permitting an affirmative defense would need to define materiality specifically, including from whose perspective materiality should be measured (*i.e.,* the creditor's or the consumer's). Based on the comments received, the Bureau believes that an affirmative defense is not warranted. The Bureau believes that permitting an affirmative defense could result in circumvention of the § 1026.43(c)(4) verification requirement. For the reasons stated, the Bureau is not adopting an affirmative defense for a creditor that can show that the amounts of the consumer's income or assets that the creditor relied upon in determining the consumer's repayment ability were not materially greater than the amounts the creditor could have verified using third-party records at or before consummation.

43(c)(5) Payment Calculation

The Board proposed § 226.43(c)(5) to implement the payment calculation requirements of TILA section 129C(a), as enacted by section 1411 of the Dodd-Frank Act. TILA section 129C(a) contains the general requirement that a creditor determine the consumer's ''ability to repay the loan, according to its terms, and all applicable taxes, insurance (including mortgage guarantee insurance), and assessments,'' based on several considerations, including ''a payment schedule that fully amortizes the loan over the term of the loan.'' TILA section 129C(a)(1) and (3). The statutory requirement to consider mortgage-related obligations, as defined in § 1026.43(b)(8), is discussed above in the section-by-section analysis of § 1026.43(c)(2)(v).

[110] The Bureau's 2012 HOEPA Proposal proposed to amend this subsection, though not in a manner that affected the overall effect of an affirmative defense. *See* 77 FR 49090, 49153 (Aug. 15, 2012).

TILA section 129C(a) requires, among other things, that a creditor make a determination that a consumer ''has a reasonable ability to repay'' a residential mortgage loan. TILA section 129C(a)(6)(D) provides the process for calculating the monthly payment amount ''[f]or purposes of making any determination under this subsection,'' *i.e.,* subsection (a), for ''any residential mortgage loan.'' TILA section 129C(a)(6)(A) through (D) requires creditors to make uniform assumptions when calculating the payment obligation for purposes of determining the consumer's repayment ability for the covered transaction. Specifically, TILA section 129C(a)(6)(D)(i) through (iii) provides that, when calculating the payment obligation that will be used to determine whether the consumer can repay the covered transaction, the creditor must use a fully amortizing payment schedule and assume that: (1) The loan proceeds are fully disbursed on the date the loan is consummated; (2) the loan is repaid in substantially equal, monthly amortizing payments for principal and interest over the entire term of the loan with no balloon payment; and (3) the interest rate over the entire term of the loan is a fixed rate equal to the fully indexed rate at the time of the loan closing, without considering the introductory rate. The term ''fully indexed rate'' is defined in TILA section 129C(a)(7).

TILA section 129C(a)(6)(D)(ii)(I) and (II), however, provides two exceptions to the second assumption regarding ''substantially equal, monthly payments over the entire term of the loan with no balloon payment'' for loans that require ''more rapid repayment (including balloon payment).'' First, this statutory provision authorizes the Bureau to prescribe regulations for calculating the payment obligation for loans that require more rapid repayment (including balloon payment), and which have an annual percentage rate that does not exceed the threshold for higher-priced mortgage loans. TILA section 129C(a)(6)(D)(ii)(I). Second, for loans that ''require more rapid repayment (including balloon payment),'' and which exceed the higher-priced mortgage loan threshold, the statute requires that the creditor use the loan contract's repayment schedule. TILA section 129C(a)(6)(D)(ii)(II). The statute does not define the term ''rapid repayment.''

The statute also provides three additional clarifications to the assumptions stated above for loans that contain certain features. First, for variable-rate loans that defer repayment of any principal or interest, TILA section 129C(a)(6)(A) states that for purposes of the repayment ability determination a creditor must use ''a fully amortizing repayment schedule.'' This provision generally reiterates the requirement provided under TILA section 129C(a)(3) to use a payment schedule that fully amortizes the loan. Second, for covered transactions that permit or require interest-only payments, the statute requires that the creditor determine the consumers' repayment ability using ''the payment amount required to amortize the loan by its final maturity.'' TILA section 129C(a)(6)(B). Third, for covered transactions with negative amortization, the statute requires the creditor to also take into account ''any balance increase that may accrue from any negative amortization provision'' when making the repayment ability determination. TILA section 129C(a)(6)(C). The statute does not define the terms ''variable-rate,'' ''fully amortizing,'' ''interest-only,'' or ''negative amortization.'' Proposed § 226.43(c)(5)(i) and (ii) implemented these statutory provisions, as discussed in further detail below.

TILA section 129C(a), as enacted by section 1411 of the Dodd-Frank Act, largely codifies many aspects of the repayment ability rule under § 1026.34(a)(4) from the Board's 2008 HOEPA Final Rule and extends such requirements to the entire mortgage market regardless of the loan's interest rate. Similarly to § 1026.34(a)(4), the statutory framework of TILA section 129C(a) focuses on prescribing the requirements that govern the underwriting process and extension of credit to consumers, rather than dictating which credit terms may or may not be permissible. However, there are differences between TILA section 129C(a) and the 2008 HOEPA Final Rule with respect to payment calculation requirements.

Current § 1026.34(a)(4) does not address how a creditor must calculate the payment obligation for a loan that cannot meet the presumption of compliance under § 1026.34(a)(4)(iii)(B). For example, § 1026.34(a)(4) does not specify how to calculate the periodic payment required for a negative amortization loan or balloon-payment mortgage with a term of less than seven years. In contrast, the Dodd-Frank Act lays out a specific framework for underwriting any loan subject to TILA section 129C(a). In taking this approach, the statutory requirements in TILA section 129C(a)(6)(D) addressing payment calculation requirements differ from § 1026.34(a)(4)(iii) in the following manner: (1) The statute generally premises repayment ability on monthly payment obligations calculated using the fully indexed rate, with no limit on the term of the loan that should be considered for such purpose; (2) the statute permits underwriting loans with balloon payments to differ depending on whether the loan's annual percentage rate exceeds the applicable loan pricing benchmark, or meets or falls below the applicable loan pricing benchmark; and (3) the statute expressly addresses underwriting requirements for loans with interest-only payments or negative amortization.

In 2006 and 2007 the Board and other Federal banking agencies addressed concerns regarding the increased risk to creditors and consumers presented by loans that permit consumers to defer repayment of principal and sometimes interest, and by adjustable-rate mortgages in the subprime market. The Interagency Supervisory Guidance stated that creditors should determine a consumer's repayment ability using a payment amount based on the fully indexed rate, assuming a fully amortizing schedule. In addition, the 2006 Nontraditional Mortgage Guidance addressed specific considerations for negative amortization and interest-only loans. State supervisors issued parallel statements to this guidance, which most states have adopted. TILA section 129C(a)(3) and (6) is generally consistent with this longstanding Interagency Supervisory Guidance and largely extends the guidance regarding payment calculation assumptions to all loan types covered under TILA section 129C(a), regardless of a loan's interest rate. The Board proposed § 226.43(c)(5) to implement the payment calculation requirements of TILA section 129C(a)(1), (3) and (6) for purposes of the repayment ability determination required under proposed § 226.43(c). Consistent with these statutory provisions, proposed § 226.43(c)(5) did not prohibit the creditor from offering certain credit terms or loan features, but rather focused on the calculation process the creditor would be required to use to determine whether the consumer could repay the loan according to its terms. Under the proposal, creditors generally would have been required to determine a consumer's ability to repay a covered transaction using the fully indexed rate or the introductory rate, whichever is greater, to calculate monthly, fully amortizing payments that are substantially equal, unless a special rule applies. *See* proposed § 226.43(c)(5)(i). For clarity and simplicity, proposed § 226.43(c)(5)(i) used the terms ''fully amortizing payment'' and ''fully indexed rate,'' which were defined separately under proposed § 226.43(b)(2) and (3), respectively, as discussed above. Proposed comment 43(c)(5)(i)–1 clarified that the general rule would apply whether the covered transaction is an adjustable-, step-, or fixed-rate mortgage, as those terms are defined in § 1026.18(s)(7)(i), (ii), and (iii), respectively.

Proposed § 226.43(c)(5)(ii)(A) through (C) created exceptions to the general rule and provided special rules for calculating the payment obligation for balloon-payment mortgages, interest-only loans or negative amortization loans, as follows:

Balloon-payment mortgages. Consistent with TILA section 129C(a)(6)(D)(ii)(I) and (II), for covered transactions with a balloon payment, proposed § 226.43(c)(5)(ii)(A) provided special rules that differed depending on the loan's rate. Proposed § 226.43(c)(5)(ii)(A)(*1*) stated that for covered transactions with a balloon payment that are not higher-priced covered transactions, the creditor must determine a consumer's ability to repay the loan using the maximum payment scheduled in the first five years after consummation. Proposed § 226.43(c)(5)(ii)(A)(*2*) further stated that for covered transactions with balloon payments that are higher priced covered transactions, the creditor must determine the consumer's ability to repay according to the loan's payment schedule, including any balloon payment. For clarity, proposed § 226.43(c)(5)(ii)(A) used the term ''higher-priced covered transaction'' to refer to a covered transaction that exceeds the applicable higher-priced mortgage loan coverage threshold. ''Higher-priced covered transaction'' is defined in § 1026.43(b)(4), discussed above. The term ''balloon payment'' has the same meaning as in current § 1026.18(s)(5)(i).

Interest-only loans. Consistent with TILA section 129C(a)(6)(B) and (D), proposed § 226.43(c)(5)(ii)(B) provided special rules for interest-only loans. Proposed § 226.43(c)(5)(ii)(B) required that the creditor determine the consumer's ability to repay the interest-only loan using (1) the fully indexed rate or the introductory rate, whichever is greater; and (2) substantially equal, monthly payments of principal and interest that will repay the loan amount over the term of the loan remaining as of the date the loan is recast. For clarity, proposed § 226.43(c)(5)(ii)(B) used the terms ''loan amount'' and ''recast,'' which are defined and discussed under § 1026.43(b)(5) and (11), respectively. The term ''interest-only loan'' has the same meaning as in current § 1026.18(s)(7)(iv).

Negative amortization loans. Consistent with TILA section 129C(a)(6)(C) and (D), proposed § 226.43(c)(5)(ii)(C) provided special rules for negative amortization loans. Proposed § 226.43(c)(5)(ii)(C) required that the creditor determine the consumer's ability to repay the negative amortization loan using (1) the fully indexed rate or the introductory rate, whichever is greater; and (2) substantially equal, monthly payments of principal and interest that will repay the maximum loan amount over the term of the loan remaining as of the date the loan is recast. Proposed comment 43(c)(5)(ii)(C)–1 clarified that for purposes of the rule, the creditor would first have to determine the maximum loan amount and the period of time that remains in the loan term after the loan is recast. For clarity, proposed § 226.43(c)(5)(ii)(C) used the terms ''maximum loan amount'' and ''recast,'' which are defined and discussed under § 1026.43(b)(7) and (11), respectively. The term ''negative amortization loan'' has the same meaning as in current § 1026.18(s)(7)(v) and comment 18(s)(7)–1.

43(c)(5)(i) General Rule

Proposed § 226.43(c)(5)(i) implemented the payment calculation requirements in TILA section 129C(a)(3), 129C(6)(D)(i) through (iii), and stated the general rule for calculating the payment obligation on a covered transaction for purposes of the ability-to-repay provisions. Consistent with the statute, proposed § 226.43(c)(5)(i) provided that unless an exception applies under proposed § 226.43(c)(5)(ii), a creditor must make the repayment ability determination required under proposed § 226.43(c)(2)(iii) by using the greater of the fully indexed rate or any introductory interest rate, and monthly, fully amortizing payments that are substantially equal. That is, under the proposed general rule the creditor would calculate the consumer's monthly payment amount based on the loan amount, and amortize that loan amount in substantially equal payments over the loan term, using the fully indexed rate.

Proposed comment 43(c)(5)(i)–1 explained that the payment calculation method set forth in proposed § 226.43(c)(5)(i) applied to any covered transaction that does not have a balloon payment or that is not an interest-only loan or negative amortization loan, whether it is a fixed-rate, adjustable-rate or step-rate mortgage. This comment further explained that the payment calculation method set forth in proposed § 226.43(c)(5)(ii) applied to any covered transaction that is a loan with a balloon payment, interest-only loan, or negative amortization loan. To facilitate compliance, this comment listed the defined terms used in proposed § 226.43(c)(5) and provided cross-references to their definitions.

The fully indexed rate or introductory rate, whichever is greater. Proposed § 226.43(c)(5)(i)(A) implemented the requirement in TILA section 129C(a)(6)(D)(iii) to use the fully indexed rate when calculating the monthly, fully amortizing payment for purposes of the repayment ability determination. Proposed § 226.43(c)(5)(i)(A) also provided that when creditors calculate the monthly, fully amortizing payment for adjustable-rate mortgages, they would have to use the introductory interest rate if it were greater than the fully indexed rate (*i.e.,* a premium rate). In some adjustable-rate transactions, creditors may set an initial interest rate that is not determined by the index or formula used to make later interest rate adjustments. Sometimes this initial rate charged to consumers is lower than the rate would be if it were determined by using the index plus margin, or formula (*i.e.,* the fully indexed rate). However, an initial rate that is a premium rate is higher than the rate based on the index or formula. Thus, requiring creditors to use only the fully indexed rate would result in creditors underwriting loans that have a ''premium'' introductory rate at a rate lower than the rate on which the consumer's initial payments would be based. The Board believed that requiring creditors to assess the consumer's ability to repay on the initial higher payments would better effectuate the statutory intent and purpose. Proposed comment 43(c)(5)(i)–2 provided guidance on using the greater of the premium or fully indexed rate.

Monthly, fully amortizing payments. For simplicity, proposed § 226.43(c)(5)(i) used the term ''fully amortizing payment'' to refer to the statutory requirements that a creditor use a payment schedule that repays the loan assuming that (1) the loan proceeds are fully disbursed on the date of consummation of the loan; and (2) the loan is repaid in amortizing payments for principal and interest over the entire term of the loan. *See* TILA sections 129C(a)(3) and (6)(D)(i) and (ii). As discussed above, § 1026.43(b)(2) defines ''fully amortizing payment'' to mean a periodic payment of principal and interest that will fully repay the loan amount over the loan term. The terms ''loan amount'' and ''loan term'' are defined in § 1026.43(b)(5) and (b)(6), respectively, and discussed above.

The statute also expressly requires that a creditor use ''*monthly* amortizing payments'' for purposes of the repayment ability determination. TILA section 129C(6)(D)(ii). The Board recognized that some loan agreements require consumers to make periodic payments with less frequency, for example quarterly or semi-annually. Proposed § 226.43(c)(5)(i)(B) did not dictate the frequency of payment under the terms of the loan agreement, but did require creditors to convert the payment schedule to monthly payments to determine the consumer's repayment ability. Proposed comment 43(c)(5)(i)–3 clarified that the general payment calculation rules do not prescribe the terms or loan features that a creditor may choose to offer or extend to a consumer, but establish the calculation method a creditor must use to determine the consumer's repayment ability for a covered transaction. This comment explained, by way of example, that the terms of the loan agreement may require that the consumer repay the loan in quarterly or bi-weekly scheduled payments, but for purposes of the repayment ability determination, the creditor must convert these scheduled payments to monthly payments in accordance with proposed § 226.43(c)(5)(i)(B). This comment also explained that the loan agreement may not require the consumer to make fully amortizing payments, but for purposes of the repayment ability determination the creditor must convert any non-amortizing payments to fully amortizing payments.

Substantially equal. Proposed comment 43(c)(5)(i)–4 provided additional guidance to creditors for determining whether monthly, fully amortizing payments are ''substantially equal.'' *See* TILA section 129C(a)(6)(D)(ii). This comment stated that creditors should disregard minor variations due to payment-schedule irregularities and odd periods, such as a long or short first or last payment period. The comment explained that monthly payments of principal and interest that repay the loan amount over the loan term need not be equal, but that the monthly payments should be substantially the same without significant variation in the monthly combined payments of both principal and interest. Proposed comment 43(c)(5)(i)–4 further explained that where, for example, no two monthly payments vary from each other by more than 1 percent (excluding odd periods, such as a long or short first or last payment period), such monthly payments would be considered substantially equal for purposes of the rule. The comment further provided that, in general, creditors should determine whether the monthly, fully amortizing payments are substantially equal based on guidance provided in current § 1026.17(c)(3) (discussing minor variations), and § 1026.17(c)(4)(i) through (iii) (discussing payment-schedule irregularities and measuring odd periods due to a long or short first period) and associated commentary. The proposal solicited comment on operational difficulties that arise by ensuring payment amounts meet the ''substantially equal'' condition. The proposal also solicited comment on whether a 1 percent variance is an appropriate tolerance threshold.

Examples of payment calculations. Proposed comment § 226.43(c)(5)(i)–5 provided illustrative examples of how to determine the consumer's repayment ability based on substantially equal, monthly, fully amortizing payments as required under proposed § 226.43(c)(5)(i) for a fixed-rate, adjustable-rate and step-rate mortgage.

The Board recognized that, although consistent with the statute, the proposed framework would require creditors to underwrite certain loans, such as hybrid ARMs with a discounted rate period of five or more years (*e.g.,* 5/1, 7/1, and 10/1 ARMs) to a more stringent standard as compared to the underwriting standard set forth in proposed § 226.43(e)(2)(v) for qualified mortgages.[111] The Board believed this approach was consistent with the statute's intent to ensure consumers can reasonably repay their loans, and that in both cases consumers' interests are properly protected. *See* TILA section 129B(a)(2), 15 U.S.C. 1639b(a)(2). To meet the definition of a qualified mortgage, a loan cannot have certain risky terms or features, such as provisions that permit deferral of principal or a term that exceeds 30 years; no similar restrictions apply to loans subject to the ability-to-repay standard. *See* proposed § 226.43(e)(2)(i) and (ii). As a result, the risk of potential payment shock is diminished significantly for qualified mortgages. For this reason, the Board believed that maintaining the potentially more lenient statutory underwriting standard for loans that satisfy the qualified mortgage criteria would help to ensure that responsible and affordable credit remains available to consumers. *See* TILA section 129B(a)(2), 15 U.S.C. 1639b(a)(2).

[111] The Bureau has also determined that in many instances the fully indexed rate would result in a more lenient underwriting standard than the qualified mortgage calculation. See the discussion of non-qualified mortgage ARM underwriting below.

Loan amount or outstanding principal balance. As noted above, proposed § 226.43(c)(5)(i) was consistent with the statutory requirements regarding payment calculations for purposes of the repayment ability determination. The Board believed that the intent of these statutory requirements was to prevent creditors from assessing the consumer's repayment ability based on understated payment obligations, especially when risky features can be present on the loan. However, the Board was concerned that the statute, as implemented in proposed § 226.43(c)(5)(i), would require creditors to determine, in some cases, a consumer's repayment ability using overstated payment amounts because the creditor would have to assume that the consumer repays the loan amount in substantially equal payments based on the fully indexed rate, regardless of when the fully indexed rate could take effect under the terms of the loan. The Board was concerned that this approach might restrict credit availability, even where consumers were able to demonstrate that they can repay the payment obligation once the fully indexed rate takes effect.

For this reason, the proposal solicited comment on whether authority should be exercised under TILA sections 105(a) and 129B(e) to provide that the creditor may calculate the monthly payment using the fully indexed rate based on the outstanding principal balance as of the date the fully indexed rate takes effect under the loan's terms, instead of the loan amount at consummation.

Step-rate and adjustable-rate calculations. Due to concerns regarding credit availability, the proposal also solicited comment on alternative means to calculate monthly payments for step-rate and adjustable-rate mortgages. The proposal asked for comment on whether or not the rule should require that creditors underwrite a step-rate or an adjustable-rate mortgage using the maximum interest rate in the first seven or ten years or some other appropriate time horizon that would reflect a significant introductory rate period. The section-by-section analysis of the ''fully indexed rate'' definition, at § 1026.43(b)(3) above, discusses this issue in regard to step-rate mortgages. For discussion of payment calculation methods for adjustable-rate mortgages, see below.

Safe harbor to facilitate compliance. The Board recognized that under its proposal, creditors would have to comply with multiple assumptions when calculating the particular payment for purposes of the repayment ability determination. The Board was concerned that the complexity of the proposed payment calculation requirements might increase the potential for unintentional errors to occur, making compliance difficult, especially for small creditors that might be unable to invest in advanced technology or software needed to ensure payment calculations are compliant. At the same time, the Board noted that the intent of the statutory framework and the proposal was to ensure consumers are offered and receive loans on terms that they can reasonably repay. Thus, the Board solicited comment on whether authority under TILA sections 105(a) and 129B(e) should be exercised to provide a safe harbor for creditors that use the largest scheduled payment that can occur during the loan term to determine the consumer's ability to repay, to facilitate compliance with the requirements under proposed § 226.43(c)(5)(i) and (ii).

Final Rule

The final rule requires creditors to underwrite the loan at the premium rate if greater than the fully indexed rate for purposes of the repayment ability determination using the authority under TILA section 105(a). 15 U.S.C. 1604(a). TILA section 105(a), as amended by section 1100A of the Dodd-Frank Act, provides that the Bureau's regulations may contain such additional requirements, classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for all or any class of transactions as in the Bureau's judgment are necessary or proper to effectuate the purposes of TILA, prevent circumvention or evasion thereof, or facilitate compliance therewith. 15 U.S.C. 1604(a). This approach is further supported by the authority under TILA section 129B(e) to condition terms, acts or practices relating to residential mortgage loans that the Bureau finds necessary and proper to ensure that responsible, affordable mortgage credit remains available to consumers in a manner consistent with and which effectuates the purposes of sections 129B and 129C, and which are in the interest of the consumer. 15 U.S.C. 1639b(e). The purposes of TILA include the purpose of TILA sections 129B and 129C, to assure that consumers are offered and receive residential mortgage loans on terms that reasonably reflect their ability to repay the loan, among other things. TILA section 129B(b), 15 U.S.C. 1639b. For the reasons discussed above, the Bureau believes that requiring creditors to underwrite the loan to the premium rate for purposes of the repayment ability determination is necessary and proper to ensure that consumers are offered, and receive, loans on terms that reasonably reflect their ability to repay, and to prevent circumvention or evasion. Without a requirement to consider payments based on a premium rate, a creditor could originate loans with introductory-period payments that consumers do not have the ability to repay. Therefore, this provision is also in the interest of consumers.

As discussed above, the Board solicited comment on whether payments for non-qualified mortgage ARMs should be calculated similarly to qualified mortgage ARMs, by using the maximum rate that will apply during a certain period, such as the first seven years or some other appropriate time horizon. Consumer and community groups were divided on this issue. Some supported use of the fully indexed rate, but one stated that underwriting ARMs based on the initial period of at least five years may be appropriate. Another suggested that for non-qualified mortgage ARMs the rule should require use of the maximum interest rate or interest rate cap, whichever is greater, to better protect against payment shock. A civil rights organization also advocated that ARMs that are not qualified mortgages should be underwritten to several points above the fully indexed rate. A combined comment from consumer advocacy organizations also supported non-qualified mortgage ARMs being underwritten more strictly, suggesting that because this is the market segment that will have the fewest controls, the predatory practices will migrate here, and there is significant danger of payment shock when using the fully indexed rate in a low-rate environment such as today's market. They suggested that the rule follow Fannie Mae's method, which requires underwriting that uses the fully indexed rate or the note rate plus 2 percent, whichever is greater, for ARMs with initial fixed periods of up to five years. In addition, one joint industry and consumer advocacy comment suggested adding 2 percent to the fully indexed rate in order to calculate the monthly payment amount.

Industry groups were strongly in favor of using a specific time period for underwriting, generally suggesting five years. One credit union association stated that use of the fully indexed rate is excessive and unnecessary, and will increase the cost of credit. Industry commenters stated that creditors generally consider only the fixed-rate period, and ARMs with fixed periods of at least five years are considered safe. One large bank stated that the calculation for ARMs, whether or not they are qualified mortgages, should be uniform to ease compliance.

The Bureau has determined that it will not use its exception and adjustment authority to change the statutory underwriting scheme for non-qualified mortgage ARMs. The statutory scheme clearly differentiates between the qualified mortgage and non-qualified mortgage underwriting strategies. The qualified mortgage underwriting rules ignore any adjustment in interest rate that may occur after the first five years; thus, for example, for an ARM with an initial adjustment period of seven years, the interest rate used for the qualified mortgage calculation will be the initial interest rate. In addition, the qualified mortgage rules, by using the ''maximum interest rate,'' take into account any adjustment in interest rate that can occur during the first five years, including adjustments attributable to changes in the index rate. In contrast, the non-qualified mortgage rules have an unlimited time horizon but do not take into account adjustments attributable to changes in the index rate.

Based on the its research and analysis, the Bureau notes that the data indicate that neither the fully indexed rate nor the maximum rate during a defined underwriting period produces consistent results with regard to ability-to-repay calculations. The Bureau finds that the underwriting outcomes under the two methods vary depending on a number of complex variables, such as the terms of the loan (*e.g.,* the length of the initial adjustment period and interest rate caps) and the interest rate environment. In other words, for a particular loan, whether the monthly payment may be higher under a calculation that uses the fully indexed rate, as opposed to the maximum rate in the first five years, depends on a number of factors. Given the fact-specific nature of the payment calculation outcomes, the Bureau believes that overriding the statutory scheme would be inappropriate.

The Bureau also believes that adjusting the interest rate to be used for non-qualified mortgage ability-to-repay calculations to somewhere between the fully indexed rate specified in the statute and the maximum interest rate mandated for qualified mortgage underwriting; for example through an adjustment to the fully indexed rate of an additional 2 percent, would be inappropriate. The fully indexed rate had been in use since it was adopted by the Interagency Supervisory Guidance in 2006, and Congress was likely relying on that experience in crafting the statutory scheme. Adding to the fully indexed rate would potentially reduce the availability of credit. Such an adjustment also could result in a calculated interest rate and monthly payment that are higher than the interest rate and payment calculated for qualified mortgage underwriting, given that the qualified mortgage rules look only to potential adjustments during the first five years.

The Bureau recognizes that underwriting practices today often take into account potential adjustments in an ARM that can result from increases in the index rate. For example, Fannie Mae requires underwriting that uses the fully indexed rate or the note rate plus 2 percent, whichever is greater, for ARMs with initial fixed periods of up to five years. The Bureau notes that underwriters have the flexibility to adjust their practices in response to changing interest rate environments whereas the process an administrative agency like the Bureau must follow to amend a rule is more time consuming. The Bureau also notes that the creditor must make a reasonable determination that the consumer has the ability to repay the loan according to its terms. Therefore, in situations where there is a significant likelihood that the consumer will face an adjustment that will take the interest rate above the fully indexed rate, a creditor whose debt-to-income or residual income calculation indicates that a consumer cannot afford to absorb any such increase may not have a reasonable belief in the consumer's ability to repay the loan according to its terms. *See* comment 43(c)(1)–1.

Although the Bureau has determined to implement the statutory scheme as written and require use of the fully indexed rate for non-qualified mortgage ARMs, it will monitor this issue through its mandatory five-year review, and may make adjustments as necessary.

As discussed above, the Board also solicited comment on whether or not to allow the fully indexed rate to be applied to the balance projected to be remaining when the fully indexed rate goes into effect, instead of the full loan amount, and thus give a potentially more accurate figure for the maximum payment that would be required for purposes of determining ability to repay. A consumer group and a group advocating for financial reform supported this possibility, saying that allowing lenders to apply the fully indexed rate to the balance remaining when the rate changes, rather than the full loan amount, will encourage longer fixed-rate periods and safer lending, as well as preserve access to credit. An association representing credit unions also agreed with the possible amendment, stating that the new method would yield a more accurate measure of the maximum payment that could be owed.

The Bureau believes it is appropriate for the final rule to remain consistent with the statutory scheme. The Bureau believes that changing the calculation method, required by the statute,[112] would not be an appropriate use of its exception and adjustment authority. The Bureau believes the potentially stricter underwriting method of calculating the monthly payment by applying the imputed (*i.e.,* fully indexed) interest rate to the full loan amount for non-qualified mortgage ARMs, provides greater assurance of the ability to repay. In addition, payment calculation using the fully indexed rate can only approximate the consumer's payments after recast, since the index may have increased significantly by then. Accordingly, the Bureau believes that requiring the use of the full loan amount will reduce the potential inaccuracy of the ability-to-repay determination in such a situation.

In addition, the Board solicited comment on whether to provide a safe harbor for any creditor that underwrites using the ''largest scheduled payment that can occur during the loan term.'' To provide such a safe harbor the Bureau would have to employ its exception and adjustment authority because the use of the fully indexed rate calculation is required by TILA section 129C(a)(6)(D)(iii). Two industry commenters and an association of state bank regulators supported this exemption, but none of them provided a developed rationale for their support or included information useful in assessing the possible exemption. The Bureau does not believe that it would be appropriate at this time to alter the statutory scheme in this manner.

As discussed above, the Board also solicited comment on how to lessen any operational difficulties of ensuring that payment amounts meet the ''substantially equal'' condition, and whether or not allowing a one percent variance between payments provided an appropriate threshold. Only two commenters mentioned this issue. One industry commenter stated that the 1 percent threshold was appropriate, but an association of state bank regulators believed that a 5 percent threshold would work better. Because the 1 percent threshold appears to be sufficient to allow for payment variance and industry commenters did not express a need for a higher threshold, the Bureau does not believe that the provision should be amended.

For the reasons stated above, the Bureau is adopting § 1026.43(c)(5)(i) and associated commentary substantially as proposed, with minor clarifying revisions.

43(c)(5)(ii) Special Rules for Loans With a Balloon Payment, Interest-Only Loans, and Negative Amortization Loans

Proposed § 226.43(c)(5)(ii) created exceptions to the general rule under proposed § 226.43(c)(5)(i), and provided special rules in proposed § 226.43(c)(5)(ii)(A) through (C) for loans with a balloon payment, interest-only loans, and negative amortization loans, respectively, for purposes of the repayment ability determination required under proposed § 226.43(c)(2)(iii). In addition to TILA section 129C(a)(6)(D)(i) through (iii), proposed § 226.43(c)(5)(ii)(A) through (C) implemented TILA sections 129C(a)(6)(B) and (C), and TILA section 129C(a)(6)(D)(ii)(I) and (II). Each of these proposed special rules is discussed below.

43(c)(5)(ii)(A)

Implementing the different payment calculation methods in TILA section 129C(a)(6)(D)(ii), the Board proposed different rules for balloon-payment mortgages that are higher-priced covered transactions and those that are not, in § 1026.43(c)(5)(ii)(A)(*1*) and (*2*). Proposed comment 43(c)(5)(ii)(A)–1 provided guidance on applying these two methods. This guidance is adopted as proposed with minor changes for clarity and to update a citation. The language describing the calculation method for balloon-payment mortgages that are not higher-priced covered transactions has been changed to reflect the use of the first regular payment due date as the start of the relevant five-year period. Pursuant to the Bureau's rulewriting authority under TILA section 129C(a)(6)(D)(ii)(I), this change has been made to facilitate compliance through consistency with the amended underwriting method for qualified mortgages. See the section-by-section analysis of § 1026.43(e)(2)(iv)(A). As with the recast on five-year adjustable-rate qualified mortgages, the Bureau believes that consumers will benefit from having a balloon payment moved to at least five years after the first regular payment due date, rather than five years after consummation.

43(c)(5)(ii)(A)(1)

The statute provides an exception from the general payment calculation discussed above for loans that require ''more rapid repayment (including balloon payment).'' *See* TILA section 129C(a)(6)(D)(ii)(I) and (II). For balloon-payment loans that are not higher-priced covered transactions (as determined by using the margins above APOR in TILA section 129C(a)(6)(D)(ii)(I) and implemented at § 1026.43(b)(4)), the statute provides that the payment calculation will be determined by regulation. The Board proposed that a creditor be required to make the repayment determination under proposed § 226.43(c)(2)(iii) for ''[t]he maximum payment scheduled during the first five years after consummation * * *''

The Board chose a five-year period in order to preserve access to affordable short-term credit, and because five years was considered an adequate period for a consumer's finances to improve sufficiently to afford a fully amortizing loan. The Board believed that balloon-payment loans of less than five years presented more risk of inability to repay. The Board also believed that the five-year period would facilitate compliance and create a level playing field because of its uniformity with the general qualified mortgage provision (see § 1026.43(e)), and balloon-payment qualified mortgage provision (see § 1026.43(f)). The Board solicited comment on whether the five-year horizon was appropriate. Proposed comment § 226.43(c)(5)(ii)(A)–2 provided further guidance to creditors on determining whether a balloon payment occurs in the first five years after consummation. Proposed comment 43(c)(5)(ii)(A)–3 addressed renewable balloon-payment loans. This comment discussed balloon-payment loans that are not higher-priced covered transactions which provide an unconditional obligation to renew a balloon-payment loan at the consumer's option or obligation to renew subject to conditions within the consumer's control. This comment clarified that for purposes of the repayment ability determination, the loan term does not include the period of time that could result from a renewal provision.

The Board recognized that proposed comment 43(c)(5)(ii)(A)–3 did not take the same approach as guidance contained in comment 17(c)(1)–11 regarding treatment of renewable balloon-payment loans for disclosure purposes, or with guidance contained in

[112] ''A creditor shall determine the ability of the consumer to repay using a payment schedule that fully amortizes the loan over the loan term.'' TILA § 129C(a)(3).

current comment 34(a)(4)(iv)–2 of the Board's 2008 HOEPA Final Rule. Although the proposal differed from current guidance in Regulation Z, the Board believed this approach was appropriate for several reasons. First, the ability-to-repay provisions in the Dodd-Frank Act do not address extending the term of a balloon-payment loan with an unconditional obligation to renew provision. Second, permitting short-term ''prime'' balloon-payment loans to benefit from the special payment calculation rule when a creditor includes an unconditional obligation to renew, but retains the right to increase the interest rate at the time of renewal, would create a significant loophole in the balloon payment rules. Such an approach could frustrate the objective to ensure consumers obtain mortgages on affordable terms for a reasonable period of time because the interest rate could escalate within a short period of time, increasing the potential risk of payment shock to the consumer. This is particularly the case where no limits exist on the interest rate that the creditor can choose to offer to the consumer at the time of renewal. *See* TILA Section 129B(a)(2), 15 U.S.C. 1639b(a)(2), and TILA Section 129C(b)(2)(A)(v). Moreover, the Board believed it would be speculative to posit the interest rate at the time of renewal for purposes of the repayment ability determination. Third, the guidance contained in comment 17(c)(1)–11 regarding treatment of renewable balloon-payment loans is meant to help ensure consumers are aware of their loan terms and avoid the uninformed use of credit, which differs from the stated purpose of this proposed provision, which was to help ensure that consumers receive loans on terms that reasonably reflect their repayment ability. TILA section 102(a), 15 U.S.C. 1601(a)(2), and TILA section 129B(a)(2), 15 U.S.C. 1639b(a)(2).

Proposed comment 43(c)(5)(ii)(A)–4 provided several illustrative examples of how to determine the maximum payment scheduled during the first five years after consummation for loans with a balloon payment that are not higher-priced covered transactions.

In regard to the proposed five-year underwriting period, some commenters suggested that the payment period considered should be increased to ten years, stating that balloon-payment loans were repeatedly used in an abusive manner during the years of heavy subprime lending. The combined consumer advocacy organizations' comment stated that the five-year underwriting might lead to an increase in five-year balloon-payment loans, which would be bad for sustainable lending. On the other hand, a trade association representing credit unions supported the five-year rule. One industry commenter objected to the whole balloon underwriting scheme, including the five-year rule, apparently preferring something less.

For the reasons discussed by the Board in the proposal, and described above, the Bureau has determined that five years is an appropriate time frame for determining the ability to repay on balloon-payment mortgages that are not higher-priced covered transactions. However, for the sake of uniformity and ease of compliance with the qualified mortgage calculation and ability-to-repay calculation for non-qualified mortgage adjustable-rate mortgages, the proposed provision has been changed to state that the five years will be measured from the date of the first regularly scheduled payment, rather than the date of consummation. The Bureau has made this determination pursuant to the authority granted by TILA section 129C(a)(6)(D)(ii)(I) to prescribe regulations for calculating payments to determine consumers' ability to repay balloon-payment mortgages that are not higher-cost covered transactions.

TILA section 129C(a)(6)(D)(ii)) refers to loans requiring ''more rapid repayment (including balloon payment).'' The Board solicited comment about whether this statutory language should be read as referring to loan types other than balloon-payment loans. The Bureau did not receive comments on this matter, and has determined that the rule language does not need to be amended to include other types of ''rapid repayment'' loans at this time.

The Board also solicited comment about balloon-payment loans that have an unconditional obligation to renew. The Board asked whether or not such loans should be allowed to comply with the ability-to-repay requirements using the total of the mandatory renewal terms, instead of just the first term. As discussed above, proposed comment 43(c)(5)(ii)(A)–3 made clear that this would not be allowed under the rule as proposed. The Board also solicited comment on any required conditions that the renewal obligation should have, if such an amendment were made. However, the Bureau did not receive comments on this matter, and the provision and staff comment are adopted as proposed. A creditor making any non-higher-priced balloon-payment mortgage of less than five years with a clear obligation to renew can avoid having the ability-to-repay determination applied to the balloon payment by including the renewal period in the loan term so that the balloon payment occurs after five years.

Accordingly, the Bureau is adopting § 1026.43(c)(5)(ii)(A)(*1*) and associated commentary substantially as proposed, with minor changes for clarification, as well as new language to reflect that the five-year underwriting period begins with the due date of the first payment, as discussed above. In addition, the Bureau has added a second example to comment 43(c)(5)(ii)(A)–2 to demonstrate the effect of the change to the beginning of the underwriting period.

43(c)(5)(ii)(A)(2)

Proposed § 226.43(c)(5)(ii)(A)(*2*) implemented TILA section 129C(a)(6)(D)(ii)(II) and provided that for a higher-priced covered transaction, the creditor must determine the consumer's ability to repay a loan with a balloon payment using the scheduled payments required under the terms of the loan, including any balloon payment. TILA section 129C(a)(6)(D)(ii)(II) states that for loans that require ''more rapid repayment [113] (including balloon payment),'' and which exceed the loan pricing threshold set forth, the creditor must underwrite the loan using the ''[loan] contract's repayment schedule.'' For purposes of proposed § 226.43(c)(5)(i)(A), ''higher-priced covered transaction'' means a covered transaction with an annual percentage rate that exceeds the average prime offer rate for a comparable transaction as of the date the interest rate is set by 1.5 or more percentage points for a first-lien covered transaction, or by 3.5 or more percentage points for a subordinate-lien covered transaction. *See* § 1026.43(b)(4).

The proposed rule interpreted the statutory requirement that the creditor use the loan contract's payment schedule to mean that the creditor must use all scheduled payments under the terms of the loan needed to fully amortize the loan, consistent with the requirement under TILA section 129C(a)(3). Payment of the balloon, either at maturity or during any intermittent period, is necessary to fully amortize the loan, and so a consumer's ability to pay the balloon payment would need to be considered. Proposed comment 43(c)(5)(ii)(A)–5 provided an illustrative example of how to determine the consumer's repayment ability based on the loan contract's payment schedule, including any

[113] See the previous section, .43(c)(5)(ii)(A)(*1*), for discussion of this statutory language.

balloon payment. The proposed rule applied to ''non-prime'' loans with a balloon payment regardless of the length of the term or any contract provision that provides for an unconditional guarantee to renew.

In making this proposal, the Board expressed concern that this approach could lessen credit choice for non-prime consumers and solicited comment, with supporting data, on the impact of this approach for low-to-moderate income consumers. In addition, the Board asked for comment on whether or not a consumer's ability to refinance out of a balloon-payment loan should be considered in determining ability to repay.

Industry commenters who focused on this provision opposed applying the ability-to-repay determination to the entire payment schedule. Two trade associations representing small and mid-size banks strongly objected to including the balloon payment in the underwriting, and one stated that many of the loans its members currently make would fall into the higher-priced category, making these loans unavailable. However, the statutory scheme for including the balloon payment was supported by a state housing agency and the combined consumer protection advocacy organizations submitting joint comments.

None of the commenters submitted data supporting the importance of higher-priced balloon-payment mortgages for credit availability, or whether consideration of a consumer's ability to obtain refinancing would make the ability-to-repay determination less significant in this context. The Bureau notes that under § 1026.43(f) a balloon-payment mortgage that is a higher-priced covered transaction made by certain creditors in rural or underserved areas may also be a qualified mortgage and thus the creditor would not have to consider the consumer's ability to repay the balloon payment. Because this final rule adopts a wider definition of ''rural or underserved area'' than the Board proposed, potential credit accessibility concerns have been lessened. See the section-by-section analysis of § 1026.43(f), below.

The statute requires the consideration of the balloon payment for higher-priced covered transactions, and the Bureau does not believe that using its exception and adjustment authority would be appropriate for this issue. Accordingly, § 1026.43(c)(5)(ii)(A)(*2*) and associated commentary are adopted substantially as proposed, with minor changes for clarification.

43(c)(5)(ii)(B)

The Board's proposed § 226.43(c)(5)(ii)(B) implemented TILA section 129C(a)(6)(B), which requires that the creditor determine the consumer's repayment ability using ''the payment amount required to amortize the loan by its final maturity.'' For clarity, the proposed rule used the term ''recast,'' which is defined for interest-only loans as the expiration of the period during which interest-only payments are permitted under the terms of the legal obligation. *See* § 1026.43(b)(11). The statute does not define the term ''interest-only.'' For purposes of this rule, the terms ''interest-only loan'' and ''interest-only'' have the same meaning as in § 1026.18(s)(7)(iv).

For interest-only loans (*i.e.,* loans that permit interest only payments for any part of the loan term), proposed § 226.43(c)(5)(ii)(B) provided that the creditor must determine the consumer's ability to repay the interest-only loan using (1) the fully indexed rate or any introductory rate, whichever is greater; and (2) substantially equal, monthly payments of principal and interest that will repay the loan amount over the term of the loan remaining as of the date the loan is recast. The proposed payment calculation rule for interest-only loans paralleled the general rule proposed in § 226.43(c)(5)(i), except that proposed § 226.43(c)(5)(ii)(B)(*2*) required a creditor to determine the consumer's ability to repay the loan amount over the term that remains after the loan is recast, rather than requiring the creditor to use fully amortizing payments, as defined under proposed § 226.43(b)(2).

The Board interpreted the statutory text in TILA section 129C(a)(6)(B) as requiring the creditor to determine the consumer's ability to repay an interest-only loan using the monthly principal and interest payment amount needed to repay the loan amount once the interest-only payment period expires, rather than using, for example, an understated monthly principal and interest payment that would amortize the loan over its entire term, similar to a 30-year fixed mortgage. The proposed rule would apply to all interest-only loans, regardless of the length of the interest-only period. The Board believed this approach most accurately assessed the consumer's ability to repay the loan once it begins to amortize; this is consistent with the approach taken for interest-only loans in the 2006 Nontraditional Mortgage Guidance.

Proposed comment 43(c)(5)(ii)(B)–1 provided guidance on the monthly payment calculation for interest-only loans, and clarified that the relevant term of the loan for calculating these payments is the period of time that remains after the loan is recast. This comment also explained that for a loan on which only interest and no principal has been paid, the loan amount will be the outstanding principal balance at the time of the recast.

Proposed comment 43(c)(5)(ii)(B)–2 provided illustrative examples for how to determine the consumer's repayment ability based on substantially equal monthly payments of principal and interest for interest-only loans.

Commenters did not focus on the calculation for interest-only loans. The Bureau considers the Board's interpretation and implementation of the statute to be accurate and appropriate. Accordingly, § 1026.43(c)(5)(ii)(B) and associated commentary are adopted as proposed.

43(c)(5)(ii)(C)

Proposed § 226.43(c)(5)(ii)(C) implemented the statutory requirement in TILA section 129C(a)(6)(C) that the creditor consider ''any balance increase that may accrue from any negative amortization provision when making the repayment ability determination.'' The statute does not define the term ''negative amortization.''

For such loans, proposed § 226.43(c)(5)(ii)(C) provided that a creditor must determine the consumer's repayment ability using (1) the fully indexed rate or any introductory interest rate, whichever is greater; and (2) substantially equal, monthly payments of principal and interest that will repay the maximum loan amount over the term of the loan remaining as of the date the loan is recast. The proposed payment calculation rule for negative amortization loans paralleled the general rule in proposed § 226.43(c)(5)(i), except that proposed § 226.43(c)(5)(ii)(C)(*2*) required the creditor to use the monthly payment amount that repays the maximum loan amount over the term of the loan that remains after the loan is recast, rather than requiring the creditor to use fully amortizing payments, as defined under § 1026.43(b)(2). The proposed rule used the terms ''maximum loan amount'' and ''recast,'' which are defined and discussed at § 1026.43(b)(7) and (b)(11), respectively.

The Board proposed that the term ''negative amortization loan'' have the same meaning as set forth in § 226.18(s)(7)(v), which provided that the term ''negative amortization loan'' means a loan, other than a reverse mortgage subject to § 226.33, that provides for a minimum periodic payment that covers only a portion of the accrued interest, resulting in negative amortization. As defined, the term ''negative amortization loan'' does not cover other loan types that may have a negative amortization feature, but which do not permit the consumer multiple payment options, such as seasonal income loans. Accordingly, proposed § 226.43(c)(5)(ii)(C) covered only loan products that permit or require minimum periodic payments, such as payment-option loans and graduated payment mortgages with negative amortization.[114] The Board believed that covering these types of loans in proposed § 226.43(c)(5)(ii)(C) was consistent with statutory intent to account for the negative equity that can occur when a consumer makes payments that defer some or all principal or interest for a period of time, and to address the impact that any potential payment shock might have on the consumer's ability to repay the loan. *See* TILA section 129C(a)(6)(C).

In contrast, in a transaction such as a seasonal loan that has a negative amortization feature, but which does not provide for minimum periodic payments that permit deferral of some or all principal, the consumer repays the loan with fully amortizing payments in accordance with the payment schedule. Accordingly, the same potential for payment shock due to accumulating negative amortization does not exist. These loans with a negative amortization feature are therefore not covered by the proposed term ''negative amortization loan,'' and would not be subject to the special payment calculation requirements for negative amortization loans at proposed § 226.43(c)(5)(ii)(C).

For purposes of determining the consumer's ability to repay a negative amortization loan under proposed § 226.43(c)(5)(ii)(C), creditors would be required to make a two-step payment calculation.

Step one: maximum loan amount. Proposed § 226.43(c)(5)(ii)(C) would have required that the creditor first determine the maximum loan amount and period of time that remains in the loan term after the loan is recast before determining the consumer's repayment ability on the loan. See comment 43(c)(5)(ii)(C)–1; *see also* proposed § 226.43(b)(11), which defined the term ''recast'' to mean the expiration of the period during which negatively amortizing payments are permitted under the terms of the legal obligation. Proposed comment 43(c)(5)(ii)(C)–2 further clarified that recast for a negative amortization loan occurs after the maximum loan amount is reached (*i.e.,* the negative amortization cap) or the introductory minimum periodic payment period expires.

As discussed above, § 1026.43(b)(7) defines ''maximum loan amount'' as the loan amount plus any increase in principal balance that results from negative amortization, as defined in § 1026.18(s)(7)(v), based on the terms of the legal obligation. Under the proposal, creditors would make the following two assumptions when determining the maximum loan amount: (1) The consumer makes only the minimum periodic payments for the maximum possible time, until the consumer must begin making fully amortizing payments; and (2) the maximum interest rate is reached at the earliest possible time.

As discussed above under the proposed definition of ''maximum loan amount,'' the Board interpreted the statutory language in TILA section 129C(a)(6)(C) as requiring creditors to fully account for any potential increase in the loan amount that might result under the loan's terms where the consumer makes only the minimum periodic payments required. The Board believed the intent of this statutory provision was to help ensure that the creditor consider the consumer's capacity to absorb the increased payment amounts that would be needed to amortize the larger loan amount once the loan is recast. The Board recognized that the approach taken towards calculating the maximum loan amount requires creditors to assume a ''worst-case scenario,'' but believed this approach was consistent with statutory intent to take into account the greatest potential increase in the principal balance.

Moreover, the Board noted that calculating the maximum loan amount based on these assumptions is consistent with the approach in the 2010 MDIA Interim Final Rule,[115] which addresses disclosure requirements for negative amortization loans, and also the 2006 Nontraditional Mortgage Guidance, which provides guidance to creditors regarding underwriting negative amortization loans.[116]

Step two: payment calculation. Once the creditor knows the maximum loan amount and period of time that remains after the loan is recast, the proposed payment calculation rule for negative amortization loans would require the creditor to use the fully indexed rate or introductory rate, whichever is greater, to calculate the substantially equal, monthly payment amount that will repay the maximum loan amount over the term of the loan that remains as of the date the loan is recast. *See* proposed § 226.43(c)(5)(ii)(C)(*1*) and (*2*).

Proposed comment 43(c)(5)(ii)(C)–1 clarified that creditors must follow this two-step approach when determining the consumer's repayment ability on a negative amortization loan, and also provided cross-references to aid compliance. Proposed comment 43(c)(5)(ii)(C)–2 provided further guidance to creditors regarding the relevant term of the loan that must be used for purposes of the repayment ability determination. Proposed comment 43(c)(5)(ii)(C)–3 provided illustrative examples of how to determine the consumer's repayment ability based on substantially equal monthly payments of principal and interest as required under proposed § 226.43(c)(5)(ii)(C) for a negative amortization loan.

In discussing the ability-to-repay requirements for negative amortization loans, the Board noted the anomaly that a graduated payment mortgage may have a largest scheduled payment that is larger than the payment calculated under proposed § 226.43(c)(5)(ii)(C). The Board solicited comment on whether or not the largest scheduled payment should be used in determining ability to repay. The Bureau received one comment on this issue, from an association of State bank regulators, arguing that the rule should use the largest payment scheduled. However, the Bureau does not believe that a special rule for graduated payment mortgages, which would require an exception from the statute, is necessary to ensure ability to repay these loans. It is unlikely that the calculated payment will be very different from the largest scheduled payment, and introducing this added complexity to the rule is unnecessary. Also, the one comment favoring such a choice did not include sufficient data to support use of the exception and adjustment authority under TILA, and the Bureau is not aware any such data.

Final Rule

The Bureau did not receive comments on the proposed method for calculating payments for negative amortization

[114] Graduated payment mortgages that have negative amortization and fall within the definition of ''negative amortization loans'' provide for step payments that may be less than the interest accrued for a fixed period of time. The unpaid interest is added to the principal balance of the loan.

[115] *See* 12 CFR 1026.18(s)(2)(ii) and comment 18(s)(2)(ii)–2.

[116] *See* 2006 Nontraditional Mortgage Guidance, *at* 58614, n.7.

loans. The Bureau believes that the method proposed by the Board implements the statutory provision accurately and appropriately. Accordingly, § 1026.43(c)(5)(ii)(C) and associated commentary are adopted substantially as proposed, with minor changes for clarification.

43(c)(6) Payment Calculation for Simultaneous Loans

43(c)(6)(i)

The Board's proposed rule provided that for purposes of determining a consumer's ability to repay a loan, ''a creditor must consider a consumer's payment on a simultaneous loan that is—(i) a covered transaction, by following paragraphs (c)(5)(i) and (ii) of this section'' (*i.e.,* the payment calculation rules for the covered transaction itself).

Proposed comment 43(c)(6)–1 stated that in determining the consumer's repayment ability for a covered transaction, the creditor must include consideration of any simultaneous loan which it knows or has reason to know will be made at or before consummation of the covered transaction. Proposed comment 43(c)(6)–2 explained that for a simultaneous loan that is a covered transaction, as that term was defined in proposed § 226.43(b)(1), the creditor must determine a consumer's ability to repay the monthly payment obligation for a simultaneous loan as set forth in proposed § 226.43(c)(5), taking into account any mortgage-related obligations.

The Bureau did not receive comments on this specific language or the use of the covered transaction payment calculation for simultaneous loans. For discussion of other issues regarding simultaneous loans, see the section-by-section analysis of § 1026.43(b)(12), .43(c)(2)(iv) and .43(c)(6)(ii).

The Bureau considers the language of proposed§ 226.43(c)(6)(i) to be an accurate and appropriate implementation of the statute. Accordingly, the Bureau is adopting § 1026.43(c)(6)(i) and associated commentary substantially as proposed, with minor changes for clarity. The requirement to consider any mortgage-related obligations, presented in comment 43(c)(6)–2, is now also part of the regulatory text, at § 1026.43(c)(6).

43(c)(6)(ii)

For a simultaneous loan that is a HELOC, the consumer is generally not committed to using the entire credit line at consummation. The amount of funds drawn on a simultaneous HELOC may differ greatly depending, for example, on whether the HELOC is used as a ''piggyback loan'' to help towards payment on a home purchase transaction or if the HELOC is opened for convenience to be drawn down at a future time. In the proposed rule, the Board was concerned that requiring the creditor to underwrite a simultaneous HELOC assuming a full draw on the credit line might unduly restrict credit access, especially in connection with non-purchase transactions, because it would require creditors to assess the consumer's repayment ability using potentially overstated payment amounts. For this reason, the Board proposed under § 226.43(c)(6)(ii) that the creditor calculate the payment for the simultaneous HELOC based on the amount of funds to be drawn by the consumer at consummation of the covered transaction. The Board solicited comment on whether this approach was appropriate.

Proposed comment 43(c)(6)–3 clarified that for a simultaneous loan that is a HELOC, the creditor must consider the periodic payment required under the terms of the plan when assessing the consumer's ability to repay the covered transaction secured by the same dwelling as the simultaneous loan. This comment explained that under proposed § 226.43(c)(6)(ii), the creditor must determine the periodic payment required under the terms of the plan by considering the actual amount of credit to be drawn by the consumer at or before consummation of the covered transaction. This comment clarified that the amount to be drawn is the amount requested by the consumer; when the amount requested will be disbursed, or actual receipt of funds, is not determinative.

Several industry commenters objected that it is difficult to know the actual amount drawn on a HELOC if it is held by another lender. One commenter suggested finding another way to do this calculation, such as by adding 1 percent of the full HELOC line to the overall monthly payment. Two banking trade associations said that the full line of credit should be considered, and if the consumer does not qualify, the line of credit can be reduced in order to qualify safely. One bank stated that creditors regulated by Federal banking agencies are bound by the interagency ''Credit Risk Guidance for Home Equity Lending'' (2005) to consider the full line of credit, and this will create an uneven playing field.

Other industry commenters supported use of the actual amount drawn at consummation. Both Freddie Mac and Fannie Mae stated that the Board's proposal for considering the actual amount drawn at closing was consistent with their underwriting standards. In addition, an association representing one state's credit unions stated that requiring consideration of a 100 percent draw would be onerous and inaccurate. It also asked that we make clear that the creditor does not have to recalculate a consumer's ability to repay if the amount drawn changes at consummation.

The Bureau believes that requiring consideration of 100 percent of a home equity line of credit would unnecessarily restrict credit availability for consumers. Available but unaccessed credit is not considered in determining ability to repay a mortgage when the consumer has other types of credit lines, such as credit cards. Although HELOCs are secured by the consumer's dwelling, and thus differ from other types of available but unaccessed credit, this difference does not seem determinative. Any potential dwelling-secured home equity line of credit that a creditor might grant to a consumer could simply be requested by the consumer immediately following consummation of the covered transaction. The fact that the potential credit line has been identified and enumerated prior to the transaction, rather than after, does not seem significant compared to the fact that the consumer has chosen not to access that credit, and will not be making payments on it. As with the rest of the ability-to-repay requirements, creditors should apply appropriate underwriting procedures, and are not restricted to the legally mandated minimum required by this rule, as long as they satisfy that minimum.

The requirements of the 2005 ''Credit Risk Guidance for Home Equity Lending'' do not change the Bureau's view of this issue. The Guidance covers home equity lending itself, not consideration of HELOCs as simultaneous loans when determining ability to repay for senior non-HELOCs. The requirement to consider the entire home equity line of credit controls only a bank's granting of that line of credit. For this reason, the Bureau does not believe that banks following this guidance will be disadvantaged. In addition, the Bureau will not be implementing the suggested alternative of adding 1 percent to the calculated monthly payment on the covered transaction. The Bureau is not aware of any data supporting the accuracy of such an approach.

In regard to the comments concerning difficulty in determining the amount of the draw and the monthly HELOC payment, the Bureau as discussed above in the section-by-section analysis of § 1026.43(c)(2)(iv) has added language to comment 43(c)(2)(iv)–4 providing more specific guidance in applying the *knows or has reason to know* standard. In addition, language has been added to comment 43(c)(6)–3, regarding payment calculations for simultaneous HELOCs, making clear that a creditor does not need to reconsider ability to repay if the consumer unexpectedly draws more money than planned at closing from a HELOC issued by a different creditor. In addition, the regulation language has been clarified to state that the creditor must use the amount of credit ''to be'' drawn at consummation, making clear that a violation does not occur if the creditor did not know or have reason to know that a different amount would be drawn.

The Board also solicited comment on whether or not a safe harbor should be given to those creditors who consider the full HELOC credit line. However, commenters did not focus on this possibility. The Bureau believes that although a creditor may choose to underwrite using the full credit line as a means of considering ability to repay in relation to the actual draw, a safe harbor is not warranted. Because the full credit line should always be equal to or greater than the actual draw, appropriate use of the full credit line in underwriting will constitute appropriate compliance without a safe harbor.

In addition to the amount of a HELOC that needs to be considered in determining ability to repay, the Board also solicited comment on whether the treatment of HELOCs as simultaneous loans should be limited to purchase transactions. The Board suggested that concerns regarding ''piggyback loans'' were not as acute with non-purchase transactions.

Consumer and public interest groups opposed limiting the consideration of HELOCs to purchase transactions. Several consumer advocacy groups suggested that if only purchase transactions were covered, the abuses would migrate to the unregulated space. Some commenters said they did not see a reason to exclude the cost of a simultaneous loan when it is extended as part of a refinance. Industry commenters did not focus much on this issue, but an association representing credit unions supported limiting consideration to purchase transactions in order to reduce regulatory burden on credit unions and streamline the refinancing process.

The Bureau believes that requiring consideration of HELOCs as simultaneous loans is appropriate in both purchase and non-purchase transactions. In both situations the HELOC is a lien on the consumer's dwelling with a cost that affects the viability of the covered transaction loan. The Bureau recognizes that a simultaneous HELOC in connection with a refinancing is more likely to be a convenience than one issued simultaneously with a purchase transaction, which will often cover down payment, transaction costs or other major expenses. However, the final rule accommodates this difference by allowing the creditor to base its ability-to-repay determination on the actual draw. The Bureau did not receive and is not aware of any information or data that justifies excluding actual draws on simultaneous HELOCs in connection with refinances from this rule.

For the reasons stated above, the Bureau considers the language of proposed§ 226.43(c)(6)(ii) to be an accurate and appropriate implementation of the statute. Accordingly, the Bureau is adopting § 1026.43(c)(6)(ii) and associated commentary as proposed, with minor changes for clarity.

43(c)(7) Monthly Debt-to-Income Ratio or Residual Income

As discussed above, TILA section 129C(a)(3) requires creditors to consider the debt-to-income ratio or residual income the consumer will have after paying non-mortgage debt and mortgage-related obligations, as part of the ability-to-repay determination under TILA section 129C(a)(1). The Board's proposal would have implemented this requirement in § 226.43(c)(2)(vii). The Board proposed definitions and calculations for the monthly debt-to-income ratio and residual income in § 226.43(c)(7).

With respect to the definitions, proposed § 226.43(c)(7)(i)(A) would have defined the total monthly debt obligations as the sum of: the payment on the covered transaction, as required to be calculated by proposed § 226.43(c)(2)(iii) and (c)(5); the monthly payment on any simultaneous loans, as required to be calculated by proposed § 226.43(c)(2)(iv) and (c)(6); the monthly payment amount of any mortgage-related obligations, as required to be considered by proposed § 226.43(c)(2)(v); and the monthly payment amount of any current debt obligations, as required to be considered by proposed § 226.43(c)(2)(vi). Proposed § 1026.43(c)(7)(i)(B) would have defined the total monthly income as the sum of the consumer's current or reasonably expected income, including any income from assets, as required to be considered by proposed § 226.43(c)(2)(i) and (c)(4).

With respect to the calculations, proposed § 226.43(c)(7)(ii)(A) would have required the creditor to consider the consumer's monthly debt-to-income ratio by taking the ratio of the consumer's total monthly debt obligations to total monthly income. Proposed § 226.43(c)(7)(ii)(B) would have required the creditor to consider the consumer's residual income by subtracting the consumer's total monthly debt obligations from the total monthly income. The Board solicited comment on whether consideration of residual income should account for loan amount, region of the country, and family size, and on whether creditors should be required to include Federal and State taxes in the consumer's obligations to calculate the residual income.

Proposed comment 43(c)(7)–1 would have stated that a creditor must calculate the consumer's total monthly debt obligations and total monthly income in accordance with the requirements in proposed § 226.43(c)(7). The proposed comment would have explained that creditors may look to widely accepted governmental and non-governmental underwriting standards to determine the appropriate thresholds for the debt-to-income ratio or residual income.

Proposed comment 43(c)(7)–2 would have clarified that if a creditor considers both the consumer's debt-to-income ratio and residual income, the creditor may base its determination of ability to repay on either the consumer's debt-to-income ratio or residual income, even if the determination would differ with the basis used. In the section-by-section analysis of proposed § 226.43(c)(7), the Board explained that it did not wish to create an incentive for creditors to consider and verify as few factors as possible in the repayment ability determination.

Proposed comment 43(c)(7)–3 would have provided that creditors may consider compensating factors to mitigate a higher debt-to-income ratio or lower residual income. The proposed comment would have provided that the creditor may, for example, consider the consumer's assets other than the dwelling securing the covered transaction or the consumer's residual income as a compensating factor for a higher debt-to-income ratio. The proposed comment also would have provided that, in determining whether and in what manner to consider compensating factors, creditors may look to widely accepted governmental and non-governmental underwriting standards. The Board solicited comment on whether it should provide more guidance on what factors creditors may consider, and on how creditors may include compensating factors in the repayment ability determination.

In addition, the Board solicited comment on two issues related to the use of automated underwriting systems. The Board solicited comment on providing a safe harbor for creditors relying on automated underwriting systems that use monthly debt-to-income ratios, if the system developer certifies that the system's use of monthly debt-to-income ratios in determining repayment ability is empirically derived and statistically sound. The Board also solicited comment on other methods to facilitate creditor reliance on automated underwriting systems, while ensuring that creditors can demonstrate compliance with the rule.

As discussed above in the section-by-section analysis of § 1026.43(c)(2)(vii), industry commenters and consumer advocates largely supported including consideration of the monthly debt-to-income ratio or residual income in the ability-to-repay determination and generally favored a flexible approach to consideration of those factors. In response to the Board's proposal, some consumer advocates asked that the Bureau conduct research on the debt-to-income ratio and residual income. They requested a standard that reflects the relationship between the debt-to-income ratio and residual income. One industry commenter recommended that the Bureau adopt the VA calculation of residual income. Another industry commenter suggested that the Bureau adopt the same definitions of the debt-to-income ratio and residual income as for qualified residential mortgages, to reduce compliance burdens and the possibility of errors. One industry commenter asked that consideration of residual income be permitted to vary with family size and geographic location. The commenter suggested that the residual income calculation account for Federal and State taxes. Several consumer advocates suggested that the Bureau review the VA residual income guidelines and update the cost of living tiers. They affirmed that all regularly scheduled debt payments should be included in the residual income calculation. They noted that residual income should be sufficient to cover basic living necessities, including food, utilities, clothing, transportation, and known health care expenses.

One industry commenter asked that the Bureau provide guidance on and additional examples of compensating factors, for example, situations where a consumer has many assets but a low income or high debt-to-income ratio. The commenter suggested that the Bureau clarify that the list of examples was not exclusive. Consumer advocates recommended that the Bureau not permit extensions of credit based on a good credit history or involving a high loan-to-value ratio if the debt-to-income ratio or residual income does not reflect an ability to repay. These commenters argued that credit scores and down payments reflect past behavior and incentives to make down payments, not ability to repay.

The Bureau is largely adopting § 1026.43(c)(7) as proposed, with certain clarifying changes to the commentary. Specifically, comment 43(c)(7)–1 clarifies that § 1026.43(c) does not prescribe a specific debt-to-income ratio with which creditors must comply. For the reasons discussed above in the section-by-section analysis of § 1026.43(c), the Bureau is not finalizing the portion of proposed comment 43(c)(7)–1 which would have provided that the creditor may look to widely accepted governmental and non-governmental underwriting standards to determine the appropriate threshold for the monthly debt-to-income ratio or the monthly residual income. Instead, comment 43(c)(7)–1 provides that an appropriate threshold for a consumer's monthly debt-to-income ratio or monthly residual income is for the creditor to determine in making a reasonable and good faith determination of a consumer's repayment ability.

Comment 43(c)(7)–2 clarifies guidance regarding use of both monthly debt-to-income and monthly residual income by providing that if a creditor considers the consumer's monthly debt-to-income ratio, the creditor may also consider the consumer's residual income as further validation of the assessment made using the consumer's monthly debt-to-income ratio. The Bureau is not finalizing proposed comment 43(c)(7)–2, which would have provided that if a creditor considers both the consumer's monthly debt-to-income ratio and residual income, the creditor may base the ability-to-repay determination on either metric, even if the ability-to-repay determination would differ with the basis used. The Bureau believes the final guidance better reflects how the two standards work together in practice, but the change is not intended to alter the rule.

Comment 43(c)(7)–3 also clarifies guidance regarding the use of compensating factors in assessing a consumer's ability to repay by providing that, for example, the creditor may reasonably and in good faith determine that an individual consumer has the ability to repay despite a higher monthly debt-to-income ratio or lower residual income in light of the consumer's assets other than the dwelling securing the covered transaction, such as a savings account. The creditor may also reasonably and in good faith determine that a consumer has the ability to repay despite a higher debt-to-income ratio in light of the consumer's residual income. The Bureau believes that not permitting use of compensating factors may reduce access to credit in some cases, even if the consumer could afford the mortgage. The Bureau does not believe, however, that the rule should provide an extensive list of compensating factors that the creditor may consider in assessing repayment ability. Instead, creditors should make reasonable and good faith determinations of the consumer's repayment ability in light of the facts and circumstances. This approach to compensating factors is consistent with the final rule's flexible approach to the requirement that creditors make a reasonable and good faith of a consumer's repayment ability throughout § 1026.43(c).

The Bureau will consider conducting a future study on the debt-to-income ratio and residual income. Except for one small creditor and the VA, the Bureau is not aware of any creditors that routinely use residual income in underwriting, other than as a compensating factor.[117] The VA underwrites its loans to veterans based on a residual income table developed in 1997. The Bureau understands that the table shows the residual income desired for the consumer based on the loan amount, region of the country, and family size, but does not account for differences in housing or living costs within regions (for instance rural Vermont versus New York City). The Bureau also understands that the residual income is calculated by deducting obligations, including Federal and State taxes, from effective income. However, at this time, the Bureau is unable to conduct a detailed review of the VA residual income guidelines, which would include an analysis of whether those guidelines are predictive of repayment ability, to determine if those standards should be incorporated, in whole or in part, into the ability-to-

[117] *See also* Michael E. Stone, *What is Housing Affordability? The Case for the Residual Income Approach,* 17 Housing Pol'y Debate 179 (2006) (advocating use of a residual income approach but acknowledging that it ''is neither well known, particularly in this country, nor widely understood, let alone accepted'').

repay analysis that applies to the entire residential mortgage market. Further, the Bureau believes that providing broad standards for the definition and calculation of residual income will help preserve flexibility if creditors wish to develop and refine more nuanced residual income standards in the future. The Bureau accordingly does not find it necessary or appropriate to specify a detailed methodology in the final rule for consideration of residual income.

The final rule also does not provide a safe harbor for creditors relying on automated underwriting systems that use monthly debt-to-income ratios. The Bureau understands that creditors routinely rely on automated underwriting systems, many of which are proprietary and thus lack transparency to the individual creditors using the systems. Such systems may decide, for example, whether the debt-to-income ratio and compensating factors are appropriate, but may not disclose to the individual creditors using such systems which compensating factors were used for loan approval. However, the Bureau does not believe a safe harbor is necessary in light of the flexibility the final rule provides to creditors in assessing a consumer's repayment ability, including consideration of monthly debt-to-income ratios. *See* comments 43(c)(1)–1 and 43(c)(2)–1.

Finally, the Bureau notes the contrast between the flexible approach to considering and calculating debt-to-income in § 1026.43(c)(2)(vii) and (7) and the specific standards for evaluating debt-to-income for purposes of determining whether a covered transaction is a qualified mortgage under § 1026.43(e)(2). For the reasons discussed below in the section-by-section analysis of § 1026.43(e)(2), the Bureau believes a specific, quantitative standard for evaluating a consumer's debt-to-income ratio is appropriate in determining whether a loan receives either a safe harbor or presumption of compliance with the repayment ability requirements of § 1026.43(c)(1) pursuant to § 1026.43(e)(2). However, the ability-to-repay requirements in § 1026.43(c) will apply to the whole of the mortgage market and therefore require flexibility to permit creditors to assess repayment ability while ensuring continued access to responsible, affordable mortgage credit. Accordingly, the final rule sets minimum underwriting standards while providing creditors with flexibility to use their own quantitative standards in making the repayment ability determination required by § 1026.43(c)(1).

43(d) Refinancing of Non-Standard Mortgages

Two provisions of section 1411 of the Dodd-Frank Act address the refinancing of existing mortgage loans under the ability-to-repay requirements. As provided in the Dodd-Frank Act, TILA section 129C(a)(5) provides that certain Federal agencies may create an exemption from the income verification requirements in TILA section 129C(a)(4) if certain conditions are met. 15 U.S.C. 1639c(a)(5). In addition, TILA section 129C(a)(6)(E) provides certain special ability-to-repay requirements to encourage applications to refinance existing ''hybrid loans'' into a ''standard loans'' with the same creditor, where the consumer has not been delinquent on any payments on the existing loan and the monthly payments would be reduced under the refinanced loan. The statute allows creditors to give special weight to the consumer's good standing and to consider whether the refinancing would prevent a likely default, as well as other potentially favorable treatment to the consumer. However, it does not expressly exempt applications for such ''payment shock refinancings'' from TILA's general ability-to-repay requirements or define ''hybrid'' or ''standard loans.'' [118] 15 U.S.C. 1639c(a)(6)(E).

The Board noted in its proposal that it reviewed the Dodd-Frank Act's legislative history, consulted with consumer advocates and representatives of both industry and the GSEs, and examined underwriting rules and guidelines for the refinance programs of private creditors, GSEs and Federal agencies, as well as for the Home Affordable Modification Program (HAMP). The Board noted that it also considered TILA section 129C(a)(5), which permits Federal agencies to adopt rules exempting refinancings from certain of the ability-to-repay requirements in TILA section 129C(a).

In proposing § 226.43(d) to implement TILA section 129C(a)(6)(E), the Board interpreted the statute as being intended to afford greater flexibility to creditors of certain home mortgage refinancings when complying with the general ability-to-repay provisions in TILA section 129C(a). Consistent with this reading of the statute, the proposal would have provided an exemption from certain criteria required to be considered as part of the general repayment ability determination under TILA section 129C(a). Specifically, the Board's proposal would have permitted creditors to evaluate qualifying applications without having to verify the consumer's income and assets as prescribed in the general ability-to-repay requirements, provided that a number of additional conditions were met. In addition, the proposal would have permitted a creditor to calculate the monthly payment used for determining the consumer's ability to repay the new loan based on assumptions that would typically result in a lower monthly payment than those required to be used under the general ability-to-repay requirements. The proposal also clarified the conditions that must be met in a home mortgage refinancing in order for this greater flexibility to apply.

The Board noted that TILA section 129C(a)(6)(E)(ii) permits creditors to give prevention of a ''likely default should the original mortgage reset a higher priority as an acceptable underwriting practice.'' 15 U.S.C. 1639c(a)(6)(E)(ii). The Board interpreted this provision to mean that certain ability-to-repay criteria under TILA section 129C(a) should not apply to refinances that meet the requisite conditions. TILA section 129C(a) specifically prescribes the requirements that creditors must meet to satisfy the obligation to determine a consumer's ability to repay a mortgage loan. The Board concluded that the term ''underwriting practice'' could reasonably be interpreted to refer to the underwriting rules prescribed in earlier portions of TILA section 129C(a); namely, those concerning the general ability-to-repay underwriting requirements.

The Board also structured its proposal to provide for flexibility in underwriting that is characteristic of so-called ''streamlined refinances,'' which are offered by creditors to existing customers without having to go through a full underwriting process appropriate for a new origination. The Board noted that section 1411 of the Dodd-Frank Act specifically authorizes streamlined refinancings of loans made, guaranteed, or insured by Federal agencies, and concluded that TILA section 129C(a)(6)(E) is most reasonably interpreted as being designed to address the remaining market for streamlined refinancings; namely, those offered under programs of private creditors and the GSEs. The Board stated that in its understanding typical streamlined refinance programs do not require documentation of income and assets, although a verbal verification of

[118] Section 128A of TILA, as added by Section 1418 of the Dodd-Frank Act, includes a definition of ''hybrid adjustable rate mortgage.'' However, that definition applies to the adjustable rate mortgage disclosure requirements under TILA section 128A, not the ability-to-repay requirements under TILA section 129C.

employment may be required. The Board further noted that TILA section 129C(a)(6)(E) includes three central elements of typical streamlined refinance programs, in that it requires that the creditor be the same for the existing and new mortgage loan obligation, that the consumer have a positive payment history on the existing mortgage loan obligation, and that the payment on the new refinancing be lower than on the existing mortgage loan obligation.

One difference the Board noted between the statute and typical streamlined refinance programs is that the statute targets consumers facing ''likely default'' if the existing mortgage ''reset[s].'' The Board indicated that, by contrast, streamlined refinance programs may not be limited to consumers at risk in this way. For example, streamlined refinancing programs may assist consumers who are not facing potential default but who simply wish to take advantage of lower rates despite a drop in their home value or wish to switch from a less stable variable-rate product to a fixed-rate product. The Board noted parallels between TILA's new refinancing provisions and the focus of HAMP, a government program specifically aimed at providing modifications for consumers at risk of ''imminent default,'' or in default or foreclosure.[119] However, the Board noted that underwriting criteria for a HAMP modification are considerably more stringent than for a typical streamlined refinance.

On balance, the Board interpreted the statutory language as being modeled on the underwriting standards of typical streamlined refinance programs rather than the tighter standards of HAMP. The Board concluded that Congress intended to facilitate opportunities to refinance loans on which payments could become significantly higher and thus unaffordable. The Board cautioned that applying underwriting standards that are too stringent could impede refinances that Congress intended to encourage. In particular, the statutory language permitting creditors to give ''likely default'' a ''higher priority as an acceptable underwriting practice'' indicates that flexibility in these special refinances should be permitted. In addition, underwriting standards that go significantly beyond those used in existing streamlined refinance programs could create a risk that these programs would be unable to meet the TILA ability-to-repay requirements; thus, an important refinancing resource for at-risk consumers would be compromised and the overall mortgage market potentially disrupted at a vulnerable time.

The Board noted, however, that consumers at risk of default when higher payments are required might present greater credit risks to the institutions holding their loans when those loans are refinanced without verifying the consumer's income and assets. Accordingly, the Board's proposal would have imposed some requirements that are more stringent than those of typical streamlined refinance programs as a prerequisite to the refinancing provision under proposed § 226.43(d). For example, the proposal would have permitted a consumer to have had only one delinquency of more than 30 days in the 24 months immediately preceding the consumer's application for a refinance. By contrast, the Board indicated that streamlined refinance programs of which it is aware tend to consider the consumer's payment history for only the last 12 months.[120] In addition, the proposal would have defined the type of loan into which a consumer may refinance under TILA's new refinancing provisions to include several characteristics designed to ensure that those loans are stable and affordable. These include a requirement that the interest rate be fixed for the first five years after consummation and that the points and fees be capped at three percent of the total loan amount, subject to a limited exemption for smaller loans.

43(d)(1) Definitions

In the Board's proposal, § 226.43(d)(1) established the scope of paragraph (d) and set forth the conditions under which the special refinancing provisions applied, while proposed § 226.43(d)(2) addressed the definitions for ''non-standard mortgage,'' ''standard mortgage,'' and ''refinancing.'' The Bureau believes that paragraph (d) should begin with the relevant definitions, before proceeding to the scope and conditions of the special refinancing provisions. The rule finalized by the Bureau is accordingly reordered. The following discussion details the definitions adopted in § 1026.43(d)(1), which were proposed by the Board under § 226.43(d)(2).

Proposed § 226.43(d)(2) defined the terms ''non-standard mortgage'' and ''standard mortgage.'' As noted earlier, the statute does not define the terms ''hybrid loan'' and ''standard loan'' used in the special refinancing provisions of TILA section 129C(a)(6)(E). Therefore, the Board proposed definitions it believed to be consistent with the policy objective underlying these special provisions: Facilitating the refinancing of home mortgages on which consumers risk a likely default due to impending payment shock into more stable and affordable products.

43(d)(1)(i) Non-Standard Mortgage

As noted above, the statute does not define the terms ''hybrid loan'' and ''standard loan'' used in TILA section 129C(a)(6)(E). The Board proposed definitions it believed to be consistent with Congress's objectives. Proposed § 226.43(d)(2)(i) substituted the term ''non-standard mortgage'' for the statutory term ''hybrid loan'' and would have defined non-standard mortgage as any ''covered transaction,'' as defined in proposed § 226.43(b)(1), that is:

- An adjustable-rate mortgage, as defined in § 226.18(s)(7)(i), with an introductory fixed interest rate for a period of one year or longer; [121]
- An interest-only loan, as defined in § 226.18(s)(7)(iv); [122] or
- A negative amortization loan, as defined in § 226.18(s)(7)(v).[123]

Proposed comment 43(d)(2)(i)(A)–1 explained the application of the definition of non-standard mortgage to an adjustable-rate mortgage with an introductory fixed interest rate for one or more years. This proposed comment clarified that, for example, a covered transaction with a fixed introductory rate for the first two, three or five years that then converts to a variable rate for the remaining 28, 27 or 25 years, respectively, is a non-standard mortgage. By contrast, a covered transaction with an introductory rate for six months that then converts to a variable rate for the remaining 29 and ½ years is not a non-standard mortgage.

The Board articulated several rationales for its proposed definition of

[119] *See, e.g.,* Fannie Mae, FM 0509, *Home Affordable Modification Program,* at 1 (2009).

[120] *See, e.g.,* Fannie Mae, *Home Affordable Refinance Refi Plus Options,* at 2 (Mar. 29, 2010); Freddie Mac, Pub. No. 387, *Freddie Mac-owned Streamlined Refinance Mortgage,* at 2 (2010).

[121] ''The term 'adjustable-rate mortgage' means a transaction secured by real property or a dwelling for which the annual percentage rate may increase after consummation.'' 12 CFR 1026.18(s)(7)(i).

[122] ''The term 'interest-only' means that, under the terms of the legal obligation, one or more of the periodic payments may be applied solely to accrued interest and not to loan principal; an 'interest-only loan' is a loan that permits interest-only payments.'' 12 CFR 1026.18(s)(7)(iv).

[123] ''[T]he term 'negative amortization' means payment of periodic payments that will result in an increase in the principal balance under the terms of the legal obligation; the term 'negative amortization loan' means a loan that permits payments resulting in negative amortization, other than a reverse mortgage subject to section 226.33.'' 12 CFR 1026.18(s)(7)(v).

a non-standard mortgage. First, the Board noted that the legislative history of the Dodd-Frank Act describes ''hybrid'' mortgages as mortgages with a ''blend'' of fixed-rate and adjustable-rate characteristics—generally loans with an initial fixed period and adjustment periods, such as ''2/23s and 3/27s.'' [124] The Board also stated that the legislative history indicates that Congress was concerned about consumers being trapped in mortgages likely to result in payments that would suddenly become significantly higher—often referred to as ''payment shock''—because their home values had dropped, thereby ''making refinancing difficult.'' [125]

The Board interpreted Congress' concern about consumers being at risk due to payment shock as supporting an interpretation of the term ''hybrid loan'' to encompass both loans that are ''hybrid'' in that they start with a fixed interest rate and convert to a variable rate, but also loans that are ''hybrid'' in that consumers can make payments that do not pay down principal for a period of time that then convert to higher payments covering all or a portion of principal. By defining ''non-standard mortgage'' in this way, the proposal was intended to increase refinancing options for a wide range of at-risk consumers while conforming to the statutory language and legislative intent.

The proposed definition of ''non-standard mortgage'' would not have included adjustable-rate mortgages whose rate is fixed for an initial period of less than one year. In those instances, the Board posited that a consumer may not face ''payment shock'' because the consumer has paid the fixed rate for such a short period of time. The Board also expressed concern that allowing streamlined refinancings under this provision where the interest rate is fixed for less than one year could result in ''loan flipping.'' A creditor, for example, could make a covered transaction and then only a few months later refinance that loan under proposed § 226.43(d) to take advantage of the exemption from certain ability-to-repay requirements while still profiting from the refinancing fees.

The Board expressed concern that under its proposed definition, a consumer could refinance out of a relatively stable product, such as an adjustable-rate mortgage with a fixed interest rate for a period of 10 years, which then adjusts to a variable rate for the remaining loan term, and that it was unclear whether TILA section 129C(a)(6)(E) was intended to cover this type of product. The Board solicited comment on whether adjustable-rate mortgages with an initial fixed rate should be considered non-standard mortgages regardless of how long the initial fixed rate applies, or if the proposed initial fixed-rate period of at least one year should otherwise be revised.

The proposed definition of non-standard mortgage also did not include balloon-payment mortgages. The Board noted that balloon-payment mortgages are not clearly ''hybrid'' products, given that the monthly payments on a balloon-payment mortgage do not necessarily increase or change from the time of consummation; rather, the entire outstanding principal balance becomes due on a particular, predetermined date. The Board stated that consumers of balloon-payment mortgages typically expect that the entire loan balance will be due at once at a certain point in time and are generally aware well in advance that they will need to repay the loan or refinance.

The Board solicited comment on whether to use its legal authority to include balloon-payment mortgages in the definition of non-standard mortgage for purposes of the special refinancing provisions of TILA section 129C(a)(6)(E). The Board also requested comment generally on the appropriateness of the proposed definition of non-standard mortgage.

Commenters on this aspect of the proposal generally urged the Bureau to expand in various ways the proposed definition of non-standard mortgage and either supported or did not address the proposed definition's inclusion of adjustable-rate mortgages, interest-only loans, or negative amortization loans. One consumer group commented that it supported the Board's proposed definition of non-standard mortgage. Other consumer group commenters stated that the Bureau should use its exemption and adjustment authority under TILA to include balloon-payment loans within the scope of proposed § 226.43(d). In addition, one industry commenter stated that creditors should have flexibility to refinance a performing balloon-payment loan within the six months preceding, or three months following, a balloon payment date without regard to the ability-to-pay requirements. In contrast, one industry commenter stated that balloon-payment loans should not be included in the definition of non-standard mortgage, because consumers are generally well aware of the balloon payment feature in a loan, which is clearly explained to customers. This industry commenter further stated that during the life of a balloon-payment loan, its customers often make regular payments that reduce the principal balance and that balloon-payment loans do not make it more likely that a consumer will default.

While the Bureau agrees that many consumers may need to seek a refinancing when a balloon loan payment comes due, given the approach that the Bureau has taken to implementing the payment shock refinancing provision in § 1026.43(d), the Bureau is declining to expand the definition of non-standard mortgage to include balloon-payment mortgages. As discussed in more detail in the supplementary information to § 1026.43(d)(3), as adopted § 1026.43(d) provides a broad exemption to all of the general ability-to-repay requirements set forth in § 1026.43(c) when a non-standard mortgage is refinanced into a standard mortgage provided that certain conditions are met. The point of this exemption is to enable creditors, without going through full underwriting, to offer consumers who are facing increased monthly payments due to the recast of a loan a new loan with lower monthly payments. Thus, a key element of the exemption is that the monthly payment on the standard mortgage be materially lower than the monthly payment for the non-standard mortgage. As discussed in the section-by-section analysis of § 1026.43(d)(1) below, the Bureau is adopting a safe harbor for reductions of 10 percent. Balloon payments pose a different kind of risk to consumers, one that arises not from the monthly payments (which often tend to be low) but from the balloon payment due when the entire remaining balance becomes due. The provisions of § 1026.43(d)(1) are not meant to address this type of risk. Accordingly, the Bureau declines to expand the definition of non-standard mortgage to include balloon-payment loans. The Bureau believes, however, that where a consumer is performing under a balloon-payment mortgage and is offered a new loan of a type that would qualify as a standard loan with monthly payments at or below the payments of the balloon-payment mortgage, creditors will have little difficulty in satisfying the ability-to-repay requirements.

Consumer group commenters and one GSE commenter argued that the definition of non-standard mortgage should accommodate GSE-held loans. These commenters stated that these loans should receive the same income verification exemption as Federal

[124] *See* Comm. on Fin. Servs., Report on H.R. 1728, Mortgage Reform and Anti-Predatory Lending Act, H. Rept. 94, 110th Cong., at 5 (2009).

[125] *Id.* at 51–52.

agency streamlined refinancing programs. These commenters noted that while the GSEs are held in conservatorship by the Federal government, GSE-held loans should be treated the same as FHA for purposes of streamlined refinance programs, which are ultimately about reducing the risk to the taxpayer by avoiding default by consumers who could receive lower-cost mortgage loans. Consumer group commenters further urged that GSE streamlined refinance programs should be subject to standards at least as stringent as those for the FHA streamlined refinance program.

In addition, one of the GSEs questioned the policy justification for the differences between sections 129C(a)(5) and 129C(a)(6)(E) of TILA. TILA section 129C(a)(5), which applies to certain government loans, permits Federal agencies to exempt certain refinancings from the income and asset verification requirement without regard to the original mortgage product, in contrast to TILA section 129C(a)(6)(E), which as discussed above applies only when the original loan is a ''hybrid'' loan. This commenter noted that consumers with certain types of mortgage loans, such as fixed-rate and balloon-payment loans, may have to go through a more costly and cumbersome process to refinance their mortgages than consumers with government loans.

The Bureau declines to adopt regulations implementing TILA section 129C(a)(5). The Bureau notes that TILA section 129C(a)(5) expressly confers authority on certain Federal agencies (*i.e.,* HUD, VA, USDA, and RHS) to exempt from the income verification requirement refinancings of certain loans made, guaranteed, or insured by such Federal agencies. The scope of TILA section 129C(a)(5) is limited to such Federal agencies or government-guaranteed or -insured loans. The Bureau also declines to expand the scope of § 1026.43(d) to include GSE refinancings that do not otherwise fall within the scope of § 1026.43(d). While accommodation for GSE-held mortgage loans that are not non-standard mortgages under § 1026.43(d) may be appropriate, the Bureau wishes to obtain additional information in connection with GSE refinancings and has requested feedback in a proposed rule published elsewhere in today's **Federal Register**. However, the Bureau notes that to the extent a loan held by the GSEs (or a loan made, guaranteed or insured by the Federal agencies above) qualifies as a non-standard mortgage under § 1026.43(d)(1)(i) and the other conditions in § 1026.43(d) are met, the refinancing provisions of general applicability in § 1026.43(d) would be available for refinancing a GSE-held loan.

Industry commenters and one industry trade association commented that special ability-to-repay requirements should be available for all rate-and-term refinancings, regardless of whether the refinancings are insured or guaranteed by the Federal government or involve a non-standard mortgage. One industry trade association stated that such special ability-to-repay requirements should incorporate similar standards to those established for certain government loans in TILA section 129C(a)(5), including a requirement that the consumer not be 30 or more days delinquent. For such loans, this trade association stated that other requirements under TILA section 129C(a)(6)(E) regarding payment history should not be imposed, because the consumer is already obligated to pay the debt and the note holder in many cases will already bear the credit risk. Other commenters stated that because a rate-and-term refinancing would offer the consumer a better rate (except in the case of adjustable rate mortgages), there is no reason to deny the creditor the ability to improve its credit risk and to offer the consumer better financing. Several industry commenters and one GSE noted that streamlined refinancing programs are an important resource for consumers seeking to refinance into a lower monthly payment mortgage even when the underlying mortgage loan is not a non-standard mortgage, and urged the Bureau to considering modifying proposed § 226.43(d) to include conventional loans where the party making or purchasing the new loan already owns the credit risk.

The Bureau declines to expand the scope of § 1026.43(d) to include rate-and-term refinancings when the underlying mortgage is not a non-standard mortgage, as defined in § 1026.43(d)(1)(i). The Bureau believes that the statute clearly limits the refinancing provision in TILA section 129(C)(6)(E) to circumstances where the loan being refinanced is a ''hybrid loan'' and where the refinancing could ''prevent a likely default.'' The Bureau agrees with the Board that TILA section 129C(a)(6)(E) is intended to address concerns about loans involving possible payment shock. Where a consumer has proven capable of making payments, is about to experience payment shock, is at risk of default, and is refinancing to a mortgage with a lower monthly payment and with product terms that do not pose any increased risk, the Bureau believes that the benefits of the refinancing outweigh the consumer protections afforded by the ability-to-repay requirements. Absent these exigent circumstances, the Bureau believes that creditors should determine that the consumer has the ability to repay the mortgage loan. The Bureau does not believe that a consumer who receives an initial lower monthly payment from a rate-and-term refinancing actually receives a benefit if the consumer cannot reasonably be expected to repay the loan. Also, the Bureau notes that some of the scenarios identified by commenters, such as offering a consumer a better rate with a rate-and-term refinancing where the creditor bears the credit risk, would be exempt from the ability-to-repay requirements. A refinancing that results in a reduction in the APR with a corresponding change in the payment schedule and meets the other conditions in § 1026.20(a) is not a ''refinancing'' for purposes of § 1026.43, and therefore is not subject to the ability-to-repay requirements. As with other terms used in TILA section 129C, the Bureau believes that this interpretation is necessary to achieve Congress's intent.

Several other industry commenters urged the Bureau to broaden the definition of non-standard mortgage to include refinancings extended pursuant to the Home Affordable Refinance Program (HARP) and similar programs. One such commenter indicated that under HARP, a loan can only be refinanced if the consumer is not in default, the new payment is fully amortizing, and both the original and new loans comply with agency requirements. This commenter stated that HARP permits consumers who would not otherwise be able to refinance due to a high loan-to-value ratio or other reasons to refinance into another loan, providing a consumer benefit. The commenter indicated that HARP loans do not meet all of the proposed ability-to-repay requirements and that the Bureau should use its authority to provide that HARP and other similar programs are exempt from the ability-to-repay requirements, as they promote credit availability and increasing stability in the housing market. The Bureau acknowledges that HARP refinancings and the payment shock refinancings addressed under TILA section 129C(a)(6)(E) are both intended to assist consumers harmed by the financial crisis. Although both types of refinancings are motivated by similar goals, the Bureau does not believe that expanding § 1026.43(d) to include all HARP refinancings is consistent with TILA section 129C(a)(6)(E) because HARP refinancings are not predicated on the occurrence of payment shock and a consumer's likely default. For example, a consumer with a mortgage loan that will not recast and who is not at risk of default may qualify for a HARP refinancing if the consumer's loan-to-value ratio exceeds 80 percent. The Bureau strongly believes that § 1026.43(d) should be limited to instances where a consumer is facing payment shock and likely default.

While not limited to the prevention of payment shock and default, the Bureau acknowledges that extensions of credit made pursuant to programs such as HARP are intended to assist consumers harmed by the financial crisis. Furthermore, these programs employ complex underwriting requirements to determine a consumer's ability to repay. Thus, it may be appropriate to modify the ability-to-repay requirements to accommodate such programs. However, an appropriate balance between helping affected consumers and ensuring that these consumers are offered and receive residential mortgage loans on terms that reasonably reflect consumers' ability to repay must be found. To determine how to strike this balance, the Bureau wishes to obtain additional information in connection with these programs and has requested feedback in a proposed rule published elsewhere in today's **Federal Register**.

Accordingly, the definition of ''non-standard mortgage'' is adopted as proposed, renumbered as § 1026.43(d)(1)(i). In addition, comment 43(d)(2)(i)(A)–1 also is adopted as proposed, renumbered as 43(d)(1)(i)(A)–1.

43(d)(1)(ii) Standard Mortgage

Proposed § 226.43(d)(2)(ii) would have substituted the term ''standard mortgage'' for the statutory term ''standard loan'' and defined this term to mean a covered transaction that has the following five characteristics:

- *First,* the regular periodic payments may not: (1) Cause the principal balance to increase; (2) allow the consumer to defer repayment of principal; or (3) result in a balloon payment.
- *Second,* the total points and fees payable in connection with the transaction may not exceed three percent of the total loan amount, with exceptions for smaller loans specified in proposed § 226.43(e)(3).
- *Third,* the loan term may not exceed 40 years.
- *Fourth,* the interest rate must be fixed for the first five years after consummation.
- *Fifth,* the proceeds from the loan may be used solely to pay—(1) the outstanding principal balance on the non-standard mortgage; and (2) closing or settlement charges required to be disclosed under RESPA.

Proposed limitations on regular periodic payments. Proposed § 226.43(d)(2)(ii)(A) would have required that a standard mortgage provide for regular periodic payments that do not result in negative amortization, deferral of principal repayment, or a balloon payment. Proposed comment 43(d)(2)(ii)(A)–1 clarified that ''regular periodic payments'' are payments that do not result in an increase of the principal balance (negative amortization) or allow the consumer to defer repayment of principal. The proposed comment explained that the requirement for ''regular periodic payments'' means that the contractual terms of the standard mortgage must obligate the consumer to make payments of principal and interest on a monthly or other periodic basis that will repay the loan amount over the loan term. Proposed comment 43(d)(2)(ii)(A)–1 further explained that, with the exception of payments resulting from any interest rate changes after consummation in an adjustable-rate or step-rate mortgage, the periodic payments must be substantially equal, with a cross-reference to proposed comment 43(c)(5)(i)–3 regarding the meaning of ''substantially equal.'' In addition, the comment clarified that ''regular periodic payments'' do not include a single-payment transaction and cross-referenced similar commentary on the meaning of ''regular periodic payments'' under proposed comment 43(e)(2)(i)–1. Proposed comment 43(d)(2)(ii)(A)–1 also cross-referenced proposed comment 43(e)(2)(i)–2 to explain the prohibition on payments that ''allow the consumer to defer repayment of principal.''

One consumer group commenter stated that it supported the exclusion of negative amortization, interest-only payments, and balloon payments from the definition of standard mortgage. In addition, several other consumer groups commented in support of the Board's proposal to exclude balloon-payment loans from the definition of standard mortgage. These commenters stated that balloon-payment products, even with self-executing renewal, should not be permitted to take advantage of an exemption from the general underwriting standards in § 1026.43(c). Consumer groups expressed concern that, in cases where the consumer does not have assets sufficient to make the balloon payment, balloon-payment loans will necessarily require another refinance or will lead to a default. The Bureau agrees with the concerns expressed by such commenters and believes that it is appropriate to require that balloon-payment loans be underwritten in accordance with the general ability-to-repay standard, rather than under the payment shock refinancing provision in § 1026.43(d). Accordingly, the Bureau is not expanding the definition of standard mortgage to include balloon-payment mortgages.

The Bureau received no other comment on this proposed definition. Accordingly, the Bureau is adopting the definition of standard mortgage as proposed, renumbered as § 1026.43(d)(1)(ii)(A). Similarly, the Bureau received no comment on proposed comment 43(d)(2)(ii)(A)–1, which is adopted as proposed and renumbered as 43(d)(1)(ii)(A)–1.

Proposed three percent cap on points and fees. Proposed § 226.43(d)(2)(ii)(B) would have prohibited creditors from charging points and fees on the mortgage loan of more than three percent of the total loan amount, with certain exceptions for small loans. Specifically, proposed § 226.43(d)(2)(ii)(B) cross-referenced the points and fees provisions under proposed § 226.43(e)(3), thereby applying the points and fees limitations for a ''qualified mortgage'' to a standard mortgage. The points and fees limitation for a ''qualified mortgage'' and the relevant exception for small loans are discussed in detail in the section-by-section analysis of § 1026.43(e)(3) below.

The Board noted several reasons for the proposed limitation on the points and fees that may be charged on a standard mortgage. First, the limitation was intended to prevent creditors from undermining the provision's purpose—placing at-risk consumers into more affordable loans—by charging excessive points and fees for the refinance. Second, the points and fees limitation was intended to ensure that consumers attain a net benefit in refinancing their non-standard mortgage. The higher a consumer's up-front costs to refinance a home mortgage, the longer it will take for the consumer to recoup those costs through lower payments on the new mortgage. By limiting the amount of points and fees that can be charged in a refinance covered by proposed § 226.43(d), the provision increases the likelihood that the consumer will hold the loan long enough to recoup those costs. Third, the proposed limitation was intended to be consistent with the provisions set forth in TILA section 129C(a)(5) regarding certain refinancings under Federal agency programs.

The Board requested comment on the proposal to apply the same limit on the points and fees that may be charged for a ''qualified mortgage'' under § 226.43(e) to the points and fees that may be charged on a ''standard mortgage'' under § 226.43(d). The Bureau received no comments on this proposed points and fees threshold, which is adopted as proposed, renumbered as § 1026.43(d)(1)(ii)(B). See the section-by-section analysis of § 1026.43(e)(3) below for more specific information regarding the limitations applicable to ''points and fees'' for qualified mortgages and refinancings under § 1026.43(d).

Proposed loan term of no more than 40 years. Proposed § 226.43(d)(2)(ii)(C) would have provided that, to qualify as a standard mortgage under proposed § 226.43(d), a covered transaction may not have a loan term of more than 40 years. The Board stated that this condition was intended to ensure that creditors and consumers have sufficient options to refinance a 30-year loan, for example, which is unaffordable for the consumer in the near term, into a loan with lower, more affordable payments over a longer term. This flexibility may be especially important in higher cost areas where loan amounts on average exceed loan amounts in other areas.

The Board noted that loans with longer terms may cost more over time, but indicated that it was reluctant to foreclose options for consumers for whom the lower payment of a 40-year loan might make the difference between defaulting and not defaulting. The Board also noted that prevalent streamlined refinance programs permit loan terms of up to 40 years and expressed concern about disrupting the current mortgage market at a vulnerable time. The Board specifically requested comment on the proposed condition to allow a standard mortgage to have a loan term of up to 40 years. The Bureau received no comment on this proposed condition, which is adopted as proposed, renumbered as § 1026.43(d)(1)(ii)(C).

Proposed requirement that the interest rate be fixed for the first five years. Proposed § 226.43(d)(2)(ii)(D) would have required that a standard mortgage have a fixed interest rate for the first five years after consummation. Proposed comment 43(d)(2)(ii)(D)–1 provided an illustrative example. The proposed comment also cross-referenced proposed comment 43(e)(2)(iv)–3.iii for guidance regarding step-rate mortgages.

The Board articulated several reasons for requiring a minimum five-year fixed-rate period for standard mortgages. First, the Board noted that a fixed rate for five years is consistent with TILA section 129C(b)(2)(A)(v), which requires the creditor to underwrite a qualified mortgage based on the maximum interest rate that may apply during the first five years. The Board indicated that Congress intended both qualified mortgages and standard mortgages to be stable loan products, and therefore that the required five-year fixed-rate period for qualified mortgages would also be an appropriate benchmark for standard mortgages. The Board further stated that the safeguard of a fixed rate for five years after consummation would help to ensure that consumers refinance into products that are stable for a substantial period of time. In particular, a fixed payment for five years after consummation would constitute a significant improvement in the circumstances of a consumer who may have defaulted absent the refinance. The Board specifically noted that the proposal would permit so-called ''5/1 ARMs,'' where the interest rate is fixed for the first five years, after which time the rate becomes variable, to be standard mortgages.

The Board requested comment on the proposal defining a standard mortgage as a mortgage loan with an interest rate that is fixed for at least the first five years after consummation, including on whether the rate should be required to be fixed for a shorter or longer period and data to support any alternative time period. One consumer group commenter stated that the use of adjustable-rate mortgages should be limited in the definition of standard mortgage. This commenter stated that adjustable-rate mortgage loans contributed to the subprime lending expansion and the financial crisis that followed. In particular, this commenter expressed concern that adjustable-rate mortgage loans were utilized in loan-flipping schemes that trapped consumers in unaffordable loans, forcing such consumers to refinance into less affordable mortgage loans. This commenter indicated that standard mortgages should be limited to fixed and step-rate loans and, in low or moderate interest rate environments, adjustable-rate mortgages with a 5-year or longer-term fixed period. However, this commenter urged the Bureau to consider permitting shorter-term adjustable-rate mortgages to be standard mortgages in high interest rate environments because in such circumstance, an adjustable-rate mortgage could potentially reduce the consumer's monthly payments at recast, which may outweigh the risks of increased payments for some consumers.

The Bureau is adopting the requirement that a standard mortgage have a fixed interest rate for the first five years after consummation as proposed, renumbered as § 1026.43(d)(1)(ii)(D). The Bureau agrees with the Board that the intent of TILA section 129C(a)(6)(E) appears to be to facilitate refinances of riskier mortgages into more stable loan products, and accordingly, believes that a standard mortgage should provide for a significant period of time during which payments will be predictable, based on a fixed rate or step rates that are set at the time of consummation. The Bureau believes that five years is an appropriate standard in part because it is consistent with the statutory requirement for a qualified mortgage under section 129C(b)(2)(A)(v). The Bureau believes that predictability for consumers is best effectuated by a single rule that applies in all interest rate environments, rather than a rule that depends on the interest rate environment in effect at the time of the refinancing. Further, given that § 1026.43(d) provides an exemption from the general ability-to-repay requirements in § 1026.43(c), the Bureau believes that it is important that a refinancing conducted in accordance with § 1026.43(d) result in a stable loan product and predictable payments for a significant period of time.

In addition, the Board solicited comment on whether a balloon-payment mortgage of at least five years should be considered a standard mortgage under the refinancing provisions of proposed § 226.43(d). The Board noted that in some circumstances, a balloon-payment mortgage with a fixed, monthly payment for five years might benefit a consumer who otherwise would have defaulted. The Board further noted that a five-year balloon-payment mortgage may not be appreciably less risky for the consumer than a ''5/1 ARM,'' which is permitted under the proposal, depending on the terms of the rate adjustment scheduled to occur in year five.

As discussed above, several consumer groups stated that balloon products, even with self-executing renewal, should not be permitted to take advantage of an exemption from the general underwriting standards in § 1026.43(c). Consumer groups expressed concern that, in cases where the consumer does not have assets sufficient to make the balloon payment, balloon-payment mortgages will necessarily require another refinance or will lead to a default. For the reasons discussed in the supplementary information to § 1026.43(d)(1)(ii)(A) above, the Bureau is not expanding the definition of ''standard mortgage'' to include balloon-payment mortgages.

Proposed requirement that loan proceeds be used for limited purposes. Proposed § 226.43(d)(2)(ii)(E) would have restricted the use of the proceeds of a standard mortgage to two purposes:

• To pay off the outstanding principal balance on the non-standard mortgage; and

• To pay closing or settlement charges required to be disclosed under the Real Estate Settlement Procedures Act, 12 U.S.C. 2601 *et seq.,* which includes amounts required to be deposited in an escrow account at or before consummation.

Proposed comment 43(d)(2)(ii)(E)–1 clarified that if the proceeds of a covered transaction are used for other purposes, such as to pay off other liens or to provide additional cash to the consumer for discretionary spending, the transaction does not meet the definition of a ''standard mortgage.''

The Board expressed concern that permitting the consumers to lose additional equity in their homes under the proposed refinancing provisions could undermine the financial stability of those consumers, thus contravening the purposes of TILA section 129C(a)(6)(E). The Board requested comment, however, on whether some *de minimis* amount of cash to the consumer should be permitted, either because this allowance would be operationally necessary to cover transaction costs or for other reasons, such as to reimburse a consumer for closing costs that were over-estimated but financed.

The Bureau received only one comment on this aspect of the proposal. An association of State bank regulators agreed that the rule should generally restrict the use of the proceeds of the standard mortgage to paying off the outstanding balance on the non-standard mortgage or to pay closing or settlement costs. However, they urged the Bureau to provide an exemption that would permit loan proceeds to be used to pay for known home repair needs and suggested that any such exemption require the consumer to provide verified estimates in advance in order to ensure that loan proceeds are used only for required home repairs.

The Bureau is adopting the limitation on the use of loan proceeds as proposed, renumbered as § 1026.43(d)(1)(ii)(E). The Bureau declines to permit the proceeds of a refinancing conducted in accordance with § 1026.43(d) to be used for home repair purposes, for several reasons. First, the Bureau believes that such an exemption would be inconsistent with the statutory purposes of TILA section 129C(a)(6)(E), which is intended to permit refinancings on the basis of less stringent underwriting in the narrow circumstances where a consumer's non-standard mortgage is about to recast and lead to a likely default by the consumer. The Bureau believes that permitting a consumer to utilize home equity for home repairs in connection with a refinancing conducted pursuant to § 1026.43(d) could further compromise the financial position of consumers who are already in a risky financial position. The Bureau believes that it would be more appropriate, where home repairs are needed, for a creditor to perform the underwriting required to advance any credit required in connection with those repairs. In addition, the Bureau believes that such an exemption could be subject to manipulation by fraudulent home contractors, by the creditor, and even by a consumer. It would be difficult, even with a requirement that the consumer provide verified estimates, to ensure that amounts being disbursed for home repairs actually are needed, and in fact used, for that purpose.

43(d)(1)(iii)

Proposed § 226.43(d)(2)(iii) would have defined the term ''refinancing'' to have the same meaning as in § 1026.20(a).[126] Section 1026.20(a) defines the term ''refinancing'' generally to mean a transaction in which an existing obligation is ''satisfied and replaced by a new obligation undertaken by the same consumer.'' Official commentary explains that ''[w]hether a refinancing has occurred is determined by reference to whether the original obligation has been satisfied or extinguished and replaced by a new obligation, based on the parties' contract and applicable law.'' *See* comment 20(a)–1. However, the following are not considered ''refinancings'' for purposes of § 1026.20(a): (1) A renewal of a payment obligation with no change in the original terms; and (2) a reduction in the annual percentage rate with a corresponding change in the payment schedule. *See* § 1026.20(a)(1) and (a)(2), and comment 20(a)–2.

The Board requested comment on whether the proposed meaning of ''refinancing'' should be expanded to include a broader range of transactions or otherwise should be defined differently or explained more fully than proposed. The Bureau received no comments on this proposed definition. Accordingly, the Bureau is adopting the definition of refinancing as proposed, renumbered as § 1026.43(d)(1)(iii).

43(d)(2) Scope

In the Board's proposal, § 226.43(d)(2) addressed the definitions for ''non-standard mortgage,'' ''standard mortgage,'' and ''refinancing,'' while proposed § 226.43(d)(1) established the scope of paragraph (d) and set forth the conditions under which the special refinancing provisions applied. The Bureau believes that paragraph (d) should begin with the relevant definitions, before proceeding to the scope and conditions of the special refinancing provisions. The rule finalized by the Bureau is accordingly reordered. The following discussion details the provisions adopted in § 1026.43(d)(2), which were proposed by the Board under § 226.43(d)(1).

Proposed § 226.43(d)(1) would have defined the scope of the refinancing provisions under proposed § 226.43(d). Specifically, proposed § 226.43(d) applied when a non-standard mortgage is refinanced into a standard mortgage and the following conditions are met—

• The creditor of the standard mortgage is the current holder of the existing non-standard mortgage or the servicer acting on behalf of the current holder.

• The monthly payment for the standard mortgage is significantly lower than the monthly payment for the non-standard mortgage, as calculated under proposed § 226.43(d)(5).

• The creditor receives the consumer's written application for the standard mortgage before the non-standard mortgage is ''recast.''

• The consumer has made no more than one payment more than 30 days late on the non-standard mortgage during the 24 months immediately preceding the creditor's receipt of the consumer's written application for the standard mortgage.

• The consumer has made no payments more than 30 days late during the six months immediately preceding the creditor's receipt of the consumer's written application for the standard mortgage.

Proposed comment 43(d)(1)–1 clarified that the requirements for a ''written application,'' a term that appears in § 226.43(d)(1)(iii), (d)(1)(iv) and (d)(1)(v), discussed in detail below, are found in comment 19(a)(1)(i)–3. Comment 19(a)(1)(i)–3 states that creditors may rely on the Real Estate Settlement Procedures Act (RESPA) and Regulation X (including any interpretations issued by HUD) in

[126] The Board's proposal originally referred to 226.20(a), which was subsequently renumbered as 12 CFR 1026.20(a).

deciding whether a ''written application'' has been received. This comment further states that, in general, Regulation X defines ''application'' to mean the submission of a borrower's financial information in anticipation of a credit decision relating to a federally related mortgage loan. *See* 12 CFR 1024.2(b). Comment 19(a)(1)(i)–3 clarifies that an application is received when it reaches the creditor in any of the ways applications are normally transmitted, such as by mail, hand delivery, or through an intermediary agent or broker. The comment further clarifies that, if an application reaches the creditor through an intermediary agent or broker, the application is received when it reaches the creditor, rather than when it reaches the agent or broker. Comment 19(a)(1)(i)–3 also cross-references comment 19(b)–3 for guidance in determining whether or not the transaction involves an intermediary agent or broker. The Bureau received no comments on this proposed comment, which is adopted as proposed, renumbered as 43(d)(2)–1.

43(d)(2)(i)

Proposed § 226.43(d)(1)(i) would have required that the creditor for the new mortgage loan also be either the current holder of the existing non-standard mortgage or the servicer acting on behalf of the current holder. This provision was intended to implement the requirement in TILA section 129C(a)(6)(E) that the existing loan must be refinanced by ''the creditor into a standard loan to be made by the same creditor.''

The Board interpreted the statutory phrase ''same creditor'' to mean that the creditor refinancing the loan must have an existing relationship with the consumer. The Board explained that the existing relationship is important because the creditor must be able to easily access the consumer's payment history and potentially other information about the consumer in lieu of documenting the consumer's income and assets. The Board also noted that this statutory provision is intended to ensure that the creditor of the refinancing has an interest in placing the consumer into a new loan that is affordable and beneficial. The proposal would have permitted the creditor of the refinanced loan to be the holder, or servicer acting on behalf of the holder, of the existing mortgage. The Board further explained that the existing servicer may be the entity conducting the refinance, particularly for refinances held by GSEs. By also permitting the creditor on the refinanced loan to be the servicer acting on behalf of the holder of the existing mortgage, the proposal was intended to apply to a loan that has been sold to a GSE, refinanced by the existing servicer, and continues to be held by the same GSE. The Board solicited comment on whether the proposed rule could be structured differently to better ensure that the creditor retains an interest in the performance of the new loan and whether additional guidance is needed.

Several commenters urged the Bureau to impose a specific period following a refinancing under § 226.43(d) during which the creditor must remain the current holder of the loan. Consumer group commenters suggested that to be eligible for the non-standard mortgage refinancing the creditor should be required to maintain full interest in the refinanced loan for a minimum of 12 months. These commenters expressed concern that the lack of such a retention requirement would permit creditors to refinance loans that are likely to fail without performing the robust underwriting that would otherwise be required for a new loan. If such loans were to be immediately sold to a third party, consumer groups indicated that it could invite abuse by creditors with an incentive to sell riskier loans without providing full value to the consumer. An association of State bank regulators urged the Bureau to adopt a two-year holding period during which the creditor must remain the current holder of the loan.

One industry commenter indicated that the Bureau should broaden the scope to permit a subservicer of the loan to be the creditor with respect to the standard loan. Another industry commenter stated that the scope should be expanded to allow a creditor to refinance a non-standard mortgage that it did not originate or is not servicing. This commenter indicated that due to the volume of requests for refinancing received by some creditors, consumers may benefit from more timely refinancing if a third-party creditor is eligible to use non-standard refinancing provisions.

The Bureau is adopting this requirement as proposed, renumbered as § 1026.43(d)(2)(i). As discussed in more detail below, as adopted § 1026.43(d) provides a broad exemption to all of the ability-to-repay requirements set forth in § 1026.43(c) when a non-standard mortgage is refinanced into a standard mortgage provided that certain conditions are met. Section 1026.43(d)(2)(i) is adopted pursuant to the Bureau's authority under section 105(a) of TILA. The Bureau finds that this adjustment is necessary to effectuate the purposes of TILA by ensuring that consumers are offered and receive residential mortgage loans on terms that reasonably reflect their ability to repay, while ensuring that consumers at risk of default due to payment shock are able to obtain responsible, affordable refinancing credit from the current holder of the consumer's mortgage loan, or the servicer acting on behalf of the current holder. To prevent unscrupulous creditors from using § 1026.43(d) to engage in loan-flipping, and to ensure that this exemption is available only in those cases where consumer benefit is the most likely, the Bureau believes that it is important that the creditor of the standard loan be the holder of, or the servicer acting on behalf of the holder of, the non-standard loan. In such cases, the Bureau agrees with the Board that the creditor has a better incentive to refinance the consumer into a more stable and affordable loan. Therefore, the Bureau declines to extend the scope of § 1026.43(d) to cover cases in which the creditor of the non-standard loan is not the current holder of the nonstandard loan or servicer acting on behalf of that holder.

The Bureau believes that the combination of this restriction and the other protections contained in § 1026.43(d) is sufficient to prevent unscrupulous creditors from engaging in loan-flipping. Therefore, the Bureau does not believe that it is necessary to impose a specified period during which the creditor of the standard mortgage must remain the holder of the loan. As discussed in the section-by-section analysis of § 1026.43(d)(2)(vi) below, the Bureau has conditioned use of § 1026.43(d), for non-standard loans consummated after the effective date of this final rule, on the non-standard loan having been made in accordance with the ability-to-repay requirements in § 1026.43(c), including consideration of the eight factors listed in § 1026.43(c)(2). The Bureau believes that this will help to ensure that creditors cannot use the refinancing provisions of § 1026.43(d) to systematically make and divest riskier mortgages, or to cure substandard underwriting on a non-standard mortgage by refinancing the consumer into a loan with a lower, but still unaffordable, payment. TILA section 130(k)(1) provides that consumers may assert as a defense to foreclosure by way of recoupment or setoff violations of TILA section 129C(a) (of which TILA section 129C(a)(6)(E) comprises a subpart). 15 U.S.C. 1640(k)(1). This defense to foreclosure applies against assignees of the loan in addition to the original creditor. Therefore, given that the non-standard loan having been originated in accordance with § 1026.43(c) is a condition for using the refinancing provision in § 1026.43(d), a consumer may assert violations of § 1026.43(c) on the original non-standard loan as a defense to foreclosure for the standard loan made under § 1026.43(d), even if that standard loan is subsequently sold by the creditor.

In addition to believing that imposition of a holding period is unnecessary, the Bureau has concerns that imposition of a holding period also could create adverse consequences for the safety and soundness of financial institutions. In some circumstances, a creditor may need for safety and soundness reasons to sell a portion of its portfolio, which may include a residential mortgage loan that was made in accordance with § 1026.43(d). However, such a creditor may not know at the time of the refinancing that it ultimately will need to sell the loan, and may even intend to remain the holder the loan for a longer period of time at the time of consummation. The Bureau has concerns about the burden imposed on issuers by a holding period in such circumstances where the creditor does not or cannot know at the time of the refinance under § 1026.43(d) that the loan will need to be sold within the next 12 months.

43(d)(2)(ii)

Proposed § 226.43(d)(1)(ii) would have required that the monthly payment on the new mortgage loan be ''materially lower'' than the monthly payment for the existing mortgage loan. This proposed provision would have implemented the requirement in TILA section 129C(a)(6)(E) that there be ''a reduction in monthly payment on the existing hybrid loan'' in order for the special provisions to apply to a refinancing. Proposed comment 43(d)(1)(ii)–1 provided that the monthly payment for the new loan must be ''materially lower'' than the monthly payment for an existing non-standard mortgage and clarifies that the payments that must be compared must be calculated according to proposed § 226.43(d)(5). The proposed comment also clarified that whether the new loan payment is ''materially lower'' than the non-standard mortgage payment depends on the facts and circumstances, but that, in all cases, a payment reduction of 10 percent or greater would meet the ''materially lower'' standard.

Consumer groups and an association of State bank regulators supported the adoption of a 10 percent safe harbor for the ''materially lower'' standard. In contrast, industry commenters opposed the requirement that payment on the standard mortgage be ''materially lower'' than the payment on the non-standard mortgage. These commenters urged the Bureau not to adopt the 10 percent safe harbor proposed by the Board and stated that the 10 percent safe harbor would become the de facto rule if adopted. These commenters expressed concerns that the ''materially lower'' standard would unduly restrict access to credit for many consumers and suggested that the Bureau instead adopt a standard that would permit more consumers to qualify for the non-standard refinancing provisions. Several commenters indicated that the Bureau should adopt a five percent safe harbor rather than the proposed ten percent. One industry commenter recommended that the Bureau permit reductions of a minimum dollar amount to satisfy the rule, particularly in cases where the monthly payment is already low. Finally, one industry commenter asked the Bureau to provide guidance regarding the meaning of ''materially lower'' when the reduction in payment is less than 10 percent.

The Bureau is adopting as proposed the requirement that the payment on the standard mortgage be ''materially lower'' than the non-standard mortgage and the safe harbor for a 10 percent or greater reduction, renumbered as § 1026.43(d)(2)(ii) and comment 43(d)(2)(ii)–1. The Bureau agrees with the Board that it would be inconsistent with the statutory purpose to permit the required reduction to be merely *de minimis.* In such cases, the consumer likely would not obtain a meaningful benefit that would help to prevent default. As discussed in the section-by-section analysis below, § 1026.43(d)(3) exempts refinancings from the ability-to-repay requirements in § 1026.43(c), provided that certain conditions are met. Given that § 1026.43(d) provides a broad exemption to the ability-to-repay requirements, the Bureau believes that it is important that the reduction in payment provide significant value to the consumer and increase the likelihood that the refinancing will improve the consumer's ability to repay the loan. Accordingly, the Bureau is adopting the 10 percent safe harbor as proposed. The Bureau declines to adopt a dollar amount safe harbor because the appropriate dollar amount would depend on a number of factors, including the amount of the loan and monthly payment, but notes that reductions of less than 10 percent could nonetheless meet the ''materially lower'' standard depending on the relevant facts and circumstances.

43(d)(2)(iii)

Proposed § 226.43(d)(1)(iii) would have required that the creditor for the refinancing receive the consumer's written application for the refinancing before the existing non-standard mortgage is ''recast.'' As discussed in the section-by-section analysis of § 1026.43(b)(11) above, the proposal defined the term ''recast'' to mean, for an adjustable-rate mortgage, the expiration of the period during which payments based on the introductory fixed rate are permitted; for an interest-only loan, the expiration of the period during which the interest-only payments are permitted; and, for a negative amortization loan, the expiration of the period during which negatively amortizing payments are permitted.

The Board explained that the proposal was intended to implement TILA section 129C(a)(6)(E)(ii), which permits creditors of certain refinances to ''consider if the extension of new credit would prevent a likely default should the original mortgage reset.'' This statutory language implies that the special refinancing provisions apply only where the original mortgage has not yet ''reset.'' Accordingly, the Board concluded that Congress's concern likely was prevention of default in the event of a ''reset,'' not loss mitigation on a mortgage for which a default on the ''reset'' payment has already occurred.

However, in recognition of the fact that a consumer may not realize that a loan will be recast until the recast occurs and that the consumer could not refinance the loan under proposed § 226.43(d), the Board also requested comment on whether it would be appropriate to use legal authority to make adjustments to TILA to permit refinancings after a loan is recast.

Consumer groups urged the Bureau to expand the scope of the non-standard refinancing provisions to apply to applications filed after the initial recast of a non-standard loan has occurred. These commenters stated that the intent of the proposal is to avoid ''likely default'' and indicated that for some consumers, notification that the consumer's interest rate has adjusted and their payment has increased may be their first notice that their payment has gone up and increased their likelihood of default. One consumer group commenter stated that these consumers may be better credit risks than those consumers whose loans have not yet recast and they would clearly benefit from a materially lower monthly payment.

Several industry commenters similarly urged the Bureau to modify the provisions to apply to applications for refinancings received after recast of the non-standard loan. One of these commenters stated that the timing of the application is irrelevant to the consumer's ability to repay or the consumer's need to refinance. One industry commenter stated that processing an application and assessing a consumer's ability to repay a new loan may require additional time well before the recast date. This commenter urged the Bureau to expand the scope of the non-standard refinancing provisions to include refinancings after a loan is recast that are in the best interests of consumers.

For the reasons discussed below, the Bureau is adopting § 1026.43(d)(2)(iii), which provides that § 1026.43(d) applies to the refinancing of a non-standard mortgage into a standard mortgage when the creditor receives the consumer's written application for the standard mortgage no later than two months after the non-standard mortgage has recast, provided certain other conditions are met. The Bureau believes that the best reading of TILA section 129C(a)(6)(E) is that it is intended to facilitate refinancings for consumers at risk of default due to the ''payment shock'' that may occur upon the recast of the consumer's loan to a higher rate or fully amortizing payments. The Bureau acknowledges that the statutory language contemplates that such recast has not yet occurred. However, the Bureau does not believe that Congress intended to provide relief for consumers facing imminent ''payment shock'' based on how promptly the consumer filed, or how quickly the creditor processed, an application for a refinancing. For example, the periodic rate on a mortgage loan may recast on July 1st, but the higher payment reflecting the recast interest rate would not be due until August 1st. In this example, a consumer may not experience payment shock until a month after the consumer's rate recasts. Additionally, it may take a significant amount of time for a consumer to provide the creditor with all of the information required by the creditor, thereby triggering the receipt of an application for purposes of the ability-to-repay requirements. The Bureau does not believe that Congress intended the special treatment afforded by TILA section 129C(a)(6)(E) to hinge on paperwork delays such as these. The Bureau agrees with the arguments raised by commenters and believes that the purposes of TILA are best effectuated by permitting consumers to submit applications for refinancings for a short period of time after recast occurs. The Bureau has determined that permitting a consumer to apply for a refinancing within two months of the date of recast strikes the appropriate balance between the language of the statute and the practical considerations involved with submitting an application for a refinancing in response to payment shock. Pursuant to its authority under TILA section 105(a), the Bureau finds that modifying § 1026.43(d) to apply to extensions of credit where the creditor receives the consumer's written application for the standard mortgage no later than two months after the non-standard mortgage has recast ensures that consumers are offered and receive residential mortgage loans on terms that reasonably reflect their ability to repay while ensuring that responsible, affordable mortgage credit remains available to consumers at risk of default due to higher payments resulting from the recast.

43(d)(2)(iv)

Proposed § 226.43(d)(1)(iv) would have required that, during the 24 months immediately preceding the creditor's receipt of the consumer's written application for the standard mortgage, the consumer has made no more than one payment on the non-standard mortgage more than 30 days late. Proposed comment 43(d)(1)(iv)–1 provided an illustrative example. Together with proposed § 226.43(d)(1)(v), proposed § 226.43(d)(1)(iv) would have implemented the portion of TILA section 129C(a)(6)(E) that requires that the consumer not have been ''delinquent on any payment on the existing hybrid loan.''

Although TILA section 129C(a)(6)(E) contains a statutory prohibition on ''any'' delinquencies on the existing non-standard (''hybrid'') mortgage, the Board interpreted its proposal as consistent with the statute in addition to being consistent with the consumer protection purpose of TILA and current industry practices. In addition, the Board noted its authority under TILA sections 105(a) and 129B(e)—which has since transferred to the Bureau—to adjust provisions of TILA and condition practices ''to assure that consumers are offered and receive residential mortgage loan on terms that reasonably reflect their ability to repay the loans and that are understandable and not unfair, deceptive, or abusive.'' 15 U.S.C. 1604(a); 15 U.S.C. 1639b(e); TILA section 129B(a)(2), 15 U.S.C. 1639b(a)(2).

The Board provided several reasons for proposing to require a look-back period for payment history of 24 months, rather than a 12-month period. First, the Board noted that consumers at risk of default when higher payments are required might present greater credit risks to the institutions holding their loans, even if the institutions refinance those loans. Second, the Board noted views expressed during outreach by GSE and creditor representatives that consumers with positive payment histories tend to be less likely than other consumers to become obligated on a new loan for which they cannot afford the monthly payments. The Board solicited comment on the proposal to require that the consumer have only one delinquency during the 24 months prior to applying for a refinancing, particularly on whether a longer or shorter look-back period should be required.

In addition, under the proposal, late payments of 30 days or fewer on the existing, non-standard mortgage would not disqualify a consumer from refinancing the non-standard mortgage under the streamlined refinance provisions of proposed § 226.43(d). The Board stated that allowing delinquencies of 30 or fewer days is consistent with the statutory prohibition on ''any'' delinquency for several reasons. First, the Board noted that delinquencies of this length may occur for many reasons outside of the consumer's control, such as mailing delays, miscommunication about where the payment should be sent, or payment crediting errors. Second, many creditors incorporate a late fee ''grace period'' into their payment arrangements, which permits consumers to make their monthly payments for a certain number of days after the contractual due date without incurring a late fee. Accordingly, the Board noted that the statute should not be read to prohibit consumers from obtaining needed refinances due to payments that are late but within a late fee grace period. Finally, the Board indicated that the predominant streamlined refinance programs of which it is aware uniformly measure whether a consumer has a positive payment history based on whether the consumer has made any payments late by 30 days (or, as in the proposal, more than 30 days).

Proposed comment 43(d)(1)(iv)–2 would have clarified that whether a payment is more than 30 days late depends on the contractual due date not accounting for any grace period and provided an illustrative example. The Board indicated that using the contractual due date for determining whether a payment has been made more than 30 days after the due date would facilitate compliance and enforcement by providing clarity. Whereas late fee ''grace periods'' are often not stated in writing, the contractual due date is unambiguous. Finally, the Board stated that using the contractual due date for determining whether a loan payment is made on time is consistent with standard home mortgage loan contracts. The Board requested comment on whether the delinquencies that creditors are required to consider under § 226.43(d)(1) should be late payments of more than 30 days as proposed, 30 days or more, or some other time period.

Consumer groups supported the Board's proposal to identify late payments as late payments of more than 30 days. However, they stated that the requirement that consumers not have more than one delinquency in the past 24 months to qualify for a refinance under § 1026.43(d) was overly stringent and that the appropriate standard would be no delinquencies in the past 12 months.

Several industry commenters similarly urged the Bureau to adopt a 12-month period rather than the proposed 24-month period in which a consumer may have one late payment. These commenters stated that permitting only one 30-day late payment in the past 24 months is too restrictive and would require a creditor to overlook a recent history of timely payments. In addition, one industry commenter stated that the standard for defining a late payment should be late payments of more than 60 days.

The Bureau is adopting this provision generally as proposed, renumbered as § 1026.43(d)(2)(iv), with one substantive change. The Bureau is adopting a 12-month look-back period rather than the 24-month period proposed by the Board. The Bureau believes that reviewing a consumer's payment history over the last 12 months would be more appropriate than a 24-month period, and agrees that a 24-month period may unduly restrict consumer access to the § 1026.43(d) refinancing provisions. The Bureau believes that the requirement that a consumer's account have no more than one 30-day late payment in the past 12 months will best effectuate the purposes of TILA by ensuring that only those consumers with positive payment histories are eligible for the non-standard refinancing provisions under § 1026.43(d). Section 1026.43(d)(2)(iv) is adopted pursuant to the Bureau's authority under section 105(a) of TILA. The Bureau finds that this adjustment is necessary and proper to effectuate the purposes of TILA by ensuring that consumers are offered and receive residential mortgage loans on terms that reasonably reflect their ability to repay, while ensuring that consumers at risk of default due to payment shock are able to obtain responsible, affordable refinancing credit.

The Bureau also is adopting comments 43(d)(1)(iv)–1 and 43(d)(1)(iv)–2 generally as proposed, with conforming amendments to reflect the 12-month look-back period in § 1026.43(d)(2)(iv), and renumbered as 43(d)(2)(iv)–1 and 43(d)(2)(iv)–2. The Bureau has made several technical amendments to the example in comment 43(d)(2)(iv)–1 for clarity. As proposed, the examples in the comment referred to dates prior to the effective date of this rule; the Bureau has updated the dates in the examples so that they will occur after this rule becomes effective.

43(d)(2)(v)

Proposed § 226.43(d)(1)(v) would have required that the consumer have made no payments on the non-standard mortgage more than 30 days late during the six months immediately preceding the creditor's receipt of the consumer's written application for the standard mortgage. This provision complemented proposed § 226.43(d)(1)(iv), discussed above, in implementing the portion of TILA section 129C(a)(6)(E) that requires that the consumer not have been ''delinquent on any payment on the existing hybrid loan.'' Taken together with proposed § 226.43(d)(1)(iv), the Board believed that this is a reasonable interpretation of the prohibition on ''any'' delinquencies on the non-standard mortgage and is supported by the Board's authority under TILA sections 105(a) and 129B(e)—which has transferred to the Bureau—to adjust provisions of TILA and condition practices ''to assure that consumers are offered and receive residential mortgage loans on terms that reasonably reflect their ability to repay the loans and that are understandable and not unfair, deceptive, or abusive.'' 15 U.S.C. 1604(a); TILA section 129B(a)(2), 15 U.S.C. 1639b(a)(2).

The Board stated that a six-month ''clean'' payment record indicates a reasonable level of financial stability on the part of the consumer applying for a refinancing. In addition, the Board noted that participants in its outreach indicated that a prohibition on delinquencies of more than 30 days for the six months prior to application for the refinancing was generally consistent with common industry practice and would not be unduly disruptive to existing streamlined refinance programs with well-performing loans.

Proposed comment 43(d)(1)(v)–1 provided an illustrative example of the proposed rule and clarified that if the number of months between consummation of the non-standard mortgage and the consumer's application for the standard mortgage is six or fewer, the consumer may not have made any payment more than 30 days late on the non-standard mortgage. The comment cross-referenced proposed comments 43(d)(1)–2 and 43(d)(1)(iv)–2 for an explanation of ''written application'' and how to determine the payment due date, respectively.

One industry commenter stated that the prohibition on late payments in the past six months should be amended to provide flexibility when the late payment was due to extenuating circumstances. The Bureau declines to adopt a rule providing an adjustment for extenuating circumstances, for several reasons. First, the existence or absence of extenuating circumstances is a fact-specific question and it would be difficult to distinguish by regulation between extenuating circumstances that reflect an ongoing risk with regard to the consumer's ability to repay the loan versus extenuating circumstances that present less risk. In addition, an adjustment for extenuating circumstances appears to be inconsistent with the purposes of TILA section 129C(a)(6)(E), which contemplates that the consumer ''has not been delinquent on any payment on the existing hybrid loan,'' without distinguishing between payments that are delinquent due to extenuating circumstances or otherwise. Furthermore, by defining a late payment as more than 30 days late, the Bureau believes that many extenuating circumstances, for example a payment made three weeks late due to mail delivery issues, will not preclude use of § 1026.43(d).

Accordingly, the Bureau is adopting this provision as proposed, renumbered as § 1026.43(d)(2)(v). Similarly, the Bureau is adopting comment 43(d)(1)(v)–1 generally as proposed, with several technical amendments for clarity and renumbered as 43(d)(2)(v)–1. As proposed, the examples in the comment referred to dates prior to the effective date of this rule; the Bureau has updated the dates in the examples so that they will occur after this rule becomes effective. Pursuant to its authority under TILA section 105(a), the Bureau finds that requiring that the consumer have made no payments on the non-standard mortgage more than 30 days late during the six months immediately preceding the creditor's receipt of the consumer's written application for the standard mortgage ensures that consumers are offered and receive residential mortgage loans on terms that reasonably reflect their ability to repay while ensuring that responsible, affordable mortgage credit remains available to consumers at risk of default due to higher payments resulting from the recast.

43(d)(2)(vi)

For the reasons discussed in the section-by-section analysis of § 1026.43(d)(3), the Bureau is adopting a new § 1026.43(d)(2)(vi) that generally conditions use of § 1026.43(d) on the existing non-standard mortgage having been made in accordance with § 1026.43(c), provided that the existing non-standard mortgage loan was consummated on or after January 10, 2014. For the reasons discussed in the section-by-section analysis of § 1026.43(d)(3), the Bureau believes that this provision is necessary and proper to prevent use of § 1026.43(d)'s streamlined refinance provision to circumvent or ''cure'' violations of the ability-to-repay requirements in § 1026.43(c). Section 1026.43(d)(2)(vi) is adopted pursuant to the Bureau's authority under TILA section 105(a). The Bureau finds that this adjustment is necessary to effectuate the purposes of TILA by ensuring that consumers are offered and receive residential mortgage loans on terms that reasonably reflect their ability to repay, while ensuring that consumers at risk of default due to payment shock are able to obtain responsible and affordable refinancing credit. Furthermore, the Bureau believes that this adjustment is necessary to prevent unscrupulous creditors from using § 1026.43(d) to engage in loan-flipping or other practices that are harmful to consumers, thereby circumventing the requirements of TILA.

43(d)(3) Exemption From Repayment Ability Requirements

Under specific conditions, proposed § 226.43(d)(3) would have exempted a creditor in a refinancing from two of the ability-to-repay requirements under proposed § 226.43(c). First, the proposal provided that a creditor is not required to comply with the income and asset verification requirements of proposed § 226.43(c)(2)(i) and (c)(4). Second, the proposal provided that the creditor is not required to comply with the payment calculation requirements of proposed § 226.43(c)(2)(iii) and (c)(5); the creditor may instead use payment calculations prescribed in proposed § 226.43(d)(5)(ii).

For these exemptions to apply, proposed § 226.43(d)(3)(i)(A) would have required that all of the conditions in proposed § 226.43(d)(1)(i) through (v) be met. In addition, proposed § 226.43(d)(3)(i)(B) would have required that the creditor consider whether the standard mortgage will prevent a likely default by the consumer on the non-standard mortgage when the non-standard mortgage is recast. This proposed provision implemented TILA section 129C(a)(6)(E)(ii), which permits a creditor to ''consider if the extension of new credit would prevent a likely default should the original mortgage reset and give such concerns a higher priority as an acceptable underwriting practice.'' As clarified in proposed comment 43(d)(3)(i)–1, the Board interpreted TILA section 129(a)(6)(E)(ii) to require a creditor to consider whether: (1) The consumer is likely to default on the existing mortgage once new, higher payments are required; and (2) the new mortgage will prevent the consumer's default. The Board solicited comment regarding whether these proposed provisions were appropriate, and also specifically solicited comment on whether exemptions from the ability-to-repay requirements, other than those proposed, were appropriate.

Several commenters expressly supported this proposed provision. An association of State bank supervisors stated that refinancing designed to put a consumer in a higher-quality standard mortgage before the existing lower-quality mortgage recasts should be given greater deference and further stated that it is sound policy to encourage refinancing where it protects both the economic interest of the creditor and the financial health of the consumer. Consumer groups commented that limited and careful exemption from income verification, provided that protections are in place, can help consumers and communities, while preventing reckless and abusive lending on the basis of little or no documentation. Civil rights organizations also stated that the streamlined refinance option would provide much-needed relief for consumers with loans that are not sustainable in the long term but who are not yet in default. These commenters also stated that minority consumers have been targeted in the past for unsustainable loans and that this provision could help to prevent further foreclosures and economic loss in minority communities, as well as for homeowners in general.

Other consumer group commenters stated that an exemption to the income verification requirement for refinancing into standard mortgages is problematic. One commenter stated that, because the refinance would be executed by the same creditor that made the original hybrid loan, income verification would not be difficult. This commenter urged the Bureau to encourage income documentation when implementing the Dodd-Frank Act.

Several industry commenters urged the Bureau to provide additional relief for refinancings made in accordance with proposed § 226.43(d), either by permitting the standard loan to be classified as a qualified mortgage or by providing exemptions from other of the proposed ability-to-repay requirements. One industry commenter stated that in addition to the proposed exemption for the verification of income and assets, refinancings conducted in accordance with § 226.43(d) also should be exempt from the requirements to consider the consumer's debt-to-income ratio or residual income, if the consumer is still employed and has not incurred significant additional debt obligations prior to the refinance. This commenter stated that overly rigid standards could significantly reduce the number of consumers who qualify for this exemption. Similarly, one industry trade association urged the Bureau to exempt refinancings from the requirement to consider the consumer's debt obligations, debt-to-income ratio, and employment. This commenter stated that the proposed requirement to consider these additional underwriting factors was seemingly in conflict with the purpose of proposed § 226.43(d) and would preclude consumers from taking advantage of beneficial and less costly refinancing opportunities. In addition, several industry commenters and one industry trade association commented that standard mortgages made in accordance with § 226.43(d) should be treated as qualified mortgages.

The Bureau agrees with the concerns raised by commenters that the proposed exemptions were drawn too narrowly. The Bureau believes that TILA section 129C(a)(6)(E) is intended to create incentives for creditors to refinance loans in circumstances where consumers have non-standard loans on which they are currently able to make payments but on which they are likely to be unable to make the payments after recast and therefore default on the loan. Accordingly, the Bureau believes that in order to create incentives for creditors to use the non-standard refinancing provision, TILA section 129C(a)(6)(E) must be intended to provide at least a limited exemption from the general ability-to-repay determination as adopted in § 1026.43(c). Otherwise, creditors may have little incentive to provide consumers at risk of default with refinancings that result in ''materially lower'' payments. The Bureau believes, however, that in implementing TILA section 129C(a)(6)(E) it is important to balance the creation of additional flexibility and incentives for creditors to refinance non-standard mortgages into standard mortgages against the likelihood of benefit to the consumer.

The Bureau notes that under the final rule as adopted, the availability of the non-standard refinancing provision contains several conditions that are intended to benefit the consumer. First, the special ability-to-repay requirements in § 1026.43(d) are available only if the conditions in § 1026.43(d)(2) are met. These conditions include limiting the scope of § 1026.43(d) to refinancings of non-standard mortgages into standard mortgages, which generally are more stable products with reduced risk of payment shock. The definition of standard mortgage in § 1026.43(d)(1)(ii) includes a number of limitations that are intended to ensure that creditors may only use the provisions in § 1026.43(d) to offer a consumer a product with safer features. For example, as discussed in the section-by-section analysis of § 1026.43(d)(1)(ii) a standard mortgage may not include negative amortization, an interest-only feature, or a balloon payment; in addition, the term of the standard mortgage may not exceed 40 years, the interest rate must be fixed for at least the first five years, the loan is subject to a limitation on the points and fees that may be charged, and there are limitations on the use of proceeds from the refinancing. Furthermore, § 1026.43(d)(2)(ii) requires that the monthly payment on the standard mortgage be materially lower than the monthly payment for the non-standard mortgage and, as discussed above, the Bureau is adopting a 10 percent safe harbor for what constitutes a ''material'' reduction.

The Bureau has concerns that, as proposed by the Board, an exemption only from the requirement to consider and verify the consumer's income or assets may create insufficient incentives for creditors to make refinancings to assist consumers at risk of default. For example, the proposal would have required creditors to comply with the requirement in § 1026.43(c)(2)(vii) to consider the consumer's debt-to-income ratio or residual income. Accordingly, notwithstanding an exemption from income or asset verification, the proposal would have required consideration of income, as well as consideration of all of the other underwriting criteria set forth in § 1026.43(c)(2).

The Bureau believes that in light of the safeguards imposed by other portions of § 1026.43(d), as discussed above, it is appropriate to provide an exemption to all of the ability-to-repay requirements under § 1026.43(c) for a refinance conducted in accordance with § 1026.43(d). The Bureau believes that a broad exemption from the general ability-to-repay determination is appropriate in order to create incentives for creditors to quickly and efficiently refinance consumers whose non-standard mortgages are about to recast, thus rendering them likely to default, into more affordable, more stable mortgage loans. The Bureau is aware that some consumers may nonetheless default on a standard mortgage made in accordance with § 1026.43(d), but those consumers likely would have defaulted had the non-standard mortgage remained in place. For others, the material reduction in payment required under § 1026.43(d)(2) and the more stable product type following refinancing may be sufficient to enable consumers to avoid default. The Bureau believes that a refinancing conducted in accordance with § 1026.43(d) will generally improve a consumer's chances of avoiding default. Section 1026.43(d)(3) is adopted pursuant to the Bureau's authority under TILA section 105(a). The Bureau finds that this adjustment is necessary to effectuate the purposes of TILA by ensuring that consumers are offered and receive residential mortgage loans on terms that reasonably reflect their ability to repay, while ensuring that consumers at risk of default due to payment shock are able to obtain responsible and affordable refinancing credit.

However, to prevent evasion or circumvention of the ability-to-repay requirements in § 1026.43(c), the Bureau is imposing one additional condition on the use of § 1026.43(d). Specifically, new § 1026.43(d)(2)(vi) conditions the use of § 1026.43(d), for non-standard mortgages consummated on or after the effective date of this rule, on the non-standard mortgage having been made in accordance with § 1026.43(c). The Bureau has concerns that absent § 1026.43(d)(2)(vi), a creditor might attempt to use a refinancing conducted in accordance with § 1026.43(d) to ''cure'' substandard underwriting of the prior non-standard mortgage. For example, without § 1026.43(d)(2)(vi), if a creditor discovered that it had made an error in consideration of the underwriting factors under § 1026.43(c)(2) for a non-standard mortgage, the creditor might consider conducting a refinancing under § 1026.43(d), in order to argue that the consumer may no longer raise as a defense to foreclosure the underwriting of the original non-standard mortgage. The Bureau believes that conditioning the use of § 1026.43(d) on the earlier loan having been made in accordance with § 1026.43(c) will better effectuate the purposes of TILA by ensuring that consumers are offered and receive residential mortgage loans on terms that reasonably reflect their ability to repay while preventing unscrupulous creditors from evading the ability-to-repay requirements.

New § 1026.43(d)(2)(vi) applies only to non-standard mortgages consummated on or after the effective date of this rule. For non-standard loans consummated before the effective date of this final rule, a refinancing under § 1026.43(d) would not be subject to this condition. The Bureau believes that non-standard mortgages made prior to the effective date, to which the ability-to-repay requirements in § 1026.43(c) did not apply, may present an increased risk of default when they are about to recast, so that facilitating refinancing into more stable mortgages may be particularly important even if the consumer could not qualify for a new loan under traditional ability-to-repay requirements. The Bureau believes that, on balance, given the conditions that apply to refinances under § 1026.43(d), refinances of these loans are more likely to benefit consumers than to harm consumers, notwithstanding the inapplicability of § 1026.43(d)(2)(vi). In addition, the concern about a creditor using § 1026.43(d) to ''cure'' prior violations of § 1026.43(c) does not apply to loans made before the effective date of this rule, as such loans were not required to be made in accordance with § 1026.43.

Proposed condition that the consumer will likely default. Proposed comment 43(d)(3)(i)–2 would have clarified that, in considering whether the consumer's default on the non-standard mortgage is ''likely,'' the creditor may look to widely accepted governmental and non-governmental standards for analyzing a consumer's likelihood of default. The proposal was not intended, however, to constrain servicers and other relevant parties from using other methods to determine a consumer's likelihood of default, including those tailored specifically to that servicer. As discussed in the supplementary information to the proposal, the Board considered certain government refinancing programs as well as feedback from outreach participants, each of which suggested that there may be legitimate differences in servicer assessments of a consumer's likelihood of default. The Board noted that it considered an ''imminent default'' standard but heard from consumer advocates that ''imminent default'' may be a standard that is too high for the refinancing provisions in TILA section 129C(a)(6)(E) and could prevent many consumers from obtaining a refinancing to avoid payment shock. Accordingly, the Board's proposal used the exact statutory wording—''likely default''—in implementing the provision permitting a creditor to prioritize prevention of default in underwriting a refinancing. The Board solicited comment on the proposal to use the term ''likely default'' in implementing TILA section 129C(a)(6)(E)(ii) and on whether additional guidance is needed on how to meet the requirement that a creditor must reasonably and in good faith determine that a standard mortgage will prevent a likely default should the non-standard mortgage be recast.

Two industry trade associations urged the Bureau to remove proposed § 226.43(d)(3)(i)(B) as a condition to the availability of the non-standard refinancing provisions. One of these commenters noted that a creditor would have to underwrite a consumer's income and assets to determine whether the consumer would likely default, which would defeat the purpose of the proposed provision. Several industry commenters also indicated that the ''likelihood of default'' standard is vague and accordingly subjects creditors to potential liability for waiving certain ability-to-repay requirements, and questioned the extent to which creditors would utilize the streamline refinance option in light of this potential liability. One such commenter urged the Bureau to eliminate this requirement or, in the alternative, to provide additional guidance regarding when a consumer is ''likely to go into default.''

An association of State bank supervisors stated that there can be no quantifiable standard for the definition of ''likely default.'' These commenters further stated that institutions must use sound judgment and regulators must provide responsible oversight to ensure that abuses are not occurring through the refinancing exemption set forth in § 1026.43(d).

The Bureau is adopting the provision as proposed, renumbered as § 1026.43(d)(3)(i)(B), and is also adopting comments 43(d)(3)(i)–1 and 43(d)(3)(i)–2 as proposed. The Bureau believes that eliminating the requirement that a creditor consider whether the extension of new credit would prevent a likely default would be inconsistent with TILA section 129C(a)(6)(E), which expressly includes language regarding consideration by the creditor of ''[whether] the extension of new credit would prevent a likely default should the original mortgage reset.'' At the same time, the Bureau agrees with the association of State bank supervisors that it would be difficult to impose by regulation a single standard for what constitutes a likely default. Accordingly, the Bureau is adopting the flexible approach proposed by the Board, which would permit but not require creditors to look to widely-accepted standards for analyzing a consumer's likelihood of default. The Bureau does not believe that this flexible approach requires a creditor to consider the consumer's income and assets if, for example, statistical evidence indicates that consumers who experience a payment shock of the type that the consumer is about to experience have a high incidence of defaulting following the payment shock.

Proposed payment calculation for repayment ability determination. Proposed comment 43(d)(3)(ii)–1 would have explained that, if the conditions in proposed § 226.43(d)(1) are met, the creditor may satisfy the payment calculation requirements for determining a consumer's ability to repay the new loan by applying the calculation prescribed under proposed § 226.43(d)(5)(ii), rather than the calculation prescribed under proposed § 226.43(c)(2)(iii) and (c)(5). As discussed in the section-by-section analysis above, as adopted § 1026.43(d)(3) provides an exemption from the requirements of § 1026.43(c) if certain conditions are met. Accordingly, while the creditor is required to determine whether there is a material reduction in payment consistent with § 1026.43(d)(2)(ii) by using the payment calculations prescribed in § 1026.43(d)(5), the creditor is not required to use these same payment calculations for purposes of § 1026.43(c). Accordingly, the Bureau is withdrawing proposed comment 43(d)(3)(ii)–1 as unnecessary.

43(d)(4) Offer of Rate Discounts and Other Favorable Terms

Proposed § 226.43(d)(4) would have provided that a creditor making a loan under the special refinancing provisions of § 226.43(d) may offer to the consumer the same or better rate discounts and other terms that the creditor offers to any new consumer, consistent with the creditor's documented underwriting practices and to the extent not prohibited by applicable State or Federal law. This aspect of the proposal was intended to implement TILA section 129C(a)(6)(E)(iii), which permits creditors of refinancings subject to special ability-to-repay requirements in TILA section 129C(a)(6)(E) to ''offer rate discounts and other favorable terms'' to the consumer ''that would be available to new customers with high credit ratings based on such underwriting practice.''

The Bureau received no comments on this provision, which is adopted as proposed and renumbered as § 1026.43(d)(4). The Bureau is concerned that the phrase ''consistent with the creditor's underwriting practice'' could be misinterpreted to refer to the underwriting requirements in § 1026.43(c). As this final rule provides an exemption under § 1026.43(d) for all of the requirements in § 1026.43(c), subject to the other conditions discussed above, the Bureau believes that additional clarification is needed to address this potential misinterpretation. Thus, the Bureau is adopting comment 43(d)(4)–1, which clarifies that in connection with a refinancing made pursuant to § 1026.43(d), § 1026.43(d)(4) requires a creditor offering a consumer rate discounts and terms that are the same as, or better than, the rate discounts and terms offered to new consumers to make such an offer consistent with the creditor's documented underwriting practices. Section 1026.43(d)(4) does not require a creditor making a refinancing pursuant to § 1026.43(d) to comply with the underwriting requirements of § 1026.43(c). Rather, § 1026.43(d)(4) requires creditors providing such discounts to do so consistent with documented policies related to loan pricing, loan term qualifications, or other similar underwriting practices. For example, assume that a creditor is providing a consumer with a refinancing made pursuant to § 1026.43(d) and that this creditor has a documented practice of offering rate discounts to consumers with credit scores above a certain threshold. Assume further that the consumer receiving the refinancing has a credit score below this threshold, and therefore would not normally qualify for the rate discount available to consumers with high credit scores. This creditor complies with § 1026.43(d)(4) by offering the consumer the discounted rate in connection with the refinancing made pursuant to § 1026.43(d), even if the consumer would not normally qualify for that discounted rate, provided that the offer of the discounted rate is not prohibited by applicable State or Federal law. However, § 1026.43(d)(4) does not require a creditor to offer a consumer such a discounted rate.

43(d)(5) Payment Calculations

Proposed § 226.43(d)(5) would have prescribed the payment calculations for determining whether the consumer's monthly payment for a standard mortgage will be ''materially lower'' than the monthly payment for the non-standard mortgage. Proposed § 226.43(d)(5) thus was intended to complement proposed § 226.43(d)(1)(ii) in implementing TILA section 129C(a)(6)(E), which requires a ''reduction'' in the monthly payment for the existing non-standard (''hybrid'') mortgage when refinanced into a standard mortgage.

43(d)(5)(i) Non-Standard mortgage

Proposed § 226.43(d)(5)(i) would have required that the monthly payment for a non-standard mortgage be based on substantially equal, monthly, fully amortizing payments of principal and interest that would result once the mortgage is recast. The Board stated that comparing the payment on the standard mortgage to the payment amount on which the consumer likely would have defaulted (*i.e.,* the payment resulting on the existing non-standard mortgage once the introductory terms cease and a higher payment results) would promote needed refinances consistent with Congress's intent.

The Board noted that the payment that the consumer is currently making on the existing non-standard mortgage may be an inappropriately low payment to compare to the standard mortgage payment. The existing payments may be interest-only or negatively amortizing; these temporarily lower payment amounts would be difficult for creditors to ''reduce'' with a refinanced loan that has a comparable term length and principal amount. Indeed, the payment on a new loan with a fixed-rate rate and fully-amortizing payment, as is required for the payment calculation of a standard mortgage under the proposal, for example, is likely to be higher than the interest-only or negative amortization payment. As a result, few refinancings would yield a lower monthly payment, so many consumers could not receive the benefits of refinancing into a more stable loan product.

Accordingly, the proposal would have required a creditor to calculate the monthly payment for a non-standard mortgage using—

- The fully indexed rate as of a reasonable period of time before or after the date on which the creditor receives the consumer's written application for the standard mortgage;
- The term of the loan remaining as of the date of the recast, assuming all scheduled payments have been made up to the recast date and the payment due on the recast date is made and credited as of that date; and
- A remaining loan amount that is—
  - For an adjustable-rate mortgage, the outstanding principal balance as of the date the mortgage is recast, assuming all scheduled payments have been made up to the recast date and the payment due on the recast date is made and credited as of that date;
  - For an interest-only loan, the loan amount, assuming all scheduled payments have been made up to the recast date and the payment due on the recast date is made and credited as of that date;
  - For a negative amortization loan, the maximum loan amount.

Proposed comment 43(d)(5)(i)–1 would have explained that, to determine whether the monthly periodic payment for a standard mortgage is materially lower than the monthly periodic payment for the non-standard mortgage under proposed § 226.43(d)(1)(ii), the creditor must consider the monthly payment for the non-standard mortgage that will result after the loan is recast, assuming substantially equal payments of principal and interest that amortize the remaining loan amount over the remaining term as of the date the mortgage is recast. The proposed comment noted that guidance regarding the meaning of ''substantially equal'' and ''recast'' is provided in comment 43(c)(5)(i)–4 and § 226.43(b)(11), respectively.

Proposed comment 43(d)(5)(i)–2 would have explained that the term ''fully indexed rate'' used for calculating the payment for a non-standard mortgage is generally defined in proposed § 226.43(b)(3) and associated commentary. The proposed comment explained an important difference between the ''fully indexed rate'' as defined in proposed § 226.43(b)(3), however, and the meaning of ''fully indexed rate'' in § 226.43(d)(5)(i). Specifically, under proposed § 226.43(b)(3), the fully indexed rate is calculated at the time of consummation. Under proposed § 226.43(d)(5)(i), the fully indexed rate would be calculated within a reasonable period of time before or after the date on which the creditor receives the consumer's written application for the standard mortgage. Comment 43(d)(5)(i)–2 clarified that 30 days would generally be considered a ''reasonable period of time.''

Proposed comment 43(d)(5)(i)–3 would have clarified that the term ''written application'' is explained in comment 19(a)(1)(i)–3. Comment 19(a)(1)(i)–3 states that creditors may rely on RESPA and Regulation X (including any interpretations issued by HUD) in deciding whether a ''written application'' has been received. In general, Regulation X defines ''application'' to mean the submission of a borrower's financial information in anticipation of a credit decision relating to a federally related mortgage loan. *See* 12 CFR 1024.2(b). As explained in comment 19(a)(1)(i)–3, an application is received when it reaches the creditor in any of the ways applications are normally transmitted, such as by mail, hand delivery, or through an intermediary agent or broker. If an application reaches the creditor through an intermediary agent or broker, the application is received when it reaches the creditor, rather than when it reaches the agent or broker. This proposed comment also cross-referenced comment 19(b)–3 for guidance in determining whether the transaction involves an intermediary agent or broker.

Proposed payment calculation for an adjustable-rate mortgage with an introductory fixed rate. Proposed comments 43(d)(5)(i)–4 and –5 would have clarified the payment calculation for an adjustable-rate mortgage with an introductory fixed rate under proposed § 226.43(d)(5)(i). Proposed comment 43(d)(5)(i)–4 clarified that the monthly periodic payment for an adjustable-rate mortgage with an introductory fixed interest rate for a period of one or more years must be calculated based on several assumptions. First, the payment must be based on the outstanding principal balance as of the date on which the mortgage is recast, assuming all scheduled payments have been made up to that date and the last payment due under those terms is made and credited on that date. Second, the payment calculation must be based on substantially equal monthly payments of principal and interest that will fully repay the outstanding principal balance over the term of the loan remaining as of the date the loan is recast. Third, the payment must be based on the fully indexed rate, as defined in § 226.43(b)(3), as of the date of the written application for the standard mortgage. The proposed comment set forth an illustrative example. Proposed comment 43(d)(5)(i)–5 would have provided a second illustrative example of the payment calculation for an adjustable-rate mortgage with an introductory fixed rate.

Proposed payment calculation for an interest-only loan. Proposed comments 43(d)(5)(i)–6 and –7 would have explained the payment calculation for an interest-only loan under proposed § 226.43(d)(5)(i). Proposed comment 43(d)(5)(i)–6 would have clarified that the monthly periodic payment for an interest-only loan must be calculated based on several assumptions. First, the payment must be based on the loan amount, as defined in § 226.43(b)(5), assuming all scheduled payments are made under the terms of the legal obligation in effect before the mortgage is recast. The comment provides an example of a mortgage with a 30-year loan term for which the first 24 months of payments are interest-only. The comment then explains that, if the 24th payment is due on September 1, 2013, the creditor must calculate the outstanding principal balance as of September 1, 2013, assuming that all 24 payments under the interest-only payment terms have been made and credited.

Second, the payment calculation must be based on substantially equal monthly payments of principal and interest that will fully repay the loan amount over the term of the loan remaining as of the date the loan is recast. Thus, in the example above, the creditor must assume a loan term of 28 years (336 payments). Third, the payment must be based on the fully indexed rate as of the date of the written application for the standard mortgage.

Proposed comment 43(d)(5)(i)–7 would have provided an illustration of the payment calculation for an interest-only loan. The example assumes a loan in an amount of $200,000 that has a 30-year loan term. The loan agreement provides for a fixed interest rate of 7 percent, and permits interest-only payments for the first two years, after which time amortizing payments of principal and interest are required. Second, the example states that the non-standard mortgage is consummated on February 15, 2011, and the first monthly payment is due on April 1, 2011. The loan is recast on the due date of the 24th monthly payment, which is March 1, 2013. Finally, the example assumes that on March 15, 2012, the creditor receives the consumer's written application for a refinancing, after the consumer has made 12 monthly on-time payments.

Proposed comment 43(d)(5)(i)–7 would have further explained that, to calculate the non-standard mortgage payment that must be compared to the standard mortgage payment, the creditor must use—

- The loan amount, which is the outstanding principal balance as of March 1, 2013, assuming all scheduled interest-only payments have been made and credited up to that date. In this example, the loan amount is $200,000.
- An interest rate of 7 percent, which is the interest rate in effect at the time of consummation of this fixed-rate non-standard mortgage.
- The remaining loan term as of March 1, 2013, the date of the recast, which is 28 years.

The comment concluded by stating that, based on the assumptions above, the monthly payment for the non-standard mortgage for purposes of determining whether the standard mortgage monthly payment is lower than the non-standard mortgage monthly payment is $1,359. This is the substantially equal, monthly payment of principal and interest required to repay the loan amount at the fully indexed rate over the remaining term.

Proposed payment calculation for a negative amortization loan. Proposed comments 43(d)(5)(i)–8 and –9 would have explained the payment calculation for a negative amortization loan under proposed § 226.43(d)(5)(i)(C). Proposed comment 43(d)(5)(i)–8 would have clarified that the monthly periodic payment for a negative amortization loan must be calculated based on several assumptions. First, the calculation must be based on the maximum loan amount. The comment further stated that examples of how to calculate the maximum loan amount are provided in proposed comment 43(b)(7)–3.

Second, the payment calculation must be based on substantially equal monthly payments of principal and interest that will fully repay the maximum loan amount over the term of the loan remaining as of the date the loan is recast. For example, the comment states, if the loan term is 30 years and the loan is recast on the due date of the 60th monthly payment, the creditor must assume a loan term of 25 years. Third, the payment must be based on the fully indexed rate as of the date of the written application for the standard mortgage.

Proposed comment 43(d)(5)(i)–9 would have provided an illustration of the payment calculation for a negative amortization loan. The example assumes a loan in an amount of $200,000 that has a 30-year loan term. The loan agreement provides that the consumer can make minimum monthly payments that cover only part of the interest accrued each month until the date on which the principal balance increases to the negative amortization cap of 115 percent of the loan amount, or for the first five years of monthly payments, whichever occurs first. The loan is an adjustable-rate mortgage that adjusts monthly according to a specified index plus a margin of 3.5 percent.

The example also assumed that the non-standard mortgage is consummated on February 15, 2011, and the first monthly payment is due on April 1, 2011. Further, the example assumes that, based on the calculation of the maximum loan amount required under § 226.43(b)(7) and associated commentary, the negative amortization cap of 115 percent is reached on July 1, 2013, the due date of the 28th monthly payment. Finally, the example assumes that on March 15, 2012, the creditor receives the consumer's written application for a refinancing, after the consumer has made 12 monthly on-time payments. On this date, the index value is 4.5 percent.

Proposed comment 43(d)(5)(i)–9 then stated that, to calculate the non-standard mortgage payment that must be compared to the standard mortgage payment under proposed § 226.43(d)(1)(ii), the creditor must use—

- The maximum loan amount of $229,243 as of July 1, 2013.
- The fully indexed rate of 8 percent, which is the index value of 4.5 percent as of March 15, 2012 (the date on which the creditor receives the application for a refinancing) plus the margin of 3.5 percent.
- The remaining loan term as of July 1, 2013, the date of the recast, which is 27 years and 8 months (332 monthly payments).

The comment concluded by stating that, based on the assumptions above, the monthly payment for the non-standard mortgage for purposes of determining whether the standard mortgage monthly payment is lower than the non-standard mortgage monthly payment is $1,717. This is the substantially equal, monthly payment of principal and interest required to repay the maximum loan amount at the fully indexed rate over the remaining term.

The Board requested comment on the proposed payment calculation for a non-standard mortgage and on the appropriateness and usefulness of the proposed payment calculation examples.

The Bureau received no specific comment on the payment calculations for non-standard mortgages set forth in proposed § 226.43(d)(5)(i) and its associated commentary. Accordingly, the provision that is being adopted is substantially similar to the version proposed, renumbered as § 1026.43(d)(5)(i). The Bureau also is adopting the associated commentary generally as proposed. The Bureau has made several technical amendments to the examples in comments 43(d)(5)(i)–4, –5, –6, –7, and –9 for clarity. As proposed, the examples in the comment referred to dates prior to the effective date of this rule; the Bureau has updated the dates in the examples so that they will occur after this rule becomes effective.

The Bureau believes that it is necessary to clarify the provisions related to payment calculations for interest-only loans and negative amortization loans. The provisions adopted clarify that the payment calculation required by § 1026.43(d)(5)(i) must be based on the outstanding principal balance, rather than the original amount of credit extended. Accordingly, as adopted § 1026.43(d)(5)(i)(C)(*2*) requires the remaining loan amount for an interest-only loan to be based on the outstanding principal balance as of the date of the recast, assuming all scheduled payments have been made up to the recast date and the payment due on the recast date is made and credited as of that date. Similarly, § 1026.43(d)(5)(i)(C)(*3*) requires the remaining loan amount for a negative amortization loan to be based on the maximum loan amount, determined after adjusting for the outstanding principal balance. The Bureau has made technical amendments to the example in comments 43(d)(5)(i)–6, –7, –8, and –9 to conform to this clarification.

Additionally, the Bureau has added new comment 43(d)(5)(i)–10 to add an additional illustration of the payment calculation for a negative amortization loan. As adopted, comment 43(d)(5)(i)–10 provides an illustrative example, clarifying that, pursuant to the example and assumptions included in the example, to calculate the non-standard mortgage payment on a negative amortization loan for which the consumer has made more than the minimum required payment that must be compared to the standard mortgage payment under § 1026.43(d)(1)(i), the creditor must use the maximum loan amount of $229,219 as of March 1, 2019, the fully indexed rate of 8 percent, which is the index value of 4.5 percent as of March 15, 2012 (the date on which the creditor receives the application for a refinancing) plus the margin of 3.5 percent, and the remaining loan term as of March 1, 2019, the date of the recast, which is 25 years (300 monthly payments). The comment further explains that, based on these assumptions, the monthly payment for the non-standard mortgage for purposes of determining whether the standard mortgage monthly payment is lower than the non-standard mortgage monthly payment is $1,769. This is the substantially equal, monthly payment of principal and interest required to repay the maximum loan amount at the fully indexed rate over the remaining term. The Bureau finds that comment 43(d)(5)(i)–10, which is adopted pursuant to the Bureau's authority under section 105(a) of TILA, is necessary to facilitate compliance with TILA.

43(d)(5)(ii) Standard Mortgage

Proposed § 226.43(d)(5)(ii) would have prescribed the required calculation for the monthly payment on a standard mortgage that must be compared to the monthly payment on a non-standard mortgage under proposed § 226.43(d)(1)(ii). The same payment calculation must also be used by creditors of refinances under proposed § 226.43(d) in determining whether the consumer has a reasonable ability to repay the standard mortgage, as would have been required under proposed § 226.43(c)(2)(ii).

Specifically, the monthly payment for a standard mortgage must be based on substantially equal, monthly, fully amortizing payments using the maximum interest rate that may apply to the standard mortgage within the first five years after consummation. Proposed comment 43(d)(5)(ii)–1 would have clarified that the meaning of ''fully amortizing payment'' is defined in § 226.43(b)(2), and that guidance regarding the meaning of ''substantially equal'' may be found in proposed comment 43(c)(5)(i)–4. Proposed comment 43(d)(5)(ii)–1 also explained that, for a mortgage with a single, fixed rate for the first five years, the maximum rate that will apply during the first five years after consummation will be the rate at consummation. For a step-rate mortgage, however, which is a type of fixed-rate mortgage, the rate that must be used is the highest rate that will apply during the first five years after consummation. For example, if the rate for the first two years is 4 percent, the rate for the second two years is 5 percent, and the rate for the next two years is 6 percent, the rate that must be used is 6 percent.

Proposed comment 43(d)(5)(ii)–2 would have provided an illustration of the payment calculation for a standard mortgage. The example assumes a loan in an amount of $200,000 with a 30-year loan term. The loan agreement provides for an interest rate of 6 percent that is fixed for an initial period of five years, after which time the interest rate will adjust annually based on a specified index plus a margin of 3 percent, subject to a 2 percent annual interest rate adjustment cap. The comment states that, based on the above assumptions, the creditor must determine whether the standard mortgage payment is materially lower than the non-standard mortgage payment based on a standard mortgage payment of $1,199. This is the substantially equal, monthly payment of principal and interest required to repay $200,000 over 30 years at an interest rate of 6 percent.

The Bureau received no specific comment on the payment calculations for standard mortgages set forth in proposed § 226.43(d)(5)(ii) and its associated commentary. Accordingly, this provisions is adopted as proposed, renumbered as § 1026.43(d)(5)(ii). The Bureau also is adopting the associated commentary generally as proposed, with several technical amendments for clarity.

43(e) Qualified Mortgages

Background

As discussed above, TILA section 129C(a)(1) prohibits a creditor from making a residential mortgage loan unless the creditor makes a reasonable and good faith determination, at or before consummation, based on verified and documented information, that at the time of consummation the consumer has a reasonable ability to repay the loan. TILA section 129C(a)(1) through (4) and (6) through (9) requires creditors specifically to consider and verify various factors relating to the consumer's income and other assets, debts and other obligations, and credit history. However, the ability-to-repay provisions do not directly restrict features, term, or costs of the loan.

TILA section 129C(b), in contrast, provides that loans that meet certain requirements shall be deemed ''qualified mortgages,'' which are entitled to a presumption of compliance with the ability-to-repay requirements. The section sets forth a number of qualified mortgage requirements which focus mainly on prohibiting certain risky features and practices (such as negative amortization and interest-only periods or underwriting a loan without verifying the consumer's income) and on generally limiting points and fees in excess of 3 percent of the total loan amount. The only underwriting provisions in the statutory definition of qualified mortgage are a requirement that ''income and financial resources relied upon to qualify the [borrowers] be verified and documented'' and a further requirement that underwriting be based upon a fully amortizing schedule using the maximum rate permitted during the first five years of the loan. TILA section 129C(b)(2)(A)(iii) through (v). However, TILA section 129C(b)(2)(A)(vi) authorizes the Bureau to adopt ''guidelines or regulations * * * relating to ratios of total monthly debt to monthly income or alternative measures of ability to pay * * * .'' And TILA section 129C(b)(3)(B)(i) further authorizes the Bureau to revise, add to, or subtract from the criteria that define a qualified mortgage upon a finding that the changes are necessary or proper to ensure that responsible, affordable mortgage credit remains available to consumers in a manner consistent with the purposes of TILA section 129C, necessary and appropriate to effectuate the purposes of TILA sections 129C and 129B, to prevent circumvention or evasion thereof, or to facilitate compliance with TILA sections 129C and 129B.[127]

The qualified mortgage requirements are critical to implementation of various parts of the Dodd-Frank Act. For example, several consumer protection requirements in title XIV of the Dodd-Frank Act treat qualified mortgages differently than non-qualified mortgages or key off elements of the qualified mortgage definition.[128] In addition, the requirements concerning retention of risk by parties involved in the securitization process under title IX of the Dodd-Frank Act provide special treatment for ''qualified residential mortgages,'' which under section 15G of the Securities Exchange Act of 1934, as amended by section 941(b) of the Dodd-Frank Act, ''shall be no broader than the term 'qualified mortgage,''' as defined by TILA section 129C(b) and the Bureau's implementing regulations. 15 U.S.C. 780–11(e)(4).[129]

For present purposes, however, the definition of a qualified mortgage is perhaps most significant because of its implications for ability-to-repay claims. TILA section 129C(b)(1) provides that ''[a]ny creditor with respect to any residential mortgage loan, and any assignee of such loan subject to liability under this title, may presume that the loan has met the [ability-to-repay] requirements of subsection (a), if the loan is a qualified mortgage.'' But the statute does not describe the strength of the presumption or what if anything could be used to rebut it. As discussed further below, there are legal and policy arguments that support interpreting the presumption as either rebuttable or conclusive.

Determining the definition and scope of protection afforded to qualified mortgages is the area of this rulemaking which has engendered perhaps the greatest interest and comment. Although TILA section 129C(a)(1) requires only that a creditor make a ''reasonable and good faith determination'' of the consumer's ''reasonable ability to repay'' a residential mortgage, considerable concern has arisen about the actual and perceived litigation and liability risk to creditors and assignees under the statute. Commenters tended to focus heavily on the choice between a presumption that is rebuttable and one that is conclusive as a means of mitigating that risk, although the criteria that define a qualified mortgage are also important because a creditor would have to prove status as a qualified mortgage in order to invoke any (rebuttable or conclusive) presumption of compliance.

In assessing the potential impacts of the statute, it is important to note that regulations issued after the mortgage crisis but prior to the enactment of the Dodd-Frank Act have already imposed ability-to-repay requirements for high-cost and higher-priced mortgages and created a presumption of compliance for such mortgages if the creditor satisfied certain underwriting and verification requirements. Specifically, under provisions of the Board's 2008 HOEPA Final Rule that took effect in October 2009, creditors are prohibited from extending high-cost or higher-priced mortgage loans without regard to the consumer's ability to repay. *See* § 1026.34(a)(4). The rules provide a presumption of compliance with those ability-to-repay requirements if the creditor follows certain optional procedures regarding underwriting the loan payment, assessing the debt-to-income (DTI) ratio or residual income, and limiting the features of the loan, in addition to following certain procedures mandated for all creditors. *See* § 1026.34(a)(4)(iii) and (iv) and comment 34(a)(4)(iii)–1. However, the 2008 HOEPA Final Rule makes clear that even if the creditor follows these criteria, the presumption of compliance is rebuttable. *See* comment 34(a)(4)(iii)–1. The consumer can still overcome that presumption by showing that, despite following the required and optional procedures, the creditor nonetheless disregarded the consumer's ability to repay the loan. For example, the consumer could present evidence that although the creditor assessed the consumer's debt-to-income ratio or residual income, the debt-to-income ratio was very high or the residual income was very low. This evidence may be sufficient to overcome the presumption of compliance and demonstrate that the creditor extended credit without regard to the consumer's ability to repay the loan.

The Dodd-Frank Act extends a requirement to assess consumers' ability to repay to the full mortgage market, and establishes a presumption using a different set of criteria that focus more on product features than underwriting practices. Further, the statute establishes similar but slightly different remedies than are available under the existing requirements. Section 1416 of the Dodd-Frank Act amended TILA section 130(a) to provide that a consumer who brings a timely action against a creditor for a violation the ability-to-repay requirements may be able to recover special statutory damages equal to the sum of all finance charges and fees paid by the consumer. The statute of limitations is three years from the date of the occurrence of the violation. Moreover, as amended by section 1413 of the Dodd-Frank Act, TILA section 130(k) provides that when a creditor, assignee, or other holder initiates a foreclosure action, a consumer may assert a violation of the ability-to-repay requirements as a matter of defense by recoupment or setoff. There is no time limit on the use of this defense, but the amount of recoupment or setoff is limited with respect to the special statutory damages to no more than three years of finance charges and fees. This limit on setoff is more restrictive than under the existing regulations, but also expressly applies to assignees.

[127] TILA section 129B contains requirements and restrictions relating to mortgage originators. TILA section 129B(b) requires a loan originator to be qualified and, when required, registered and licensed as a mortgage originator under the Secure and Fair Enforcement of Mortgage Licensing Act of 2008 (SAFE Act), and to include on all loan documents any unique identifier of the mortgage originator provided by the Nationwide Mortgage Licensing System and Registry. That section also requires the Bureau to prescribe regulations requiring depository institutions to establish and maintain procedures designed to ensure and monitor compliance of such institutions, including their subsidiaries and employees, with the SAFE Act. TILA section 129B(c) contains certain prohibitions on loan originator steering, including restrictions on various compensation practices, and requires the Bureau to prescribe regulations to prohibit certain specific steering activities.

[128] For example, as described in the section-by-section analysis of § 1026.43(g), TILA section 129C(c), added by section 1414(a) of the Dodd-Frank Act, provides that a residential mortgage loan that is not a ''qualified mortgage'' may not contain a prepayment penalty. In addition, section 1471 of the Dodd-Frank Act establishes a new TILA section 129H, which sets forth appraisal requirements applicable to higher-risk mortgages. The definition of ''higher-risk mortgage'' expressly excludes qualified mortgages.

[129] See part II.G for a discussion of the 2011 QRM Proposed Rule.

In light of the statutory ambiguities, complex policy considerations, and concerns about litigation risk, the Board's proposal mapped out two alternatives at the opposite ends of a spectrum for defining a qualified mortgage and the protection afforded to such mortgages. At one end, the Board's Alternative 1 would have defined qualified mortgage only to include the mandated statutory elements listed in TILA section 129C(b)(2), most of which, as noted above, relate to product features and not to the underwriting decision or process itself. This alternative would have provided creditors with a safe harbor to establish compliance with the general repayment ability requirement in proposed § 226.43(c)(1). As the Board recognized, this would provide strong incentives for creditors to make qualified mortgages in order to minimize litigation risk and compliance burden under general ability-to-repay requirements, but might prevent consumers from seeking redress for failure to assess their ability to repay. In Alternative 2, the Board proposed a definition of qualified mortgage which incorporated both the statutory product feature restrictions and additional underwriting elements drawn from the general ability-to-repay requirements, as well as seeking comment on whether to establish a specific debt-to-income requirement. Alternative 2 also specified that consumers could rebut the presumption of compliance by demonstrating that a creditor did not adequately determine the consumers' ability to repay the loan. As the Board recognized, this would better ensure that creditors fully evaluate consumers' ability to repay qualified mortgages and preserve consumers' rights to seek redress. However, the Board expressed concern that Alternative 2 would provide little incentive to make qualified mortgages in the first place, given that the requirements may be challenging to satisfy and the strength of protection afforded would be minimal.

Overview of Final Rule

As noted above and discussed in greater detail in the section-by-section analysis below, the Dodd-Frank Act accords the Bureau significant discretion in defining the scope of, and legal protections afforded to, a qualified mortgage. In developing the rules for qualified mortgages, the Bureau has carefully considered numerous factors, including the Board's proposal to implement TILA section 129C(b), comments and ex parte communications, current regulations and the current state of the mortgage market, and the implications of the qualified mortgage rule on other parts of the Dodd-Frank Act. The Bureau is acutely aware of the problematic practices that gave rise to the financial crisis and sees the ability-to-pay requirement as an important bulwark to prevent a recurrence of those practices by establishing a floor for safe underwriting. At the same time, the Bureau is equally aware of the anxiety in the mortgage market today concerning the continued slow pace of recovery and the confluence of multiple major regulatory and capital initiatives. Although every industry representative that has communicated with the Bureau acknowledges the importance of assessing a consumer's ability to repay before extending a mortgage to the consumer—and no creditor claims to do otherwise—there is nonetheless a widespread fear about the litigation risks associated with the Dodd-Frank Act ability-to-repay requirements. Even community banks, deeply ingrained within their local communities and committed to a relationship lending model, have expressed to the Bureau their fear of litigation. In crafting the rules to implement the qualified mortgage provision, the Bureau has sought to balance creating new protections for consumers and new responsibilities for creditors with preserving consumers' access to credit and allowing for appropriate lending and innovation.

The Bureau recognizes both the need for certainty in the short term and the risk that actions taken by the Bureau in order to provide such certainty could, over time, defeat the prophylactic aims of the statute or impede recovery in various parts of the market. For instance, in defining the criteria for a qualified mortgage, the Bureau is called upon to identify a class of mortgages which can be presumed to be affordable. The boundaries must be clearly drawn so that consumers, creditors, and secondary market investors can all proceed with reasonable assurance as to whether a particular loan constitutes a qualified mortgage. Yet the Bureau believes that it is not possible by rule to define every instance in which a mortgage is affordable, and the Bureau fears that an overly broad definition of qualified mortgage could stigmatize non-qualified mortgages or leave insufficient liquidity for such loans. If the definition of qualified mortgage is so broad as to deter creditors from making non-qualified mortgages altogether, the regulation would curtail access to responsible credit for consumers and turn the Bureau's definition of a qualified mortgage into a straitjacket setting the outer boundary of credit availability. The Bureau does not believe such a result would be consistent with congressional intent or in the best interests of consumers or the market.

The Bureau is thus attuned to the problems of the past, the pressures that exist today, and the ways in which the market might return in the future. As a result, the Bureau has worked to establish guideposts in the final rule to make sure that the market's return is healthy and sustainable for the long-term. Within that framework, the Bureau is defining qualified mortgages to strike a clear and calibrated balance as follows:

First, the final rule provides meaningful protections for consumers while providing clarity to creditors about what they must do if they seek to invoke the qualified mortgage presumption of compliance. Accordingly, the qualified mortgage criteria include not only the minimum elements required by the statute—including prohibitions on risky loan features, a cap on points and fees, and special underwriting rules for adjustable-rate mortgages—but additional underwriting features to ensure that creditors do in fact evaluate individual consumers' ability to repay the qualified mortgages. The qualified mortgage criteria thus incorporate key elements of the verification requirements under the ability-to-repay standard and strengthen the consumer protections established by the ability-to-repay requirements.

In particular, the final rule provides a bright-line threshold for the consumer's total debt-to-income ratio, so that under a qualified mortgage, the consumer's total monthly debt payments cannot exceed 43 percent of the consumer's total monthly income. The bright-line threshold for debt-to-income serves multiple purposes. First, it protects consumer interests because debt-to-income ratios are a common and important tool for evaluating consumers' ability to repay their loans over time, and the 43 percent threshold has been utilized by the Federal Housing Administration (FHA) for many years as its general boundary for defining affordability. Relative to other benchmarks that are used in the market (such as GSE guidelines) that have a benchmark of 36 percent, before consideration of compensating factors, this threshold is a relatively liberal one which allows ample room for consumers to qualify for an affordable mortgage. Second, it provides a well-established and well-understood rule that will provide certainty for creditors and help to minimize the potential for disputes and costly litigation over whether a mortgage is a qualified mortgage. Third, it allows room for a vibrant market for non-qualified mortgages over time. The Bureau recognizes that there will be many instances in which individual consumers can afford an even higher debt-to-income ratio based on their particular circumstances, although the Bureau believes that such loans are better evaluated on an individual basis under the ability-to-repay criteria rather than with a blanket presumption. The Bureau also believes that there are a sufficient number of potential borrowers who can afford a mortgage that would bring their debt-to-income ratio above 43 percent that responsible creditors will continue to make such loans as they become more comfortable with the new regulatory framework. To preserve access to credit during the transition period, the Bureau has also adopted temporary measures as discussed further below.

The second major feature of the final rule is the provision of carefully calibrated presumptions of compliance afforded to different types of qualified mortgages. Following the approach developed by the Board in the existing ability-to-repay rules to distinguish between prime and subprime loans, the final rule distinguishes between two types of qualified mortgages based on the mortgage's Annual Percentage Rate (APR) relative to the Average Prime Offer Rate (APOR).[130] For loans that exceed APOR by a specified amount—loans denominated as ''higher-priced mortgage loans''—the final rule provides a rebuttable presumption. In other words, the creditor is presumed to have satisfied the ability-to-repay requirements, but a consumer may rebut that presumption under carefully defined circumstances.[131] For all other loans, *i.e.,* loans that are not ''higher-priced,'' the final rule provides a conclusive presumption that the creditor has satisfied the ability-to-repay requirements once the creditor proves that it has in fact made a qualified mortgage. In other words, the final rule provides a safe harbor from ability-to-repay challenges for the least risky type of qualified mortgages, while providing room to rebut the presumption for qualified mortgages whose pricing is indicative of a higher level of risk.[132] The Bureau believes that this calibration will further encourage creditors to extend credit responsibly and provide certainty that promotes access to credit.

The Bureau believes that loans that fall within the rebuttable presumption category will be loans made to consumers who are more likely to be vulnerable [133] so that, even if the loans satisfy the criteria for a qualified mortgage, those consumers should be provided the opportunity to prove that, in an individual case, the creditor did not have a reasonable belief that the loan would be affordable for that consumer. Under a qualified mortgage with a safe harbor, most of the loans within this category will be the loans made to prime borrowers who pose fewer risks. Furthermore, considering the difference in historical performance levels between prime and subprime loans, the Bureau believes that it is reasonable to presume conclusively that a creditor who has verified a consumer's debt and income, determined in accordance with specified standards that the consumer has a debt-to-income ratio that does not exceed 43 percent, and made a prime mortgage with the product features required for a qualified mortgage has satisfied its obligation to assess the consumer's ability to repay. This approach will provide significant certainty to creditors operating in the prime market. The approach will also create lesser but still important protection for creditors in the subprime market who follow the qualified mortgage rules, while preserving consumer remedies and creating strong incentives for more responsible lending in the part of the market in which the most abuses occurred prior to the financial crisis.

Third, the final rule provides a temporary special rule for certain qualified mortgages to provide a transition period to help ensure that sustainable credit will return in all parts of the market over time. The temporary special rule expands the definition of a qualified mortgage to include any loan that is eligible to be purchased, guaranteed, or insured by various Federal agencies or by the GSEs while they are operating under conservatorship. This temporary provision preserves access to credit in today's market by permitting a loan that does not satisfy the 43 percent debt-to-income ratio threshold to nonetheless be a qualified mortgage based upon an underwriting determination made pursuant to guidelines created by the GSEs while in conservatorship or one of the Federal agencies. This temporary provision will sunset in a maximum of seven years. As with loans that satisfy the 43 percent debt-to-income ratio threshold, qualified mortgages under this temporary rule will receive either a rebuttable or conclusive presumption of compliance depending upon the pricing of the loan relative to APOR. The Bureau believes this provision will provide sufficient consumer protection while providing adequate time for creditors to adjust to the new requirements of the final rule as well as to changes in other regulatory, capital, and economic conditions.

A detailed description of the qualified mortgage definition is set forth below. Section 1026.43(e)(1) provides the presumption of compliance provided to qualified mortgages. Section 1026.43(e)(2) provides the criteria for a qualified mortgage under the general definition, including the restrictions on certain product features, verification requirements, and a specified debt-to-income ratio threshold. Section 1026.43(e)(3) provides the limits on points and fees for qualified mortgages, including the limits for smaller loan amounts. Section 1026.43(e)(4) provides the temporary special rule for qualified mortgages. Lastly, § 1026.43(f) implements a statutory exemption permitting certain balloon-payment loans by creditors operating predominantly in rural or underserved areas to be qualified mortgages.

43(e)(1) Safe Harbor and Presumption of Compliance

As discussed above, the Dodd-Frank Act provides a presumption of compliance with the ability-to-repay requirements for qualified mortgages, but the statute is not clear as to whether that presumption is intended to be conclusive so as to create a safe harbor that cuts off litigation or a rebuttable presumption of compliance with the ability-to-repay requirements. The title of section 1412 refers to both a ''safe

[130] APOR means ''the average prime offer rate for a comparable transaction as of the date on which the interest rate for the transaction is set, as published by the Bureau.'' TILA section 129C(b)(2)(B).

[131] As described further below, under a qualified mortgage with a rebuttable presumption, a consumer can rebut that presumption by showing that, in fact, at the time the loan was made the consumer did not have sufficient income or assets (other than the value of the dwelling that secures the transaction), after paying his or her mortgage and other debts, to be able to meet his or her other living expenses of which the creditor was aware.

[132] The threshold for determining which treatment applies generally matches the threshold for ''higher-priced mortgage loans'' under existing Regulation Z, except that the rule does not provide a separate, higher threshold for jumbo loans. The Dodd-Frank Act itself codified the same thresholds for other purposes. *See* Dodd-Frank Act section 1411, enacting TILA section 129C(6)(d)(ii). In adopting the ''higher-priced mortgage loans'' threshold in 2008, the Board explained that the aim was to ''cover the subprime market and generally exclude the prime market.'' 73 FR 44522, 44532 (July 30, 2008).

[133] *See generally, id.* at 44533.

harbor and rebuttable presumption,'' and as discussed below there are references to both safe harbors and presumptions in other provisions of the statute. As the Board's proposal discussed, an analysis of the statutory construction and policy implications demonstrates that there are sound reasons for adopting either interpretation. *See* 76 FR 27390, 27452–55 (May 11, 2011).

Several aspects of the statutory structure favor a safe harbor interpretation. First, TILA section 129C(b)(1) states that a creditor or assignee may presume that a loan has ''met the requirements of subsection (a), if the loan is a qualified mortgage.'' TILA section 129C(a) contains the general ability-to repay requirement, and also a set of specific underwriting criteria that must be considered by a creditor in assessing the consumer's repayment ability. Rather than stating that the presumption of compliance applies only to TILA section 129C(a)(1) for the general ability-to-repay requirements, it appears Congress intended creditors who make qualified mortgages to be presumed to comply with both the ability-to-repay requirements and all of the specific underwriting criteria. Second, TILA section 129C(b)(2) does not define a qualified mortgage as requiring compliance with all of the underwriting criteria of the general ability-to-repay standard. Therefore, unlike the approach found in the 2008 HOEPA Final Rule, it appears that meeting the criteria for a qualified mortgage is an alternative way of establishing compliance with all of the ability-to-repay requirements, which could suggest that meeting the qualified mortgage criteria conclusively satisfies these requirements. In other words, given that a qualified mortgage satisfies the ability-to-repay requirements, one could assume that meeting the qualified mortgage definition conclusively establishes compliance with those requirements.

In addition, TILA section 129C(b)(3)(B), which provides the Bureau authority to revise, add to, or subtract from the qualified mortgage criteria upon making certain findings, is titled ''Revision of Safe Harbor Criteria.'' Further, in section 1421 of the Dodd-Frank Act, Congress instructed the Government Accountability Office to issue a study on the effect ''on the mortgage market for mortgages that are not within the safe harbor provided in the amendments made by this subtitle.''

Certain policy considerations also favor a safe harbor. Treating a qualified mortgage as a safe harbor provides greater legal certainty for creditors and secondary market participants than a rebuttable presumption of compliance. Increased legal certainty may benefit consumers if as a result creditors are encouraged to make loans that satisfy the qualified mortgage criteria, as such loans cannot have certain risky features and have a cap on upfront costs. Furthermore, increased certainty may result in loans with a lower cost than would be charged in a world of legal uncertainty. Thus, a safe harbor may also allow creditors to provide consumers additional or more affordable access to credit by reducing their expected total litigation costs.

On the other hand, there are also several aspects of the statutory structure that favor interpreting qualified mortgage as creating a rebuttable presumption of compliance. With respect to statutory construction, TILA section 129C(b)(1) states that a creditor or assignee ''may presume'' that a loan has met the repayment ability requirement if the loan is a qualified mortgage. As the Board's proposal notes, this could suggest that originating a qualified mortgage provides a presumption of compliance with the repayment ability requirements, which the consumer can rebut with evidence that the creditor did not, in fact, make a good faith and reasonable determination of the consumer's ability to repay the loan. Similarly, in the smaller loans provisions in TILA section 129C(b)(2)(D), Congress instructed the Bureau to adjust the points and fees cap for qualified mortgages ''to permit lenders that extend smaller loans to meet the requirements of the presumption of compliance'' in TILA section 129C(b)(1).[134] As noted above, the 2008 HOEPA Final Rule also contains a rebuttable presumption of compliance with respect to the ability-to-repay requirements that currently apply to high-cost and higher-priced mortgages.

The legislative history of the Dodd-Frank Act may also favor interpreting ''qualified mortgage'' as a rebuttable presumption of compliance. As described in a joint comment letter from several consumer advocacy groups, a prior version of Dodd-Frank Act title XIV from 2007 contemplated a dual track for liability in litigation: a rebuttable presumption for creditors and a safe harbor for secondary market participants.[135] That draft legislation would have provided that creditors, assignees, and securitizers could presume compliance with the ability-to-repay provision if the loan met certain requirements.[136] However, the presumption of compliance would have been rebuttable only against the creditor, effectively creating a safe harbor for assignees and securitizers.[137] The caption ''safe harbor and rebuttable presumption'' appears to have originated from the 2007 version of the legislation. The 2009 version of the legislation did not contain this dual track approach.[138] Instead, the language simply stated that creditors, assignees, and securitizers ''may presume'' that qualified mortgages satisfied ability-to-repay requirements, without specifying the nature of the presumption.[139] The committee report of the 2009 bill described the provision as establishing a ''limited safe harbor'' for qualified mortgages, while also stating that ''the presumption can be rebutted.'' [140] This suggests that Congress contemplated that qualified mortgages would receive a rebuttable presumption of compliance with the ability-to-repay provisions, notwithstanding Congress's use of the term ''safe harbor'' in the heading of section 129C(b) and elsewhere in the statute and legislative history.

There are also policy reasons that favor interpreting ''qualified mortgage'' as a rebuttable presumption of compliance. The ultimate aim of the statutory provisions is to assure that, before making a mortgage loan, the creditor makes a determination of the consumer's ability to repay. No matter how many elements the Bureau might add to the definition of qualified mortgage, it still would not be possible to define a class of loans which ensured that every consumer within the class could necessarily afford a particular loan. In light of this, interpreting the statute to provide a safe harbor that precludes a consumer from challenging the creditor's determination of repayment ability seems to raise

[134] In prescribing such rules, the Bureau is to consider the potential impact of such rules on rural areas and other areas where home values are lower. This provision did not appear in earlier versions of title XIV of the Dodd-Frank Act, so there is no legislative history to explain the use of the word ''presumption'' in this context.

[135] *See* Mortgage Reform and Anti-Predatory Lending Act of 2007, H.R. 3915, 110th Cong. (2007).

[136] *See* H.R. 3915 § 203. Specifically, that prior version of title XIV would have created two types of qualified mortgages: (1) a ''qualified mortgage,'' which included loans with prime interest rates or government insured VA or FHA loans, and (2) a ''qualified safe harbor mortgage,'' which met underwriting standards and loan term restrictions similar to the definition of qualified mortgage eventually codified at TILA section 129C(b)(2).

[137] *Id.*

[138] *See* Mortgage Reform and Anti-Predatory Lending Act of 2009, H.R. 1728.

[139] *See* H.R. 1728 § 203.

[140] Mortgage Reform and Anti-Predatory Lending Act of 2009, H. Rept. No. 94, 111th Cong., at 48 (2009).

tensions with the requirement to determine repayment ability. In contrast, interpreting a qualified mortgage as providing a rebuttable presumption of compliance would better ensure that creditors consider each consumer's ability to repay the loan rather than only satisfying the qualified mortgage criteria.

The Board's Proposal

As described above, in light of the statutory ambiguity and competing policy considerations, the Board proposed two alternative definitions for a qualified mortgage, which generally represent two ends of the spectrum of possible definitions. Alternative 1 would have applied only the specific requirements listed for qualified mortgages in TILA section 129C(b)(2), and would have provided creditors with a safe harbor to establish compliance with the general repayment ability requirement in proposed § 226.43(c)(1). Alternative 2 would have required a qualified mortgage to satisfy the specific requirements listed in the TILA section 129C(b)(2), as well as additional requirements taken from the general ability-to-repay standard in proposed § 226.43(c)(2) through (7). Alternative 2 would have provided a rebuttable presumption of compliance with the ability-to-repay requirements. Although the Board specifically proposed two alternative qualified mortgage definitions, it also sought comment on other approaches by soliciting comment on other alternative definitions. The Board also specifically solicited comment on what criteria should be included in the definition of a qualified mortgage to ensure that the definition provides an incentive to creditors to make qualified mortgages, while also ensuring that consumers have the ability to repay those loans. In particular, the Board sought comment on whether the qualified mortgage definition should require consideration of a consumer's debt-to-income ratio or residual income, including whether and how to include a quantitative standard for the debt-to-income ratio or residual income for the qualified mortgage definition.

Comments

Generally, numerous industry and other commenters, including some members of Congress, supported a legal safe harbor while consumer groups and other commenters, including an association of State bank regulators, supported a rebuttable presumption. However, as described below, commenters did not necessarily support the two alternative proposals specifically as drafted by the Board. For instance, a significant number of industry commenters advocated incorporating the general ability-to-repay requirements into the qualified mortgage definition, while providing a safe harbor for those loans that met the enhanced standards. And a coalition of industry and consumer advocates presented a proposal to the Bureau that would have provided a tiered approach to defining a qualified mortgage. Under the first tier, if the consumer's back-end debt-to-income (total debt-to-income) ratio is 43 percent or less, the loan would be a qualified mortgage, and no other tests would be required. Under the second tier, if the consumer's total debt-to-income ratio is more than 43 percent, the creditor would apply a series of tests related to the consumer's front-end debt-to-income ratio (housing debt-to-income), stability of income and past payment history, availability of reserves, and residual income to determine if a loan is a qualified mortgage.

Comments in favor of safe harbor. Industry commenters strongly supported a legal safe harbor from liability for qualified mortgages. These commenters believe that a broad safe harbor with clear, bright lines would provide certainty and clarity for creditors and assignees. Generally, industry commenters argued that a safe harbor is needed in order: (i) To ensure creditors make loans, (ii) to ensure the availability of and access to affordable credit without increasing the costs of borrowing; (iii) to promote certainty and saleability in the secondary market, and (iv) to contain litigation risk and costs for creditors and assignees.

Generally, although acknowledging ambiguities in the statutory language, industry commenters argued that the statute's intent and legislative history indicate that qualified mortgages are meant to be a legal safe harbor, in lieu of the ability-to-repay standards. Industry commenters argued that a safe harbor would best ensure safe, well-documented, and properly underwritten loans without limiting the availability of credit or increasing the costs of credit to consumers. Many industry commenters asserted that a legal safe harbor from liability would ensure access to affordable credit. Other industry commenters argued that a safe harbor ultimately benefits consumers with increased access to credit, reduced loan fees and interest rates, and less-risky loan features. In contrast, various industry commenters contended that a rebuttable presumption would not provide enough certainty for creditors and the secondary market. Commenters argued that if creditors cannot easily ascertain whether a loan satisfies the ability-to-repay requirements, creditors will either not make loans or will pass the cost of uncertain legal risk to consumers, which in turn would increase the cost of borrowing.

Numerous industry commenters argued for a legal safe harbor because of the liabilities of an ability-to-repay violation and the costs associated with ability-to-repay litigation. Generally, commenters argued that a rebuttable presumption for qualified mortgages would invite more extensive litigation than necessary that will result in greater costs being borne by all consumers. Commenters emphasized the relatively severe penalties for ability-to-repay violations under the Dodd-Frank Act, including enhanced damages, an extended three-year statute of limitations, a recoupment or set-off provision as a defense to foreclosure, and new enforcement authorities by State attorneys general. In addition, assignee liabilities are amplified because of the recoupment and set-off provision in TILA section 130(k). Commenters asserted that the increased costs associated with litigation could make compliance too costly for smaller creditors, which would reduce competition and credit availability from the market. In particular, community bank trade association commenters argued that the Bureau should adopt a safe harbor for qualified mortgage loans and include bright-line requirements to protect community banks from litigation and ease the compliance burden. Ultimately, community bank trade association commenters stated that few, if any, banks would risk providing a mortgage that only has a rebuttable presumption attached.

Industry commenters generally believed that a rebuttable presumption would increase the incidence of litigation because any consumer who defaults on a loan would be likely to sue for recoupment in foreclosure. Commenters were also concerned about frivolous challenges in court as well as heightened scrutiny by regulators. In particular, a credit union association commenter supported a safe harbor because of concerns that a rebuttable presumption would cause credit unions to be faced with significant amounts of frivolous foreclosure defense litigation in the future. In addition to increased incidence of litigation, industry commenters and other interested parties argued that the estimated costs of litigation under a rebuttable presumption would be overly burdensome for creditors and assignees. Some commenters and interested parties presented estimates of the litigation costs associated with claims alleging a violation of the ability-to-repay requirements. For example, one industry trade association commenter estimated that the attorney's fees for a claim involving a qualified mortgage under a safe harbor would cost $30,000, compared to $50,000 for a claim under a rebuttable presumption. That commenter provided a separate estimation from a law firm that the attorneys' fees to the creditor will be approximately $26,000 in cases where the matter is disposed of on a motion to dismiss, whereas the fees for the cost of a full trial could reach $155,000. That commenter asserted that safe harbor claims are more likely to be dismissed on a motion to dismiss than the rebuttable presumption.

An industry commenter and other interested parties argued that the estimated costs to creditors associated with litigation and penalties for an ability-to-repay violation could be substantial and provided illustrations of costs under the proposal, noting potential cost estimates of the possible statutory damages and attorney's fees. For example, the total estimated costs and damages ranged between approximately $70,000 and $110,000 depending on various assumptions, such as the interest rate on a loan or whether the presumption of compliance is conclusive or rebuttable.

Industry commenters also generally argued that a safe harbor would promote access to credit because creditors would be more willing to extend credit where they receive protections under the statutory scheme. One industry trade association commenter cited the 2008 HOEPA Final Rule, which provided a rebuttable presumption of compliance with the requirement to consider a consumer's repayment ability upon meeting certain criteria, as causing a significant drop in higher-priced mortgage loan originations, and suggested that access to general mortgage credit would be similarly restricted if the final rule adopts a rebuttable presumption for the market as a whole. A large bank commenter similarly noted the lack of lending in the higher-priced mortgage space since the 2008 HOEPA Final Rule took effect.

In addition to the liquidity constraints for non-qualified mortgages, commenters argued that the liability and damages from a potential ability-to-repay TILA violation would be a disincentive for a majority of creditors to make non-qualified mortgage loans. Further, some commenters suggested that creditors could face reputational risk from making non-qualified mortgage loans because consumers would view them as ''inferior'' to qualified mortgages. Other commenters argued that reducing the protections afforded to qualified mortgages could cause creditors to act more conservatively and restrict credit or result in the denial of credit at a higher rate and increase the cost of credit. Many commenters argued that the most serious effects and impacts on the availability and cost of credit would be for minority, low- to moderate-income, and first-time borrowers. Therefore, industry commenters believed that a bright-line safe harbor would provide the strongest incentive for creditors to provide sustainable mortgage credit to the widest array of qualified consumers. Furthermore, one industry trade association commenter argued that not providing strong incentives for creditors would diminish the possibility of recovery of the housing market and the nation's economy.

Industry commenters also expressed concerns regarding secondary market considerations and assignee liability. Commenters urged the Bureau to consider commercial litigation costs associated with the contractually required repurchase (''put-back'') of loans sold on the secondary market where there is litigation over those loans, as well as the risk of extended foreclosure timelines because of ongoing ability-to-repay litigation. Industry commenters asserted that a safe harbor is critical to promote saleability of loans in the secondary market. In particular, they stated that clarity and certainty provided by a safe harbor would promote efficiencies in the secondary market because investors in securitized residential mortgage loans (mortgage backed securities, or MBS) could be more certain that they are not purchasing compliance risk along with their investments. Commenters asserted that without a safe harbor, the resulting uncertainty would eliminate the efficiencies provided by secondary sale or securitization of loans. By extension, commenters claimed that the cost of borrowing for consumers would ultimately increase. Large bank commenters stated that although they might originate non-qualified mortgage loans, the number would be relatively small and held in portfolio because they believe it is unlikely that non-qualified mortgage loans will be saleable in the secondary market. Generally, industry commenters asserted that creditors, regardless of size, would be unwilling to risk exposure outside the qualified mortgage space. One large bank commenter stated that the 2008 HOEPA Final Rule did not create a defense to foreclosure against assignees for the life of the loan, as does the Dodd-Frank Act's ability-to-repay provisions. Accordingly, industry commenters strongly supported broad coverage of qualified mortgages, as noted above.

Commenters asserted that the secondary market will demand a ''safe harbor'' for quality assurance and risk avoidance. If the regulatory framework does not provide a safe harbor, commenters asserted that investors would require creditors to agree to additional, strict representations and warranties when assigning loans. Contracts between loan originators and secondary market purchasers often require originators to repurchase loans should a loan perform poorly, and these commenters expect that future contracts will include provisions related to the ability-to-repay rule. Commenters assert that the risks and costs associated with additional potential put-backs to the creditor would increase liability and risk to creditors, which would ultimately increase the cost of credit to consumers. Furthermore, commenters contended that if the rule is too onerous in its application to the secondary market, then the secondary market participants may purchase fewer loans or increase pricing to account for the additional risk, such as is now the case for high-cost mortgages.

Commenters noted that the risks associated with assignee liability are heightened by any vagueness in standards in the rule. One secondary market purchaser commenter argued that a rebuttable presumption would present challenges because purchasers (or assignees) are not part of the origination process. It is not feasible for purchasers to evaluate all of the considerations that went into an underwriting decision, so they must rely on the creditor's representations that the loan was originated in compliance with applicable laws and the purchaser's requirements. However, assignees may have to defend a creditor's underwriting decision at any time during the life of the loan because there is no statute of limitations on raising the failure to make an ability-to-repay determination as a defense to foreclosure. The commenters argued that defending these cases would be difficult and costly, and that such burdens would be reduced by safe harbor protections.

Comments in favor of rebuttable presumption of compliance. Consumer group commenters generally urged the Bureau to adopt a rebuttable presumption for qualified mortgages. Commenters argued that Congress intended a rebuttable presumption, not a safe harbor. In particular, commenters contended that the Dodd-Frank Act's legislative history and statutory text strongly support a rebuttable presumption. Commenters noted that the statute is designed to strike a fair balance between market incentives and market discipline, as well as a balance between consumers' legal rights and excessive exposure to litigation risk for creditors. Commenters asserted that the purpose of the qualified mortgage designation is to foster sustainable lending products and practices built upon sound product design and sensible underwriting. To that end, a rebuttable presumption would accomplish the goal of encouraging creditors to originate loans that meet the qualified mortgage definition while assuring consumers of significantly greater protection from abusive or ineffective underwriting than if a safe harbor were adopted. Consumer group commenters contended that qualified mortgages can earn and deserve the trust of both consumers and investors only if they carry the assurance that they are soundly designed and properly underwritten. Many consumer group commenters asserted that a rebuttable presumption would provide better protections for consumers as well as improving safeguards against widespread risky lending while helping ensure that there would be no shortcuts on common sense underwriting. They argued that a legal safe harbor could invite abusive lending because consumers will have no legal recourse. Several commenters also asserted that no qualified mortgage definition could cover all contingencies in which such abuses could occur.

Some commenters argued that a legal safe harbor would leave consumers unprotected against abuses, such as those associated with simultaneous liens or from inadequate consideration of employment and income. An association of State bank regulators favored a rebuttable presumption because, although a rebuttable presumption provides less legal protection than a safe harbor, a rebuttable presumption encourages institutions to consider repayment factors that are part of a sound underwriting process. That commenter contended that a creditor should not be granted blanket protection from a foreclosure defense of an ability-to-repay violation if the creditor failed to consider and verify such crucial information as a consumer's employment status and credit history, for example. On this point, the rebuttable presumption proposed by the Board would require creditors to make individualized determinations that the consumer has the ability to repay the loan based on all of the underwriting factors listed in the general ability-to-repay standard.

Consumer group commenters observed that a rebuttable presumption would better ensure that creditors actually consider a consumer's ability to repay the loan. Consumer group commenters also asserted that the goals of safe, sound, sustainable mortgage lending and a balanced system of accountability are best served by a rebuttable presumption because consumers should be able to put evidence before a court that the creditor's consideration and verification of the consumer's ability to repay the loan was unreasonable or in bad faith. To that end, a rebuttable presumption would allow the consumer to assert that, despite complying with the criteria for a qualified mortgage and the ability-to-repay standard, the creditor did not make a reasonable and good faith determination of the consumer's ability to repay the loan. Without this accountability, commenters argued that the Dodd-Frank Act's effectiveness would be undermined.

Ultimately, consumer group commenters believed that a rebuttable presumption would not exacerbate current issues with credit access and availability, but would instead allow room for honest, efficient competition and affordable credit. Consumer group commenters generally contended that the fear of litigation and estimated costs and risks associated with ability-to-repay violations are overstated and based on misunderstanding of the extent of exposure to TILA liability. Consumer group commenters and some ex parte communications asserted that the potential incidence of litigation is relatively small, and therefore liability cost and risk are minimal for any given mortgage creditor. For example, consumer group commenters asserted that there are significant practical limitations to consumers bringing an ability-to-repay claim, suggesting that few distressed homeowners would be able to obtain legal representation often necessary to mount a successful rebuttal in litigation. Consumer groups provided percentages of borrowers in foreclosure who are represented by lawyers, noting the difficulty of bringing a TILA violation claim, and addressed estimates of litigation costs, such as attorneys' fees. Consumer groups provided estimates of the number of cases in foreclosure and the percentage of cases that involve TILA claims, such as a claim of rescission.

Furthermore, consumer group commenters argued that the three-year cap on enhanced damages (equal to the sum if all finance charges and fees paid by the consumer within three years of consummation) for violation of the ability-to-repay requirements limits litigation risk significantly. Commenters contended that, as a general rule, a court is more likely to find that the ability-to-repay determination at consummation was not reasonable and in good faith the earlier in the process a default occurs, and at that point the amount of interest paid by a consumer (a component of enhanced damages) will be relatively small. Commenters argued that the longer it takes a consumer to default, the harder the burden it will be for the consumer to show that the default was reasonably predictable at consummation and was caused by improper underwriting rather than a subsequent income or expense shock; moreover, even if the consumer can surmount that burden, the amount of damages is still capped at three years' worth of paid interest. In addition, consumer group commenters contended that the penalties to which creditors could be subject on a finding of failure to meet the ability-to-repay requirements would not be so injurious or even so likely to be applied in all but the most egregious situations as to impose any meaningful risk upon creditors.

Moreover, many consumer group commenters observed that creditors that comply with the rules and ensure that their loan originators are using sound, well documented and verified underwriting will be adequately protected by a rebuttable presumption.

Final Rule

As described above, the presumption afforded to qualified mortgages in the final rule balances consumers' ability to invoke the protections of the Dodd-Frank Act scheme with the need to create sufficient certainty to promote access to credit in all parts of the market. Specifically, the final rule provides a safe harbor with the ability-to-repay requirements for loans that meet the qualified mortgage criteria and pose the least risk, while providing a rebuttable presumption for ''higher-priced'' mortgage loans, defined as having an APR that exceeds APOR by 1.5 percentage points for first liens and 3.5 percentage points for second liens.[141] The final rule also specifically defines the grounds on which the presumption accorded to more expensive qualified mortgages can be rebutted. In issuing this final rule, the

[141] For the reasons discussed above in the section-by-section analysis of § 1026.43(b)(4), the Bureau does not adopt a separate threshold for jumbo loans in the higher-priced covered transaction definition for purposes of § 1026.43(e)(1).

Bureau has drawn on the experiences from the current ability-to-repay provisions that apply to higher-priced mortgages, described above. Based on the difference in historical performance levels between prime and subprime loans, the Bureau believes that this approach will provide significant certainty to creditors while preserving consumer remedies and creating strong incentives for more responsible lending in the part of the market in which the most abuses occurred prior to the financial crisis.

In issuing this final rule, the Bureau carefully considered the comments received and the interpretive and policy considerations for providing qualified mortgages either a safe harbor or rebuttable presumption of compliance with the repayment ability requirements. For the reasons set forth by the Board and discussed above, the Bureau finds that the statutory language is ambiguous and does not mandate a particular approach. In adopting the final rule, the Bureau accordingly focused on which interpretation would best promote the various policy goals of the statute, taking into account the Bureau's authority, among other things, to make adjustments and exceptions necessary or proper to effectuate the purposes of TILA, as amended by the Dodd-Frank Act.

Discouraging unsafe underwriting. As described in part II above, the ability-to-repay provisions of the Dodd-Frank Act were codified in response to lax lending terms and practices in the mid-2000's, which led to increased foreclosures, particularly for subprime borrowers. The statutory underwriting requirements for a qualified mortgage—for example, the requirement that loans be underwritten on a fully amortized basis using the maximum interest rate during the first five years and not a teaser rate, and the requirement to consider and verify a consumer's income or assets—will help prevent a return to such lax lending. So, too, will the requirement that a consumer's debt-to-income ratio (including mortgage-related obligations and obligations on simultaneous second liens) not exceed 43 percent, as discussed further below.

Notwithstanding these requirements, however, the Bureau recognizes that it is not possible to define by a bright-line rule a class of mortgages as to which it will always be the case that each individual consumer has the ability to repay his or her loan. That is especially true with respect to subprime loans. In many cases, the pricing of a subprime loan is the result of loan level price adjustments established by the secondary market and calibrated to default risk. Furthermore, the subprime segment of the market is comprised of borrowers who tend to be less sophisticated and who have fewer options available to them, and thus are more susceptible to being victimized by predatory lending practices. The historical performance of subprime loans bears all this out.[142] The Bureau concludes, therefore, that for subprime loans there is reason to impose heightened standards to protect consumers and otherwise promote the policies of the statute. Accordingly, the Bureau believes that it is important to afford consumers the opportunity to rebut the presumption of compliance that applies to qualified mortgages with regard to higher-priced mortgages by showing that, in fact, the creditor did not have a good faith and reasonable belief in the consumer's reasonable ability to repay the loan at the time the loan was made.

These same considerations lead to the opposite result with respect to prime loans which satisfy the requirements for a qualified mortgage. The fact that a consumer receives a prime rate is itself indicative of the absence of any indicia that would warrant a loan level price adjustment, and thus is suggestive of the consumer's ability to repay. Historically, prime rate loans have performed significantly better than subprime rate loans and the prime segment of the market has been subject to fewer abuses.[143] Moreover, requiring creditors to prove that they have satisfied the qualified mortgage requirements in order to invoke the presumption of compliance will itself ensure that the loans in question do not contain certain risky features and are underwritten with careful attention to consumers' debt-to-income ratios. Accordingly, the Bureau believes that where a loan is not a higher-priced covered transaction and meets both the product and underwriting requirements for a qualified mortgage, there are sufficient grounds for concluding that the creditor had a reasonable and good faith belief in the consumer's ability to repay to warrant a safe harbor.

This approach carefully balances the likelihood of consumers needing redress with the potential benefits to both consumers and industry of reducing uncertainty concerning the new regime. To the extent that the rule reduces litigation risk concerns for prime qualified mortgages, consumers in the prime market may benefit from enhanced competition (although, as discussed below, the Bureau believes litigation costs will be small and manageable for almost all creditors). In particular, the Bureau believes that larger creditors may expand correspondent lending relationships with smaller banks with respect to prime qualified mortgages. Larger creditors may also relax currently restrictive credit overlays (creditor-created underwriting requirements that go beyond GSE or agency guidelines), thereby increasing access to credit.

Scope of rebuttable presumption. In light of the heightened protections for subprime loans, the final rule also carefully defines the grounds on which the presumption that applies to higher-priced qualified mortgages can be rebutted. The Bureau believes that this feature is critical to ensuring that creditors have sufficient incentives to provide higher-priced qualified mortgages to consumers. Given the historical record of abuses in the subprime market, the Bureau believes it is particularly important to ensure that consumers are able to access qualified mortgages in light of their product feature restrictions and other protections.

Specifically, the final rule defines the standard by which a consumer may rebut the presumption of compliance afforded to higher-priced qualified mortgages, and provides an example of how a consumer may rebut the presumption. As described below, the final rule provides that consumers may rebut the presumption with regard to a higher-priced covered transaction by showing that, at the time the loan was originated, the consumer's income and debt obligations left insufficient residual income or assets to meet living expenses. The analysis would consider the consumer's monthly payments on the loan, mortgage-related obligations, and any simultaneous loans of which the creditor was aware, as well as any recurring, material living expenses of which the creditor was aware.

The Bureau believes the rebuttal standard in the final rule appropriately balances the consumer protection and access to credit considerations described above. This standard is consistent with the standard in the 2008 HOEPA Final Rule, and is specified as the exclusive means of rebutting the presumption. Commentary to the

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[142] For example, data from the MBA delinquency survey show that serious delinquency rates for conventional prime mortgages averaged roughly 2 percent from 1998 through 2011 and peaked at 7 percent following the recent housing collapse. In contrast, the serious delinquency rates averaged 13 percent over the same period. In late 2009, it peaked at over 30 percent.'' Mortgage Bankers Association, *National Delinquency Survey.* For a discussion of the historical performance of subprime loans, *see* 2008 HOEPA Final Rule, 73 FR 44522, 44524–26 (July 30, 2008).

[143] *See id.*

existing rule provides as an example of how its presumption may be rebutted that the consumer could show ''a very high debt-to-income ratio and a very limited residual income.'' Under the definition of qualified mortgage that the Bureau is adopting, however, the creditor generally is not entitled to a presumption if the debt-to-income ratio is ''very high.'' As a result, the Bureau is focusing the standard for rebutting the presumption in the final rule on whether, despite meeting a debt-to-income test, the consumer nonetheless had insufficient residual income to cover the consumer's living expenses. The Bureau believes this standard is sufficiently broad to provide consumers a reasonable opportunity to demonstrate that the creditor did not have a good faith and reasonable belief in the consumer's repayment ability, despite meeting the prerequisites of a qualified mortgage. At the same time, the Bureau believes the rebuttal standard in the final rule is sufficiently clear to provide certainty to creditors, investors, and regulators about the standards by which the presumption can successfully be challenged in cases where creditors have correctly followed the qualified mortgage requirements.

Several commenters raised concerns about the use of oral evidence to impeach the information contained in the loan file. For example, a consumer may seek to show that a loan does not meet the requirements of a qualified mortgage by relying on information provided orally to the creditor or loan originator to establish that the debt-to-income ratio was miscalculated. Alternatively, a consumer may seek to show that the creditor should have known, based upon facts disclosed orally to the creditor or loan originator, that the consumer had insufficient residual income to be able to afford the mortgage. The final rule does not preclude the use of such oral evidence in ability-to-repay cases. The Bureau believes that courts will determine the weight to be given to such evidence on a case-by-case basis. To exclude such evidence across the board would invite abuses in which consumers could be misled or coerced by an unscrupulous loan originator into keeping certain facts out of the written record.

Litigation risks and access to credit. In light of the continuing and widespread concern about litigation risk under the Dodd-Frank Act regime, the Bureau, in the course of developing the framework described above, carefully analyzed the impacts of potential litigation on non-qualified mortgages, any qualified mortgages with a rebuttable presumption, and any qualified mortgages with a safe harbor. The Bureau also considered secondary market dynamics, including the potential impacts on creditors from loans that the secondary market ''puts back'' on the originators because of ability-to-repay litigation. The Bureau's analysis is described in detail in the section 1022(b)(2) analysis under part VII; the results of that analysis helped to shape the calibrated approach that the Bureau is adopting in the final rule and suggest that the mortgage market will be able to absorb litigation risks under the rule without jeopardizing access to credit.

Specifically, as discussed in the section 1022(b)(2) analysis under part VII, the Bureau believes that even without the benefit of any presumption of compliance, the actual increase in costs from the litigation risk associated with ability-to-pay requirements would be quite modest. This is a function of the relatively small number of potential claims, the relatively small size of those claims, and the relatively low likelihood of claims being filed and successfully prosecuted. The Bureau notes that litigation likely would arise only when a consumer in fact was unable to repay the loan (*i.e.* was seriously delinquent or had defaulted), and even then only if the consumer elects to assert a claim and is able to secure a lawyer to provide representation; the consumer can prevail only upon proving that the creditor lacked a reasonable and good faith belief in the consumer's ability to repay at consummation or failed to consider the statutory factors in arriving at that belief.

The rebuttable presumption of compliance being afforded to qualified mortgages that are higher-priced reduces the litigation risk, and hence the potential transaction costs, still further. As described above, the Bureau has crafted the presumption of compliance being afforded to subprime loans so that it is not materially different than the presumption that exists today under the 2008 HOEPA Final Rule. Indeed, the Bureau is defining with more particularity the requirements for rebutting this presumption. No evidence has been presented to the Bureau to suggest that the presumption under the 2008 HOEPA Final Rule has led to significant litigation or to any distortions in the market for higher-priced mortgages. As noted above, commenters noted the lack of lending in the higher-priced mortgage space since the 2008 HOEPA Final Rule took effect, but the Bureau is unaware of evidence suggesting the low lending levels are the result of the Board's rule, as compared to the general state of the economy, uncertainty over multiple regulatory and capital initiatives, and other factors.

Relative to the Dodd-Frank Act, the Bureau notes that the existing regime already provides for attorneys' fees and the same remedies against creditors in affirmative cases, and actually provides for greater remedies against creditors in foreclosure defense situations. Nevertheless, the incidence of claims under the existing ability-to-repay rules for high-cost and higher-priced loans and analogous State laws is relatively low. The Bureau's analysis shows that cost estimates remain modest for both loans that are not qualified mortgages and loans that are qualified mortgages with a rebuttable presumption of compliance, and even more so for qualified mortgages with a safe harbor.

The Bureau recognizes, of course, that under the Dodd-Frank Act ability-to-repay provisions, a consumer can assert a claim against an assignee as a ''defense by recoupment or set off'' in a foreclosure action. There is no time limit on the use of this defense, but the consumer cannot recover as special statutory damages more than three years of finance charges and fees. To the extent this leads to increased litigation potential with respect to qualified mortgages as to which the presumption of compliance is rebuttable, this may cause creditors to take greater care when underwriting these riskier products to avoid potential put-back risk from investors. The Bureau believes that this is precisely what Congress intended—to create incentives for creditors to engage in sound underwriting and for secondary market investors to monitor the quality of the loans they buy—and that these incentives are particularly warranted with respect to the subprime market.

At the same time, the Bureau does not believe that the potential assignee liability with respect to higher-priced qualified mortgages will preclude such loans from being sold on the secondary market. Specifically, in analyzing impacts on the secondary market the Bureau notes that investors are purchasing higher-priced mortgage loans that are subject to the existing ability-to-repay requirements and presumption of compliance and that the GSEs have already incorporated into their contracts with creditors a representation and warranty designed to provide investor protection in the event of an ability-to-repay violation. The Bureau agrees with industry and secondary market participant commenters that investors will likely require creditors to agree to similar representations and warranties when assigning or selling loans under the new rule because secondary market participants will not want to be held accountable for ability-to-repay compliance which investors will view as the responsibility of the creditor. For prime loans, this may represent an incremental risk of put-back to creditors, given that such loans are not subject to the current regime, but those loans are being provided a safe harbor if they are qualified mortgages. For subprime (higher risk) loans it is not clear that there is any incremental risk beyond that which exists today under the Board's rule. There are also some administrative costs associated with such ''put-backs'' (*e.g.,* costs associated with the process of putting back loans from the issuer or insurer or servicer on behalf of the securitization trust to the creditor as a result of the ability-to-repay claims), but those costs are unlikely to be material for qualified mortgages subject to the rebuttable presumption and will not affect either the pricing of the loans or the availability of a secondary market for these loans.

In sum, the Bureau has crafted the calibrated presumptions to ensure that these litigation and secondary market impacts do not jeopardize access to credit. With regard to subprime loans, there is some possibility that creditors who are less sophisticated or less able to bear any litigation risk may elect to refrain from engaging in subprime lending, but as discussed below, the Bureau believes that there are sufficient creditors with the capabilities of making responsible subprime loans so as to avoid significant adverse impact on credit availability in that market.

Specific provisions. For the reasons discussed above, in § 1026.43(e)(1), the Bureau is providing a safe harbor and rebuttable presumption with the ability-to-repay requirements for loans that meet the definition of a qualified mortgage. As explained in comment 43(e)(1)–1, § 1026.43(c) requires a creditor to make a reasonable and good faith determination at or before consummation that a consumer will be able to repay a covered transaction. Section 1026.43(e)(1)(i) and (ii) provide a safe harbor and rebuttable presumption of compliance, respectively, with the repayment ability requirements of § 1026.43(c) for creditors and assignees of covered transactions that satisfy the requirements of a qualified mortgage under § 1026.43(e)(2), (e)(4), or (f).

Section 1026.43(e)(1)(i) provides a safe harbor for qualified mortgages that are not higher-priced covered transactions, by stating that a creditor or assignee of a qualified mortgage as defined in § 1026.43(e)(2), (e)(4), or (f) that is not a higher-priced covered transaction, as defined in § 1026.43(b)(4), complies with the repayment ability requirements of § 1026.43(c). Comment 43(e)(1)(i)–1 clarifies that, to qualify for the safe harbor in § 1026.43(e)(1)(i), a covered transaction must meet the requirements of a qualified mortgage in § 1026.43(e)(2), (e)(4), or (f) and must not be a higher-priced covered transaction, as defined in § 1026.43(b)(4).

For qualified mortgages that are higher-priced covered transactions, § 1026.43(e)(1)(ii)(A) provides a rebuttable presumption of compliance with the repayment ability requirements. That section provides that a creditor or assignee of a qualified mortgage as defined in § 1026.43(e)(2), (e)(4), or (f) that is a higher-priced covered transaction, as defined § 1026.43(b)(4), is presumed to comply with the repayment ability requirements of § 1026.43(c). Section 1026.43(e)(1)(ii)(B) provides that to rebut the presumption of compliance, it must be proven that, despite meeting the requirements of § 1026.43(e)(2), (e)(4), or (f), the creditor did not make a reasonable and good faith determination of the consumer's repayment ability at the time of consummation, by showing that the consumer's income, debt obligations, alimony, child support, and the consumer's monthly payment (including mortgage-related obligations) on the covered transaction and on any simultaneous loans of which the creditor was aware at consummation would leave the consumer with insufficient residual income or assets other than the value of the dwelling (including any real property attached to the dwelling) that secures the loan with which to meet living expenses, including any recurring and material non-debt obligations of which the creditor was aware at the time of consummation.

Comment 43(e)(1)(ii)–1 clarifies that a creditor or assignee of a qualified mortgage under § 1026.43(e)(2), (e)(4), or (f) that is a higher-priced covered transaction is presumed to comply with the repayment ability requirements of § 1026.43(c). To rebut the presumption, it must be proven that, despite meeting the standards for a qualified mortgage (including either the debt-to-income standard in § 1026.43(e)(2)(vi) or the standards of one of the entities specified in § 1026.43(e)(4)(ii)), the creditor did not have a reasonable and good faith belief in the consumer's repayment ability. To rebut the presumption, it must be proven that, despite meeting the standards for a qualified mortgage (including either the debt-to-income standard in § 1026.43(e)(2)(vi) or the standards of one of the entities specified in § 1026.43(e)(4)(ii)), the creditor did not have a reasonable and good faith belief in the consumer's repayment ability. Specifically, it must be proven that, at the time of consummation, based on the information available to the creditor, the consumer's income, debt obligations, alimony, child support, and the consumer's monthly payment (including mortgage-related obligations) on the covered transaction and on any simultaneous loans of which the creditor was aware at consummation would leave the consumer with insufficient residual income or assets other than the value of the dwelling (including any real property attached to the dwelling) that secures the loan with which to meet living expenses, including any recurring and material non-debt obligations of which the creditor was aware at the time of consummation, and that the creditor thereby did not make a reasonable and good faith determination of the consumer's repayment ability. The comment also provides, by way of example, that a consumer may rebut the presumption with evidence demonstrating that the consumer's residual income was insufficient to meet living expenses, such as food, clothing, gasoline, and health care, including the payment of recurring medical expenses of which the creditor was aware at the time of consummation, and after taking into account the consumer's assets other than the value of the dwelling securing the loan, such as a savings account. In addition, the longer the period of time that the consumer has demonstrated actual ability to repay the loan by making timely payments, without modification or accommodation, after consummation or, for an adjustable-rate mortgage, after recast, the less likely the consumer will be able to rebut the presumption based on insufficient residual income and prove that, at the time the loan was made, the creditor failed to make a reasonable and good faith determination that the consumer had the reasonable ability to repay the loan.

As noted above, the Bureau believes that the statutory language regarding whether qualified mortgages receive either a safe harbor or rebuttable presumption of compliance is ambiguous, and does not plainly mandate one approach over the other. Furthermore, the Bureau has the authority to tailor the strength of the presumption of compliance based on the characteristics associated with the different types of qualified mortgages. Accordingly, the Bureau interprets TILA section 129C(b)(1) to create a rebuttable presumption, but exercises its adjustment authority under TILA section 105(a) to limit the ability to rebut the presumption in two ways, because an open-ended rebuttable presumption would unduly restrict access to credit without a corresponding benefit to consumers.

First, the Bureau uses its adjustment authority under section 105(a) to limit the ability to rebut the presumption to insufficient residual income or assets other than the dwelling that secures the transaction because the Bureau believes exercise of this authority is necessary and proper to facilitate compliance with and to effectuate a purpose of section 129 and TILA. The Bureau believes this approach, while preserving consumer remedies, provides clear standards to creditors and courts regarding the basis upon which the presumption of compliance that applies to higher-priced covered transactions may be rebutted, thereby enhancing creditor certainty and encouraging lending in the higher-priced mortgage market. The Bureau finds this approach is necessary and proper to ensure that consumers are offered and receive residential mortgage loans on terms that reasonably reflect their ability to repay the loans, a purpose of section 129 and TILA.

Second, with respect to prime loans (loans with an APR that does not exceed APOR by 1.5 percentage points for first liens and 3.5 percentage points for second liens), the Bureau also uses its adjustment authority under TILA section 105(a) to provide a conclusive presumption (*e.g.,* a safe harbor). Under the conclusive presumption, if a prime loan satisfies the criteria for being a qualified mortgage, the loan will be deemed to satisfy section 129C's ability-to-repay criteria and will not be subject to rebuttal based on residual income or otherwise. The Bureau finds that this approach balances the competing consumer protection and access to credit considerations described above. As discussed above, the Bureau will not extend the safe harbor to higher-priced loans because that approach would provide insufficient protection to consumers in loans with higher interest rates who may require greater protection than consumers in prime rate loans. On the other hand, an approach that provided a rebuttable presumption of compliance for all qualified mortgages (including prime loans which historically have a low default rate) could lead creditors to make fewer mortgage loans to certain consumers, which could restrict access to credit (or unduly raise the cost of credit) without a corresponding benefit to consumers. The Bureau finds that this adjustment providing a safe harbor for prime loans is necessary and proper to facilitate compliance with and to effectuate the purposes of section 129C and TILA, including to assure that consumers are offered and receive residential mortgage loans on terms that reasonably reflect their ability to repay the loans.[144]

43(e)(2) Qualified Mortgage Defined—General

As discussed above, TILA section 129C(b)(2) defines the requirements for qualified mortgages to limit certain loan terms and features. The statute generally prohibits a qualified mortgage from permitting an increase of the principal balance on the loan (negative amortization), interest-only payments, balloon payments (except for certain balloon-payment qualified mortgages pursuant to TILA section 129C(b)(2)(E)), a term greater than 30 years, or points and fees that exceed a specified threshold.

In addition, the statute incorporates limited underwriting criteria that overlap with some elements of the general ability-to-repay standard. Specifically, the statutory definition of qualified mortgage requires the creditor to (1) verify and document the income and financial resources relied upon to qualify the obligors on the loan; and (2) underwrite the loan based on a fully amortizing payment schedule and the maximum interest rate during the first five years, taking into account all applicable taxes, insurance, and assessments. As noted above, these requirements appear to be focused primarily on ensuring that certain mortgage products—no-documentation loans and loans underwritten based only on a consumer's ability to make payments during short introductory periods with low ''teaser'' interest rates—are not eligible to be qualified mortgages.

In addition to these limited underwriting criteria, the statute also authorizes the Bureau to establish additional criteria relating to ratios of total monthly debt to monthly income or alternative measures of ability to pay regular expenses after payment of total monthly debt, taking into account the income levels of the consumer and other factors the Bureau determines relevant and consistent with the purposes described in TILA section 129C(b)(3)(B)(i). To the extent the Bureau incorporates a debt-to-income or residual income requirement into the qualified mortgage definition, several additional elements of the general ability-to-repay standard would effectively also be incorporated into the qualified mortgage definition, since debt-to-income and residual income analyses by their nature require assessment of income, debt (including simultaneous loans), and mortgage-related obligations. As discussed above, the Board proposed two alternatives to implement the qualified mortgage elements. Both alternatives under the Board's proposal would have incorporated the statutory elements of a qualified mortgage (*e.g.,* product feature and loan term restrictions, limits on points and fees, payment calculation requirements, and the requirement to consider and verify the consumer's income or assets). However, Alternative 2 also included the additional factors in the general ability-to-repay standard.

Comments

Qualified mortgage definition. As an initial matter, the majority of commenters generally favored defining qualified mortgages to reach a broad portion of the overall market and to provide clarity with regard to the required elements. Commenters agreed that clarity promotes the benefits of creditors lending with confidence and consumers receiving loans that comply with the basic requirements of an affordable loan. In addition, commenters generally agreed that a qualified mortgage should be broad, encompassing the vast majority of the existing mortgage market. Numerous commenters indicated that creditors believed that the difference between the legal protections afforded (or risks associated with) qualified mortgages and non-qualified mortgages would result in very little lending outside of qualified mortgages. Commenters asserted that a narrowly defined qualified mortgage would leave loans outside the legal protections of qualified mortgages and would result in constrained credit or increased cost of credit.

As discussed in the section-by-section analysis of § 1026.43(e)(1), commenters did not necessarily support the two

[144] These adjustments are consistent with the Bureau's authority under TILA section 129C(b)(3)(B)(i) to prescribe regulations that revise, add to, or subtract from the criteria that define a qualified mortgage upon a finding that such regulations are necessary or proper to ensure that responsible, affordable mortgage credit remains available to consumers in a manner consistent with the purposes of this section, necessary and appropriate to effectuate the purposes of TILA section 129B and section 129C, to prevent circumvention or evasion thereof, or to facilitate compliance with such sections.

alternatives specifically as proposed by the Board, but suggested variations on the definition of qualified mortgage that contain some or all of the Board's proposed criteria, or additional criteria not specifically included in either of the Board's proposed alternatives. For example, as described below, a coalition of industry and consumer advocates suggested a tiered approach to defining qualified mortgage, based primarily on meeting a specific back-end debt-to-income requirement, with alternative means of satisfying the qualified mortgage definition (such as housing debt-to-income, reserves, and residual income) if the back-end debt-to-income test is not satisfied. Similarly, one industry commenter suggested using a weighted approach to defining qualified mortgage, which would weight some underwriting factors more heavily than others and permit a significant factor in one area to compensate for a weak or missing factor in another area.

Consumer group commenters and some industry commenters generally supported excluding from the definition of qualified mortgage certain risky loan features which result in ''payment shock,'' such as negative amortization or interest-only features. Consumer group commenters also supported limiting qualified mortgages to a 30-year term, as required by statute. Consumer group commenters and one industry trade association strongly supported requiring creditors to consider and verify the all the ability-to-repay requirements. These commenters contended that the ability-to-repay requirements represent prudent mortgage underwriting techniques and are essential to sustainable lending. To that point, these commenters argued that qualified mortgage loans should represent the best underwritten and most fully documented loans, which would justify some form of protection from future liability. In addition, several consumer group commenters suggested adding a further requirement that when assessing the consumer's income and determining whether the consumer will be able to meet the monthly payments, a creditor must also take into account other recurring but non-debt related expenses. These commenters argued that many consumers, and especially low- and moderate-income consumers, face significant monthly recurring expenses, such as medical care or prescriptions and child care expense needed to enable the borrower or co-borrower to work outside the home. These commenters further argued that even where the percentage of disposable income in such situations seems reasonable, the nominal amounts left to low- and moderate-income consumers may be insufficient to enable such households to reasonably meet all their obligations. While one consumer group commenter specifically supported the inclusion of a consumer's credit history as an appropriate factor for a creditor to consider and verify when underwriting a loan, several commenters argued that the consumer's credit history should be not included in the ability-to-repay requirements because, although credit history may be relevant in prudent underwriting, it involves a multitude of factors that need to be taken into consideration. In addition, one association of State bank regulators also favored consideration of the repayment factors that are part of a sound underwriting process.

As noted above, some industry commenters also generally supported including the underwriting requirements as proposed in Alternative 2, with some adjustments, so long as the resulting qualified mortgage was entitled to a safe harbor. These commenters stated that most creditors today are already complying with the full ability-to-repay underwriting standards, and strong standards will help them resist competitive forces to lower underwriting standards in the future. Other industry commenters argued that the qualified mortgage criteria should not exclude specific loan products because the result will be that such products will be unavailable in the market.

Some commenters generally supported aligning the definition of qualified mortgage with the definition proposed by several Federal agencies to define ''qualified residential mortgages'' (QRM) for purposes of the risk retention requirements in title IX of the Dodd-Frank Act. For example, one commenter suggested that the required payment calculation for qualified mortgages be consistent with the QRM proposed requirement that the payment calculation be based on the maximum rate in the first five years after the first full payment required. An association of reverse mortgage lenders requested that a ''qualified'' reverse mortgage be defined to ensure that the Federal agencies finalizing the QRM rule are able to make a proprietary reverse mortgage a QRM, which would be exempt from the risk retention requirements. Lastly, numerous consumer group commenters argued that high-cost mortgages be excluded from being a qualified mortgage.

Quantitative standards. Some industry commenters supported including quantitative standards for such variables as debt-to-income ratios and credit score with compensating factors in the qualified mortgage definition. These commenters contended that quantitative standards provide certainty and would help ensure creditworthy consumers have access to qualified mortgage loans. One consumer group commenter argued that, without specific quantitative standards, bank examiners and assignees would have no benchmarks against which to measure a creditor's compliance or safety and soundness. One industry commenter favored quantitative standards such as a maximum back-end debt-to-income ratio because that would provide sufficient certainty to creditors and investors. One consumer group commenter supported including quantitative standards for the debt-to-income ratio because, without this, every loan would be open to debate as to whether the consumer had the ability to repay at the time of loan consummation.

As described further below, certain commenters and interested parties requested that the Bureau adopt a specific debt-to-income ratio requirement for qualified mortgages. For example, some suggested that if a consumer's total debt-to-income ratio is below a specified threshold, the mortgage loan should satisfy the qualified mortgage requirements, assuming other relevant conditions are met. In addition to a debt-to-income requirement, some commenters and interested parties suggested that the Bureau should include within the definition of a ''qualified mortgage'' loans with a debt-to-income ratio above a certain threshold if the consumer has a certain amount of assets, such as money in a savings or similar account, or a certain amount of residual income.

Some industry commenters advocated against including quantitative standards for such variables as debt-to-income ratios and residual income. Those commenters argued that underwriting a loan involves weighing a variety of factors, and creditors and investors should be allowed to exercise discretion and weigh risks for each individual loan. To that point, one industry trade group commenter argued that community banks, for example, generally have conservative requirements for a consumer's debt-to-income ratio, especially for loans that are held in portfolio by the bank, and consider many factors when underwriting mortgage loans, such as payment history, liquid reserves, and other assets. Because several factors are considered and evaluated in the underwriting process, this commenter asserted that community banks can be flexible when underwriting mortgage loans and provide arrangements for certain consumers that fall outside of the normal debt-to-income ratio for a certain loan. This commenter contended that strict quantitative standards would inhibit community banks' relationship lending and ability to use their sound judgment in the lending process. Some commenters contended that requiring specific quantitative standards could restrict credit access and availability for consumers.

Generally, industry commenters and some consumer group commenters believed compensating factors are beneficial in underwriting and should be permitted. These commenters generally believe compensating factors should be incorporated into the qualified mortgage criteria, such as in circumstances when a specified debt-to-income ratio threshold was exceeded. In their view, lending is an individualized decision and compensating factors can, for example, mitigate a consumer's high debt-to-income ratio or low residual income. One industry trade group commenter argued that the inclusion of compensating factors would allow for a broader underwriting approach and should include family history, repayment history, potential income growth, and inter-family transactions. One association of State bank regulators suggested that the rule provide guidance on mitigating factors for creditors to consider when operating outside of standard parameters. For example, creditors lending outside of typical debt-to-income standards can rely upon other assets or the fact that a consumer has a high income. Other industry commenters argued that the rule should provide for enough flexibility to allow for common-sense underwriting and avoid rigid limits or formulas that would exclude consumers on the basis of one or a few underwriting factors.

Another commenter stated that the rule should not set thresholds or limits on repayment ability factors. Instead, the rule should allow the creditor to consider the required factors and be held to a good faith standard. Such a rule permits individualized determinations to be made based on each consumer, local markets, and the risk tolerance of each creditor.

Final Rule

Section 1026.43(e)(2) of the final rule contains the general qualified mortgage definition. As set forth below, the final rule defines qualified mortgages under § 1026.43(e)(2) as loans that satisfy all of the qualified mortgage criteria required by the statute (including underwriting to the maximum interest rate during the first five years of the loan and consideration and verification of the consumer's income or assets), for which the creditor considers and verifies the consumer's current debt obligations, alimony, and child support, and that have a total (''back-end'') monthly debt-to-income ratio of no greater than 43 percent, following the standards for ''debt'' and ''income'' set forth in appendix Q.

While the general definition of qualified mortgage in § 1026.43(e)(2) contains all of the statutory qualified mortgage elements, it does not separately incorporate all of the general ability-to-repay underwriting requirements that would have been part of the qualified mortgage definition under the Board's proposed Alternative 2. In particular, the definition of qualified mortgage in § 1026.43(e)(2) does not specifically require consideration of the consumer's employment status, monthly payment on the covered transaction (other than the requirement to underwrite the loan to the maximum rate in the first five years), monthly payment on any simultaneous loans, or the consumer's credit history, which are part of the general ability-to-repay analysis under § 1026.43(c)(2). Instead, most of these requirements are incorporated into the standards for determining ''debt'' and ''income'' pursuant to § 1026.43(e)(2)(vi)(A) and (B), to which the creditor must look to determine if the loan meets the 43 percent debt-to-income ratio threshold as required in § 1026.43(e)(2)(vi). In particular, that calculation will require the creditor to verify, among other things, the consumer's employment status (to determine current or expected income) and the monthly payment on the covered transaction (including mortgage-related obligations) and on any simultaneous loans that the creditor knows or has reason to know will be made. In addition, although consideration and verification of a consumer's credit history is not specifically incorporated into the qualified mortgage definition, creditors must verify a consumer's debt obligations using reasonably reliable third-party records, which may include use of a credit report or records that evidence nontraditional credit references. *See* section-by-section analysis of § 1026.43(e)(2)(v) and (c)(3).

The final rule adopts this approach because the Bureau believes that the statute is fundamentally about assuring that the mortgage credit consumers receive is affordable. Qualified mortgages are intended to be mortgages as to which it can be presumed that the creditor made a reasonable determination of the consumer's ability to repay. Such a presumption would not be reasonable—indeed would be imprudent—if a creditor made a mortgage loan without considering and verifying core aspects of the consumer's individual financial picture, such as income or assets and debt. Incorporating these ability-to-repay underwriting requirements into the qualified mortgage definition thus ensures that creditors assess the consumer's repayment ability for a qualified mortgage using robust and appropriate underwriting procedures. The specific requirements for a qualified mortgage under § 1026.43(e)(2) are described below.

The Bureau notes that the final rule does not define a ''qualified'' reverse mortgage. As described above, TILA section 129C(a)(8) excludes reverse mortgages from the repayment ability requirements. *See* section-by-section analysis of § 1026.43(a)(3)(i). However, TILA section 129C(b)(2)(ix) provides that the term ''qualified mortgage'' may include a ''residential mortgage loan'' that is ''a reverse mortgage which meets the standards for a qualified mortgage, as set by the Bureau in rules that are consistent with the purposes of this subsection.'' The Board's proposal did not include reverse mortgages in the definition of a ''qualified mortgage.'' Because reverse mortgages are exempt from the ability-to-repay requirements, the effects of defining a reverse mortgage as a ''qualified mortgage'' would be, for example, to allow for certain otherwise banned prepayment penalties and permit reverse mortgages to be QRMs under the Dodd-Frank Act's risk retention rules. The Bureau believes that the first effect is contrary to the purposes of the statute. With respect to the QRM rulemaking, the Bureau will continue to coordinate with the Federal agencies finalizing the QRM rulemaking to determine the appropriate treatment of reverse mortgages.

43(e)(2)(i)

TILA section 129C(b)(2)(A)(i) states that the regular periodic payments of a qualified mortgage may not result in an increase of the principal balance or allow the consumer to defer repayment of principal (except for certain balloon-payment loans made by creditors operating predominantly in rural or underserved areas, discussed below in the section-by-section analysis of § 1026.43(f)). TILA section 129C(b)(2)(A)(ii) states that the terms of a qualified mortgage may not include a balloon payment (subject to an exception for creditors operating predominantly in rural or underserved areas). The statute defines ''balloon payment'' as ''a scheduled payment that is more than twice as large as the average of earlier scheduled payments.'' TILA section 129C(b)(2)(A)(ii).

The Board's proposed § 226.43(e)(2)(i) would have implemented TILA sections 129C(b)(2)(A)(i) and (ii). First, the proposed provision would have required that a qualified mortgage provide for regular periodic payments. Second, proposed § 226.43(e)(2)(i) would have provided that the regular periodic payments may not (1) result in an increase of the principal balance; (2) allow the consumer to defer repayment of principal, except as provided in proposed § 226.43(f); or (3) result in a balloon payment, as defined in proposed § 226.18(s)(5)(i), except as provided in proposed § 226.43(f).

Proposed comment 43(e)(2)(i)–1 would have explained that, as a consequence of the foregoing requirements, a qualified mortgage must require the consumer to make payments of principal and interest, on a monthly or other periodic basis, that will fully repay the loan amount over the loan term. These periodic payments must be substantially equal except for the effect that any interest rate change after consummation has on the payment amount in the case of an adjustable-rate or step-rate mortgage. The proposed comment would have also provided that, because proposed § 226.43(e)(2)(i) would have required that a qualified mortgage provide for regular, periodic payments, a single-payment transaction may not be a qualified mortgage. This comment would have clarified a potential evasion of the regulation, as a creditor otherwise could structure a transaction with a single payment due at maturity that technically would not be a balloon payment as defined in proposed § 226.18(s)(5)(i) because it is not more than two times a regular periodic payment.

Proposed comment 43(e)(2)(i)–2 would have provided additional guidance on the requirement in proposed § 226.43(e)(2)(i)(B) that a qualified mortgage may not allow the consumer to defer repayment of principal. The comment would have clarified that, in addition to interest-only terms, deferred principal repayment also occurs if the payment is applied to both accrued interest and principal but the consumer makes periodic payments that are less than the amount that would be required under a payment schedule that has substantially equal payments that fully repay the loan amount over the loan term. Graduated payment mortgages, for example, allow deferral of principal repayment in this manner and therefore may not be qualified mortgages.

As noted above, the Dodd-Frank Act defines ''balloon payment'' as ''a scheduled payment that is more than twice as large as the average of earlier scheduled payments.'' However, proposed § 226.43(e)(2)(i)(C) would have cross-referenced Regulation Z's existing definition of ''balloon payment'' in § 226.18(s)(5)(i), which provides that a balloon payment is ''a payment that is more than two times a regular periodic payment.'' The Board noted that this definition is substantially similar to the statutory one, except that it uses as its benchmark any regular periodic payment rather than the average of earlier scheduled payments. The Board explained that the difference in wording between the statutory definition and the existing regulatory definition does not yield a significant difference in what constitutes a ''balloon payment'' in the qualified mortgage context. Specifically, the Board stated its belief that because a qualified mortgage generally must provide for substantially equal, fully amortizing payments of principal and interest, a payment that is greater than twice any one of a loan's regular periodic payments also generally will be greater than twice the average of its earlier scheduled payments.

Accordingly, to facilitate compliance, the Board proposed to cross-reference the existing definition of ''balloon payment.'' The Board proposed this adjustment to the statutory definition pursuant to its authority under TILA section 105(a) to make such adjustments for all or any class of transactions as in the judgment of the Board are necessary or proper to facilitate compliance with TILA. The Board stated that this approach is further supported by its authority under TILA section 129B(e) to condition terms, acts or practices relating to residential mortgage loans that the Board finds necessary or proper to facilitate compliance.

Finally, in the preamble to the Board's proposal, the Board noted that some balloon-payment loans are renewable at maturity and that such loans might appropriately be eligible to be qualified mortgages, provided the terms for renewal eliminate the risk of the consumer facing a large, unaffordable payment obligation, which underlies the rationale for generally excluding balloon-payment loans from the definition of qualified mortgages. If the consumer is protected by the terms of the transaction from that risk, the Board stated that such a transaction might appropriately be treated as though it effectively is not a balloon-payment loan even if it is technically structured as one. The Board solicited comment on whether it should include an exception providing that, notwithstanding proposed § 226.43(e)(2)(i)(C), a qualified mortgage may provide for a balloon payment if the creditor is unconditionally obligated to renew the loan at the consumer's option (or is obligated to renew subject to conditions within the consumer's control). The Board sought comment on how such an exception should be structured to ensure that the large-payment risk ordinarily accompanying a balloon-payment loan is fully eliminated by the renewal terms and on how such an exception might be structured to avoid the potential for circumvention.

As discussed above, commenters generally supported excluding from the definition of qualified mortgage certain risky loan features which result in ''payment shock,'' such as negative amortization or interest-only features. Commenters generally recognized such features as significant contributors to the recent housing crisis. Industry commenters noted that such restrictions are objective criteria which creditors can conclusively demonstrate were met at the time of origination. However, one mortgage company asserted that such limitations should not apply in loss mitigation transactions, such as loan modifications and extensions, or to loan assumptions. That commenter noted that while negative amortization is not common in most loan modification programs, the feature can be used at times to help consumers work through default situations. The commenter also noted that deferral of payments, including principal payments, and balloon payment structures are commonly used to relieve payment default burdens. One bank commenter argued that the rule should permit qualified mortgages to have balloon payment features if the creditor is unconditionally obligated to renew the loan at the consumer's option, or is obligated to renew subject to conditions within the consumer's control.

For the reasons discussed in the proposed rule, the Bureau is adopting § 226.43(e)(2)(i) as proposed in renumbered § 1026.43(e)(2)(i), with certain clarifying changes. In particular, in addition to the proposed language, section 1026.43(e)(2)(i) specifies that a qualified mortgage is a covered transaction that provides for regular periodic payments that are substantially equal, ''except for the effect that any interest rate change after consummation has on the payment in the case of an adjustable-rate or step-rate mortgage.''

This language appeared in the commentary to § 226.43(e)(2)(i) in the proposed rule, but to provide clarity, the Bureau is adopting this language in the text of § 1026.43(e)(2)(i) in the final rule.

Notably, the Bureau is adopting in § 1026.43(e)(2)(i) the proposed cross-reference to the existing Regulation Z definition of balloon payment. Like the Board, the Bureau finds that the statutory definition and the existing regulatory definition do not yield a significant difference in what constitutes a ''balloon payment'' in the qualified mortgage context. Accordingly, the Bureau makes this adjustment pursuant to its authority under TILA section 105(a) because the Bureau believes that affording creditors a single definition of balloon payment within Regulation Z is necessary and proper to facilitate compliance with and effectuate the purposes of TILA.

In addition, like the proposal, the final rule does not provide exceptions from the prohibition on qualified mortgages providing for balloon payments, other than the exception for creditors operating predominantly in rural or underserved areas, described below in the section-by-section analysis of § 1026.43(f). The Bureau believes that it is appropriate to implement the rule consistent with statutory intent, which specifies only a narrow exception from this general rule for creditors operating predominantly in rural or underserved areas rather than a broader exception to the general prohibition on qualified mortgages containing balloon payment features. With respect to renewable balloon-payment loans, the Bureau does not believe that the risk that a consumer will face a significant payment shock from the balloon feature can be fully eliminated, and that a rule that attempts to provide such special treatment for renewable balloon-payment loans would be subject to abuse.

43(e)(2)(ii)

TILA section 129C(b)(2)(A)(viii) requires that a qualified mortgage must not provide for a loan term that exceeds 30 years, ''except as such term may be extended under paragraph (3), such as in high-cost areas.'' As discussed above, TILA section 129C(b)(3)(B)(i) authorizes the Bureau to revise, add to, or subtract from the qualified mortgage criteria if the Bureau makes certain findings, including that such revision is necessary or proper to ensure that responsible, affordable mortgage credit remains available to consumers in a manner consistent with the purposes of TILA section 129C(b) or necessary and appropriate to effectuate the purposes of section 129C.

Proposed § 226.43(e)(2)(ii) would have implemented the 30-year maximum loan term requirement in the statute without exception. The preamble to the proposed rule explains that, based on available information, the Board believed that mortgage loans with terms greater than 30 years are rare and, when made, generally are for the convenience of consumers who could qualify for a loan with a 30-year term but prefer to spread out their payments further. Therefore, the Board believed such an exception is generally unnecessary. The Board solicited comment on whether there are any ''high-cost areas'' in which loan terms in excess of 30 years are necessary to ensure that responsible, affordable credit is available and, if so, how they should be identified for purposes of such an exception. The Board also sought comment on whether any other exceptions would be appropriate, consistent with the Board's authority in TILA section 129C(b)(3)(B)(i).

As noted above, commenters generally supported the 30-year term limitation. One commenter suggested the final rule should clarify that a loan term that is slightly longer than 30 years because of the due date of the first regular payment nevertheless meets the 30-year term requirement. One trade association commenter suggested that creditors be provided flexibility to originate 40-year loans in order to accommodate consumers in regions of the country where housing prices are especially high, but did not provide any information regarding the historic performance of 40-year loans or discuss how the Bureau should define high-cost areas in a way that avoids abuse. An association of State bank regulators also suggested that the rule permit loan terms beyond 30 years in high-cost areas and suggested that those areas could be determined based on housing price indices. That commenter, two large industry trade associations, and one mortgage company commenter argued that the 30-year term limitation should not apply to loan modifications that provide a consumer with a loan with a lower monthly payment than he or she may otherwise face. One such commenter noted that, as a general matter, the rule should clarify that modifications of existing loans should not be subject to the same ability-to-repay requirements to avoid depriving consumers of beneficial modifications.

For the reasons discussed in the proposed rule, the Bureau is generally adopting § 226.43(e)(2)(ii) as proposed in renumbered § 1026.43(e)(2)(ii). In response to commenter concern, the final rule clarifies in comment 43(e)(2)(ii)–1 that the 30-year term limitation in § 1026.43(e)(2)(ii) is applied without regard to any interim period between consummation and the beginning of the first full unit period of the repayment schedule. Consistent with the Board's analysis, the final rule does not provide exceptions to the 30-year loan limitation. Like the Board, the Bureau is unaware of a basis upon which to conclude that an exception to the 30-year loan term limitation for qualified mortgages in high-cost areas is appropriate. In particular, the Bureau believes that loans with terms greater than 30 years are rare and that, when made, generally are for the convenience of consumers who could qualify for a loan with a 30-year term.

The final rule also does not provide additional guidance on the 30-year loan term limitation in the context of loan modifications. The Bureau understands that private creditors may offer loan modifications to consumers at risk of default or foreclosure, and that such modifications may extend the duration of the loan beyond the initial term. If such modification results in the satisfaction and replacement of the original obligation, the loan would be a refinance under current § 1026.20(a), and therefore the new transaction must comply with the ability-to-repay requirements of § 1026.43(c) or satisfy the criteria for a qualified mortgage, independent of any ability-to-repay analysis or the qualified mortgage status of the initial transaction. However, if the transaction does not meet the criteria in 1026.20(a), which determines a refinancing—generally resulting in the satisfaction and replacement of the original obligation—the loan would not be a refinance under § 1026.20(a), and would instead be an extension of the original loan. In such a case, compliance with the ability-to-repay provision, including a loan's qualified mortgage status, would be determined as of the date of consummation of the initial transaction, regardless of a later modification.

43(e)(2)(iii)

TILA section 129C(b)(2)(A)(vii) defines a qualified mortgage as a loan for which, among other things, the total points and fees payable in connection with the loan do not exceed three percent of the total loan amount. TILA section 129C(b)(2)(D) requires the Bureau to prescribe rules adjusting this threshold to ''permit lenders that extend smaller loans to meet the requirements of the presumption of compliance.'' The statute further requires the Bureau, in prescribing such rules, to ''consider the potential impact of such rules on rural areas and other areas where home values are lower.''

Proposed § 226.43(e)(2)(iii) would have implemented these provisions by providing that a qualified mortgage is a loan for which the total points and fees payable in connection with the loan do not exceed the amounts specified under proposed § 226.43(e)(3). As discussed in detail in the section-by-section analysis of § 1026.43(e)(3), the Board proposed two alternatives for calculating the allowable points and fees for a qualified mortgage: One approach would have consisted of five ''tiers'' of loan sizes and corresponding limits on points and fees, while the other approach would have consisted of three ''tiers'' of points and fees based on a formula yielding a greater allowable percentage of the total loan amount to be charged in points and fees for each dollar increase in loan size. Additionally, proposed § 226.43(b)(9) would have defined ''points and fees'' to have the same meaning as in proposed § 226.32(b)(1).

For the reasons discussed in the proposed rule, the Bureau is generally adopting § 226.43(e)(2)(iii) as proposed in renumbered § 1026.43(e)(2)(iii). For a discussion of the final rule's approach to calculating allowable points and fees for a qualified mortgage, see the section-by-section analysis of § 1026.43(e)(3). For a discussion of the definition of points and fees, see the section-by-section analysis of § 1026.32(b)(1).

As noted above, several consumer group commenters requested that high-cost mortgages be prohibited from receiving qualified mortgage status. Those commenters noted that high-cost mortgages have been singled out by Congress as deserving of special regulatory treatment because of their potential to be abusive to consumers. They argue that it would seem incongruous for any high-cost mortgage to be given a presumption of compliance with the ability-to-repay rule. However, the final rule does not prohibit a high-cost mortgage from being a qualified mortgage. Under the Dodd-Frank Act, a mortgage loan is a high-cost mortgage when (1) the annual percentage rate exceeds APOR by more than 6.5 percentage points for first-liens or 8.5 percentage points for subordinate-liens; (2) points and fees exceed 5 percent, generally; or (3) when prepayment penalties may be imposed more than three years after consummation or exceed 2 percent of the amount prepaid. Neither the Board's 2011 ATR–QM Proposal nor the Bureau's 2012 HOEPA Proposal would have prohibited loans that are high-cost mortgages as a result of a high interest rate from receiving qualified mortgage status.

As a general matter, the ability-to-repay requirements in this final rule apply to most closed-end mortgage loans, including closed-end high-cost mortgages. Notwithstanding the Dodd-Frank Act's creation of a new ability-to-repay regime for mortgage loans, Congress did not modify an existing prohibition in TILA section 129(h) against originating a high-cost mortgage without regard to a consumer's repayment ability (HOEPA ability-to-repay). Thus, under TILA (as amended by the Dodd-Frank Act), closed-end high-cost mortgages are subject both to the general ability-to-repay provisions and to HOEPA's ability-to-repay requirement.[145] As implemented in existing § 1026.34(a)(4), the HOEPA ability-to-repay rules contain a rebuttable presumption of compliance if the creditor takes certain steps that are generally less rigorous than the Dodd-Frank Act's ability-to-repay requirements, as implemented in this rule. For this reason, and as explained further in that rulemaking, the Bureau's 2013 HOEPA Final Rule provides that a creditor complies with the high-cost mortgage ability-to-repay requirement by complying with the general ability-to-repay provision, as implemented by this final rule.[146]

The final rule does not prohibit high-cost mortgages from being qualified mortgages for several reasons. First, the Dodd-Frank Act does not prohibit high-cost mortgages from receiving qualified mortgage status. While the statute imposes a points and fees limit on qualified mortgages (3 percent, generally) that effectively prohibits loans that trigger the high-cost mortgage points and fee threshold from receiving qualified mortgage status, it does not impose an annual percentage rate limit on qualified mortgages.[147] Therefore, nothing in the statute prohibits a creditor from making a loan with a very high interest rate such that the loan is a high-cost mortgage while still meeting the criteria for a qualified mortgage.

In addition, the final rule does not prohibit high-cost mortgages from being qualified mortgages because the Bureau believes that, for loans that meet the qualified mortgage definition, there is reason to presume, subject to rebuttal, that the creditor had a reasonable and good faith belief in the consumer's ability to repay notwithstanding the high interest rate. High-cost mortgages will be less likely to meet qualified mortgage criteria because the higher interest rate will generate higher monthly payments and thus require higher income to satisfy the debt-to-income test for a qualified mortgage. But where that test is satisfied—that is, where the consumer has an acceptable debt-to-income ratio calculated in accordance with qualified mortgage underwriting rules—there is no logical reason to exclude the loan from the definition of a qualified mortgage.

Allowing a high-cost mortgage to be a qualified mortgage can benefit consumers. The Bureau anticipates that, in the small loan market, creditors may sometimes exceed high-cost mortgage thresholds due to the unique structure of their business. The Bureau believes it would be in the interest of consumers to afford qualified mortgage status to loans meeting the qualified mortgage criteria so as to remove any incremental impediment that the general ability-to-repay provisions would impose on making such loans. The Bureau also believes this approach could provide an incentive to creditors making high-cost mortgages to satisfy the qualified mortgage requirements, which would provide additional consumer protections, such as restricting interest-only payments and limiting loan terms to 30 years, which are not requirements under HOEPA.

[145] The statutory HOEPA ability-to-repay provisions prohibit creditors from engaging in a pattern or practice of making loans without regard to the consumer's repayment ability. In the 2008 HOEPA Final Rule, the Board eliminated the ''pattern or practice'' requirement under the HOEPA ability-to-repay provision and also applied the repayment ability requirement to higher-priced mortgage loans.

[146] The Bureau notes that, among other restrictions, the 2013 HOEPA Final Rule also includes in § 1026.32(d)(1) a prohibition on balloon payment features for most high-cost mortgages, and retains the current restrictions on high-cost mortgages permitting negative amortization. As noted, high-cost mortgages will be subject to these restrictions in addition to the requirements imposed in this final rule. With respect to prepayment penalty revisions, the Dodd-Frank Act deleted the statutory restrictions applicable to high-cost mortgages. The new Dodd-Frank Act prepayment penalty restrictions of section 1414 are implemented as discussed below.

[147] The points and fees limit for qualified mortgages set forth in the Dodd-Frank Act, as implemented in § 1026.43(e) of this final rule (including separate points and fees limits for smaller loans), is lower than the high-cost mortgage points and fees threshold. Thus, any loan that triggers the high-cost mortgage provisions through the points and fees criteria could not satisfy the qualified mortgage definition. Likewise, § 1026.43(g) of this final rule provides that, where qualified mortgages are permitted to have prepayment penalties, such penalties may not be imposed more than three years after consummation or in an amount that exceeds 2 percent of the amount prepaid. This limitation aligns with the prepayment penalty trigger for the high-cost mortgage provisions, such that a loan that satisfies the qualified mortgage requirements would never trigger the high-cost mortgage provisions as a result of a prepayment penalty.

Furthermore, allowing high-cost mortgage loans to be qualified mortgages would not impact the various impediments to making high-cost mortgage loans, including enhanced disclosure and counseling requirements and the enhanced liability for HOEPA violations. Thus, there would remain strong disincentives to making high-cost mortgages. The Bureau does not believe that allowing high-cost mortgages to be qualified mortgages would incent creditors who would not otherwise make high-cost mortgages to start making them.

43(e)(2)(iv)

TILA section 129C(b)(2)(A)(iv) and (v) provides as a condition to meeting the definition of a qualified mortgage, in addition to other criteria, that the underwriting process for a fixed-rate or adjustable-rate loan be based on ''a payment schedule that fully amortizes the loan over the loan term and takes into account all applicable taxes, insurance, and assessments.'' The statute further states that for an adjustable-rate loan, the underwriting must be based on ''the maximum rate permitted under the loan during the first 5 years.'' *See* TILA section 129C(b)(2)(A)(v). The statute does not define the terms ''fixed rate,'' ''adjustable-rate,'' or ''loan term,'' and provides no additional assumptions regarding how to calculate the payment obligation.

These statutory requirements differ from the payment calculation requirements set forth in existing § 1026.34(a)(4)(iii), which provides a presumption of compliance with the repayment ability requirements for higher-priced mortgage loans, where the creditor underwrites the loan using the largest payment of principal and interest scheduled in the first seven years following consummation. The existing presumption of compliance under § 1026.34(a)(4)(iii) is available for all high-cost and higher-priced mortgage loans, except for loans with negative amortization or balloon-payment mortgages with a term less than seven years. In contrast, TILA section 129C(b)(2)(A) requires the creditor to underwrite the loan based on the maximum payment during the first five years, and does not extend the scope of qualified mortgages to any loan that contains certain risky features or a loan term exceeding 30 years. Loans with a balloon-payment feature would not meet the definition of a qualified mortgage regardless of term length, unless made by a creditor that satisfies the conditions in § 1026.43(f).

The Board proposed to implement the underwriting requirements of TILA section 129C(b)(2)(A)(iv) and (v), for purposes of determining whether a loan meets the definition of a qualified mortgage, in proposed § 226.43(e)(2)(iv). Under the proposal, creditors would have been required to underwrite a loan that is a fixed-, adjustable-, or step-rate mortgage using a periodic payment of principal and interest based on the maximum interest rate permitted during the first five years after consummation. The terms ''adjustable-rate mortgage,'' ''step-rate mortgage,'' and ''fixed-rate mortgage'' would have had the meaning as in current § 1026.18(s)(7)(i) through (iii), respectively.

Specifically, proposed § 226.43(e)(2)(iv) would have provided that meeting the definition of a qualified mortgage is contingent, in part, on creditors meeting the following underwriting requirements:

(1) Proposed § 226.43(e)(2)(iv) would have required that the creditor take into account any mortgage-related obligations when underwriting the consumer's loan;

(2) Proposed § 226.43(e)(2)(iv)(A) would have required the creditor to use the maximum interest rate that may apply during the first five years after consummation; and

(3) Proposed § 226.43(e)(2)(iv)(B) would have required that the periodic payments of principal and interest repay either the outstanding principal balance over the remaining term of the loan as of the date the interest rate adjusts to the maximum interest rate that can occur during the first five years after consummation, or the loan amount over the loan term.

These three underwriting conditions under proposed § 226.43(e)(2)(iv), and the approach to these criteria adopted in the final rule, are discussed below.

Proposed § 226.43(e)(2)(iv) would have implemented TILA section 129C(b)(2)(A)(iv) and (v), in part, and provided that, to be a qualified mortgage under proposed § 1026.43(e)(2), the creditor must underwrite the loan taking into account any mortgage-related obligations. Proposed comment 43(e)(2)(iv)–6 would have provided cross-references to proposed § 226.43(b)(8) and associated commentary. The Board proposed to use the term ''mortgage-related obligations'' in place of ''all applicable taxes, insurance (including mortgage guarantee insurance), and assessments.'' Proposed § 226.43(b)(8) would have defined the term ''mortgage-related obligations'' to mean property taxes; mortgage-related insurance premiums required by the creditor as set forth in proposed § 226.45(b)(1); homeowners association, condominium, and cooperative fees; ground rent or leasehold payments; and special assessments.

Commenters generally supported the inclusion of mortgage-related obligations in the underwriting requirement in proposed § 226.43(e)(2)(iv). Several industry trade associations, banks, civil rights organizations, and consumer advocacy groups specifically supported the requirement. Several commenters requested clear guidance on the amounts to be included in the monthly payment amount, including mortgage-related obligations. In addition, a civil rights organization and several consumer advocacy groups argued that the creditor should also be required to consider recurring, non-debt expenses, such as medical supplies and child care.

As discussed above in the section-by-section analysis of § 1026.43(b)(8), the Bureau is adopting the proposed definition of mortgage-related obligations in renumbered § 1026.43(b)(8), with certain clarifying changes and additional examples.

For the reasons discussed above, the Bureau is adopting the mortgage-related obligations portion of § 226.43(e)(2)(vi) as proposed in renumbered § 1026.43(e)(2)(vi). The final rule does not contain a specific requirement that the creditor consider, when underwriting the consumer's monthly payment, recurring non-debt expenses, such as medical supplies and child care. However, such expenses, if known to the creditor at the time of consummation, may be relevant to a consumer's ability to rebut the presumption of compliance that applies to qualified mortgages that are higher-priced covered transactions. *See* section-by-section analysis of § 1026.43(e)(1)(ii)(B).

43(e)(2)(iv)(A)

Proposed § 226.43(e)(2)(iv)(A) would have implemented TILA section 129C(b)(2)(A)(iv) and (v), in part, and provided that, to be a qualified mortgage under proposed § 1026.43(e)(2), the creditor must underwrite the loan using the maximum interest rate that may apply during the first five years after consummation. However, the statute does not define the term ''maximum rate,'' nor does the statute clarify whether the phrase ''the maximum rate permitted under the loan during the first 5 years'' means the creditor should use the maximum interest rate that occurs during the first five years of the loan beginning with the first periodic payment due under the loan, or during the first five years after consummation of the loan. The former approach would capture the rate recast for a 5/1 hybrid adjustable-rate mortgage that occurs on the due date of the 60th monthly payment, and the latter would not.

The Board interpreted the phrase ''maximum rate permitted'' as requiring creditors to underwrite the loan based on the maximum interest rate that could occur under the terms of the loan during the first five years after consummation, assuming a rising index value. *See* proposed comment 43(e)(2)(iv)–1. The Board noted that this interpretation is consistent with current guidance contained in Regulation Z regarding disclosure of the maximum interest rate. *See* MDIA Interim Rule, 75 FR 58471 (Sept. 24, 2010). The Board further stated that this interpretation is consistent with congressional intent to encourage creditors to make loans to consumers that are less risky and that afford the consumer a reasonable period of time to repay (*i.e.,* 5 years) on less risky terms. For the reasons described in the proposed rule, the Bureau is adopting the ''maximum interest rate'' provision in § 1026.43(e)(2)(iv) as proposed in renumbered § 1026.43(e)(2)(iv).

The Board proposed to interpret the phrase ''during the first 5 years'' as requiring creditors to underwrite the loan based on the maximum interest rate that may apply during the first five years after consummation. TILA section 129C(b)(2)(A)(v). The preamble to the proposed rule explains several reasons for this interpretation. First, the Board noted that a plain reading of the statutory language conveys that the ''first five years'' is the first five years of the loan once it comes into existence (*i.e.,* once it is consummated). The Board believed that interpreting the phrase to mean the first five years beginning with the first periodic payment due under the loan would require an expansive reading of the statutory text.

Second, the Board noted that the intent of this underwriting condition is to ensure that the consumer can afford the loan's payments for a reasonable amount of time and that Congress intended for a reasonable amount of time to be the first five years after consummation.

Third, the Board proposed this approach because it is consistent with prior iterations of this statutory text and the Board's 2008 HOEPA Final Rule. As noted above, the Dodd-Frank Act codifies many aspects of the repayment ability requirements contained in existing § 1026.34(a)(4) of the Board's 2008 HOEPA Final Rule.

Fourth, the Board believed that interpreting the phrase ''during the first five years'' as including the rate adjustment at the end of the fifth year would be of limited benefit to consumers because creditors could easily structure their product offerings to avoid application of the rule. For example, a creditor could move a rate adjustment that typically occurs on the due date of the 60th monthly payment to due date of the first month that falls outside the specified time horizon, making any proposal to extend the time period in order to include the rate adjustment of diminished value.

Finally, the Board believed that the proposed timing of the five-year period could appropriately differ from the approach used under the 2010 MDIA Interim Final Rule, given the different purposes of the rules. The Board amended the 2010 MDIA Interim Final Rule to require that creditors base their interest rate and payment disclosures on the first five years after the due date of the first regular periodic payment rather than the first five years after consummation. *See* 75 FR 81836, 81839 (Dec. 29, 2010). The revision clarified that the disclosure requirements for 5⁄1 hybrid adjustable-rate mortgages must include the rate adjustment that occurs on the due date of the 60th monthly payment, which typically occurs more than five years after consummation. The disclosure requirements under the 2010 MDIA Interim Final Rule, as revised, are intended to help make consumers aware of changes to their loan terms that may occur if they choose to stay in the loan beyond five years and therefore, helps to ensure consumers avoid the uninformed use of credit. The Board believed a different approach is appropriate under proposed § 226.43(e)(2)(iv) because that requirement seeks to ensure that the loan's payments are affordable for a reasonable period of time. For the reasons stated above, the Board believed that Congress intended the first five years after consummation to be a reasonable period of time to ensure that the consumer has the ability to repay the loan according to its terms.

For all the above-listed reasons, the Board interpreted the statutory text as requiring that the creditor underwrite the loan using the maximum interest rate during the first five years after consummation. The Board solicited comment on its interpretation of the phrase ''first five years'' and the appropriateness of this approach. The Board also proposed clarifying commentary and examples, which are described below.

As described above, commenters generally supported the payment calculation requirements in the proposed rule, including the five-year payment calculation. A comment from a coalition of consumer advocates suggested that the period may not be long enough to assure a consumer's ability to repay given that the average homeowner holds their mortgage for approximately seven years, and suggested that the five-year payment calculation requirement be extended to reflect the average mortgage duration of the first ten years of the loan. Two industry commenters suggested that the time horizon in the required payment calculation for qualified mortgages be consistent with the proposed requirement in the 2011 QRM Proposed Rule that the payment calculation be based on the maximum rate in the first five years after the date on which the first regular periodic payment will be due. One such commenter noted that the payment calculation approach in the 2011 QRM Proposed Rule is more protective of consumers. Another industry commenter suggested that the final rule should measure the first five years from the first regularly scheduled payment, for consistency with the 2010 MDIA Interim Final Rule. An association of State bank regulators agreed with the Board's reasoning, noting that creditors could structure loans to recast outside any parameter set by the rule and that an effective way to prevent purposeful evasion of the payment calculation provision would require legislation.

Notwithstanding the Board's proposed approach, the Bureau interprets the phrase ''during the first 5 years'' as requiring creditors to underwrite the loan based on the maximum interest rate that may apply during the first five years after the first regular periodic payment will be due. Like the Board, the Bureau finds the statutory language to be ambiguous. However, the Bureau believes that the statutory phrase ''during the first 5 years'' could be given either meaning, and that this approach provides greater protections to consumers by requiring creditors to underwrite qualified mortgages using the rate that would apply after the recast of a five-year adjustable rate mortgage. Further, as noted, this approach is consistent with the payment calculation in the 2011 QRM Proposed Rule and in existing Regulation Z with respect to the disclosure requirements for interest rates on adjustable-rate amortizing loans.

Accordingly, § 1026.43(e)(2)(iv)(A) provides that a qualified mortgage under § 1026.43(e)(2) must be underwritten, taking into account any mortgage-related obligations, using the maximum interest rate that may apply during the first five years after the date on which the first regular periodic payment will be due. Although the Bureau is finalizing the commentary and examples to § 226.43(e)(2)(iv) as proposed in the commentary to renumbered § 1026.43(e)(2)(iv), the final rule makes conforming changes to the proposed commentary to reflect the adjusted time horizon. The proposed commentary and the changes to the proposed commentary as implemented in the final rule are described below.

The Bureau is finalizing comment 43(e)(2)(iv)–1 as proposed, but with conforming changes to reflect the new time horizon. In the final rule, the comment provides guidance to creditors on how to determine the maximum interest rate during the first five years after the date on which the first regular periodic payment will be due. This comment explains that creditors must use the maximum rate that could apply at any time during the first five years after the date on which the first regular periodic payment will be due, regardless of whether the maximum rate is reached at the first or subsequent adjustment during such five year period.

The Bureau is finalizing comment 43(e)(2)(iv)(A)–2 as proposed. That comment clarifies that for a fixed-rate mortgage, creditors should use the interest rate in effect at consummation, and provides a cross-reference to § 1026.18(s)(7)(iii) for the meaning of the term ''fixed-rate mortgage.''

The Bureau is finalizing comment 43(e)(2)(iv)–3 as proposed, but with conforming changes to reflect the new time horizon. That comment provides guidance to creditors regarding treatment of periodic interest rate adjustment caps, and explains that, for an adjustable-rate mortgage, creditors should assume the interest rate increases after consummation as rapidly as possible, taking into account the terms of the legal obligation. The comment further explains that creditors should account for any periodic interest rate adjustment cap that may limit how quickly the interest rate can increase under the terms of the legal obligation. The comment states that where a range for the maximum interest rate during the first five years is provided, the highest rate in that range is the maximum interest rate for purposes of this section. Finally, the comment clarifies that where the terms of the legal obligation are not based on an index plus a margin, or formula, the creditor must use the maximum interest rate that occurs during the first five years after the date on which the first regular periodic payment will be due.

The Bureau is also adopting comment 43(e)(2)(iv)–3.i through .iii as proposed, but with conforming changes to the comment to reflect the new time horizon. Those comments provide examples of how to determine the maximum interest rate. For example, comment 43(e)(2)(iv)–3.1 illustrates how to determine the maximum interest rate in the first five years after the date on which the first regular periodic payment will be due for an adjustable-rate mortgage with a discounted rate for three years.

The Bureau is also finalizing comment 43(e)(2)(iv)–4 as proposed, but with conforming changes to reflect the new time horizon. Comment 43(e)(2)(iv)–4 clarifies the meaning of the phrase ''first five years after the date on which the first regular periodic payment will be due.'' This comment provides that under § 1026.43(e)(2)(iv)(A), the creditor must underwrite the loan using the maximum interest rate that may apply during the first five years after the date on which the first regular periodic payment will be due, and provides an illustrative example.

43(e)(2)(iv)(B)

Proposed § 226.43(e)(2)(iv)(B) would have implemented TILA section 129C(b)(2)(A)(iv) and (v), in part, by providing, as part of meeting the definition of a qualified mortgage under proposed § 1026.43(e)(2), that the creditor underwrite the loan using periodic payments of principal and interest that will repay either (1) the outstanding principal balance over the remaining term of the loan as of the date the interest rate adjusts to the maximum interest rate that occurs during the first five years after consummation; or (2) the loan amount over the loan term. *See* proposed § 226.43(e)(2)(iv)(B)(*1*) and (*2*).

TILA section 129C(b)(2)(A)(iv) and (v) states that underwriting should be based ''on a payment schedule that fully amortizes the loan over the loan term.'' The Board noted that unlike the payment calculation assumptions set forth for purposes of the general ability-to-repay rule, under TILA section 129C(a)(6), the underwriting conditions for purposes of meeting the definition of a qualified mortgage do not specify the loan amount that should be repaid, and do not define ''loan term.'' For consistency and to facilitate compliance, the Board proposed to use the terms ''loan amount'' and ''loan term'' in proposed § 226.43(b)(5) and (b), respectively, for purposes of this underwriting condition.

However, the Board also believed that a loan that meets the definition of a qualified mortgage and which has the benefit of other safeguards, such as limits on loan features and fees, merits flexibility in the underwriting process. Accordingly, the Board proposed to permit creditors to underwrite the loan using periodic payments of principal and interest that will repay either the outstanding principal balance as of the date the maximum interest rate during the first five years after consummation takes effect under the terms of the loan, or the loan amount as of the date of consummation. The Board believed the former approach more accurately reflects the largest payment amount that the consumer would need to make under the terms of the loan during the first five years after consummation, whereas the latter approach would actually overstate the payment amounts required. This approach would have set a minimum standard for qualified mortgages, while affording creditors latitude to choose either approach to facilitate compliance.

For the reasons described in the proposed rule, the Bureau is finalizing § 226.43(e)(2)(iv)(A) as proposed in renumbered § 1026.43(e)(2)(iv)(A). However, the final rule makes conforming changes to the proposed commentary to reflect the adjusted time-horizon to the first five years after the due date of the first regular periodic payment. The proposed commentary and the changes to the proposed commentary in the final rule are described below.

The Bureau is finalizing comment 43(e)(2)(iv)–5 as proposed, but with conforming changes to reflect the new time horizon. Comment 43(e)(2)(iv)–5 provides further clarification to creditors regarding the loan amount to be used for purposes of this second condition in § 1026.43(e)(2)(iv). The comment explains that for a creditor to meet the definition of a qualified mortgage under § 1026.43(e)(2), the creditor must determine the periodic payment of principal and interest using the maximum interest rate permitted during the first five years after the date on which the first regular periodic payment will be due that repays either (1) the outstanding principal balance as of the earliest date the maximum interest rate can take effect under the terms of the legal obligation, over the remaining term of the loan, or (2) the loan amount, as that term is defined in § 1026.43(b)(5), over the entire loan term, as that term is defined in § 1026.43(b)(6). This comment provides illustrative examples for both approaches.

The Bureau is finalizing comment 43(c)(2)(iv)–6 as proposed. That comment reiterates that § 1026.43(e)(2)(iv) requires creditors to take mortgage-related obligations into account when underwriting the loan and refers to § 1026.43(b)(8) and its associated commentary for the meaning of mortgage-related obligations.

The Bureau is also finalizing comment 43(e)(2)(iv)–7 as proposed, but with conforming changes to reflect the new time horizon. Comment 43(e)(2)(iv)–7 provides examples of how to determine the periodic payment of principal and interest based on the maximum interest rate during the first five years after the date on which the first regular periodic payment will be due under § 1026.43(e)(2)(iv). The final rule provides an additional example of how to determine the periodic payment of principal and interest based on the maximum interest rate during the first five years after the date on which the first regular periodic payment will be due under § 1026.43(e)(2)(iv) for an adjustable-rate mortgage with a discount of seven years, to illustrate how the payment calculation applies in a loan that adjusts after the five-year time horizon. Comment 43(e)(2)(iv)–7.iv provides an example of a loan in an amount of $200,000 with a 30-year loan term, that provides for a discounted interest rate of 6 percent that is fixed for an initial period of seven years, after which the interest rate will adjust annually based on a specified index plus a margin of 3 percent, subject to a 2 percent annual interest rate adjustment cap. The index value in effect at consummation is 4.5 percent. The loan is consummated on March 15, 2014, and the first regular periodic payment is due May 1, 2014. Under the terms of the loan agreement, the first rate adjustment is on April 1, 2021 (the due date of the 84th monthly payment), which occurs more than five years after the date on which the first regular periodic payment will be due. Thus, the maximum interest rate under the terms of the loan during the first five years after the date on which the first regular periodic payment will be due is 6 percent. Under this example, the transaction will meet the definition of a qualified mortgage if the creditor underwrites the loan using the monthly payment of principal and interest of $1,199 to repay the loan amount of $200,000 over the 30-year loan term using the maximum interest rate during the first five years after the date on which the first regular periodic payment will be due of 6 percent.

43(e)(2)(v)

43(e)(2)(v)(A)

TILA section 129C(b)(2)(A)(iii) provides that a condition for meeting the requirements of a qualified mortgage is that the income and financial resources relied upon to qualify the obligors on the residential mortgage loan are verified and documented. This requirement is consistent with requirement under the general ability-to-repay standard to consider and verify a consumer's income or assets using third-party records, pursuant to TILA section 129C(a)(1) and (3), as discussed above in the section-by-section analysis of § 1026.43(c)(2)(i) and (c)(4).

Proposed § 226.43(e)(2)(v) would have implemented TILA section 129C(b)(2)(A)(iii) by providing that for a covered transaction to be a qualified mortgage, the creditor must consider and verify the consumer's current or reasonably expected income or assets to determine the consumer's repayment ability, as required by proposed § 226.43(c)(2)(i) and (c)(4). The proposal used the term ''assets'' instead of ''financial resources'' for consistency with other provisions in Regulation Z and, as noted above, the Bureau believes that the terms have the same meaning. Proposed comment 43(e)(2)(v)–1 would have clarified that creditors may rely on commentary to proposed § 226.43(c)(2)(i), (c)(3) and (c)(4) for guidance regarding considering and verifying the consumer's income or assets to satisfy the conditions for a qualified mortgage under proposed § 226.43(e)(2)(v).

For the reasons discussed in the proposal, the Bureau is finalizing § 226.43(e)(2)(v)(A) as proposed in renumbered § 1026.43(e)(2)(v)(A), with additional clarification that the value of the dwelling includes any real property to which the dwelling is attached. Renumbered § 1026.43(e)(2)(v)(A) also provides that the creditor must consider and verify the consumer's current or reasonably expected income or assets other than the value of the dwelling (including any real property attached to the dwelling) that secures the loan, in accordance with appendix Q, in addition to § 1026.43(c)(2)(i) and (c)(4). Comment 43(e)(2)(v)–2 clarifies this provision, by explaining that, for purposes of this requirement, the creditor must consider and verify, at a minimum, any income specified in appendix Q. A creditor may also consider and verify any other income in accordance with § 1026.43(c)(2)(i) and (c)(4); however, such income would not be included in the total monthly debt-to-income ratio determination by § 1026.43(e)(2)(vi). As described below, appendix Q contains specific standards for defining ''income,'' to provide certainty to creditors as to whether a loan meets the requirements for a qualified mortgage. The final rule includes this reference to appendix Q and additional comment to clarify the relationship between the requirement to consider a consumer's current or reasonably expected income in § 1026.43(e)(2)(v)(A) and the definition of ''income'' in appendix Q. In other words, a creditor who considers ''income'' as defined in appendix Q meets the income requirement in § 1026.43(e)(2)(v)(A), so long as that income is verified pursuant to § 1026.43(c)(4). In addition, comment 43(e)(2)(v)–1 provides that for guidance on satisfying § 1026.43(e)(2)(v), a creditor may rely on commentary to § 1026.43(c)(2)(i) and (vi), (c)(3), and (c)(4).

43(e)(2)(v)(B)

The Board's proposed Alternative 2 would have required that creditors consider and verify the following additional underwriting requirements, which are also required under the general ability-to-repay standard: the consumer's employment status, the consumer's monthly payment on any simultaneous loans, the consumer's current debt obligations, the consumer's monthly debt-to-income ratio or residual income, and the consumer's credit history. The commentary would have provided that creditors could look to commentary on the general repayment ability provisions under proposed § 226.43(c)(2)(i), (ii), (iv), and (vi) through (viii), and (c)(3), (c)(4), (c)(6), and (c)(7) for guidance regarding considering and verifying the consumer's repayment ability to satisfy the conditions under § 226.43(e)(2)(v) for a qualified mortgage. *See* proposed comment 43(e)(2)(v)–1 under Alternative 2. The Board proposed these additions pursuant to its legal authority under TILA section 129C(b)(3)(B)(i). The Board believed that adding these requirements may be necessary to better ensure that the consumers are offered and receive loans on terms that reasonably reflect their ability to repay the loan.

In the final rule, § 1026.43(e)(2)(v)(B) provides that, to meet the requirements for a qualified mortgage under § 1026.43(e)(2), the creditor must consider and verify the consumer's current debt obligations, alimony, and child support, in accordance with appendix Q and § 1026.43(c)(2)(vi) and (c)(3). In addition, new comment 43(e)(2)(v)–3 clarifies that, for purposes of considering and verifying the consumer's current debt obligations, alimony, and child support pursuant to § 1026.43(e)(2)(v)(B), the creditor must consider and verify, at a minimum, any debt or liability specified in appendix Q. A creditor may also consider and verify other debt in accordance with § 1026.43(c)(2)(vi) and (c)(3); however, such debt would not be included in the total monthly debt-to-income ratio determination required by § 1026.43(e)(2)(vi). As described below, appendix Q contains specific standards for defining ''debt,'' to provide certainty to creditors as to whether a loan meets the requirements for a qualified mortgage. The final rule includes this reference to appendix Q and additional comment to clarify the relationship between the requirement to consider a consumer's current debt obligations, alimony, and child support in § 1026.43(e)(2)(v)(B) and the definition of ''debt'' in appendix Q. In other words, a creditor who considers ''debt'' as defined in appendix Q meets the requirement in § 1026.43(e)(2)(v)(B), so long as that income is verified pursuant to § 1026.43(c)(3).

The Bureau is incorporating the requirement that the creditor consider and verify the consumer's current debt obligations, alimony, and child support into the definition of a qualified mortgage in § 1026.43(e)(2) pursuant to its authority under TILA section 129C(b)(3)(B)(i). The Bureau finds that this addition to the qualified mortgage criteria is necessary and proper to ensure that responsible, affordable mortgage credit remains available to consumers in a manner that is consistent with the purposes of TILA section 129C and necessary and appropriate to effectuate the purposes of TILA section 129C, which includes assuring that consumers are offered and receive residential mortgage loans on terms that reasonably reflect their ability to repay the loan. The Bureau also incorporates this requirement pursuant to its authority under TILA section 105(a) to issue regulations that, among other things, contain such additional requirements, other provisions, or that provide for such adjustments for all or any class of transactions, that in the Bureau's judgment are necessary or proper to effectuate the purposes of TILA, which include the above purpose of section 129C, among other things. The Bureau believes that this addition to the qualified mortgage criteria is necessary and proper to achieve this purpose. In particular, as discussed above, the Bureau finds that incorporating the requirement that a creditor consider and verify a consumer's current debt obligations, alimony, and child support into the qualified mortgage criteria ensures that creditors consider, on an individual basis, and verify whether a consumer has the ability to repay a qualified mortgage. Furthermore, together with the requirement to consider and verify income, the Bureau believes this requirement to consider and verify debt obligations, alimony, and child support strengthens consumer protection and is fundamental to the underlying components of the requirement in § 1026.43(e)(2)(vi), which provides a specific debt-to-income ratio threshold.

Ultimately, the Bureau believes that the statute is fundamentally about establishing standards for determining a consumer's reasonable ability to repay and therefore believes it is appropriate to incorporate the ability-to-repay underwriting requirements into the qualified mortgage definition to ensure consistent consumer protections for repayment ability for a qualified mortgage. However, as described above, most of the ability-to-repay requirements must be considered and verified to satisfy the specific debt-to-income ratio requirement in § 1026.43(e)(2)(vi), which requires the creditor to follow the standards for ''debt'' and ''income'' in appendix Q, including the consumer's employment status, monthly payment on the covered transaction, monthly payment on simultaneous loans of which the creditor is aware, and monthly payment on mortgage-related obligations. For this reason, unlike the Board's proposed Alternative 2, the final rule does not separately require consideration and verification of these factors that are part of the general ability-to-repay analysis.

43(e)(2)(vi)

TILA section 129C(b)(2)(vi) states that the term qualified mortgage includes any mortgage loan ''that complies with any guidelines or regulations established by the Bureau relating to ratios of total monthly debt to monthly income or alternative measure of ability to pay regular expenses after payment of total monthly debt, taking into account the income levels of the consumer and such other factors as the Bureau may determine relevant and consistent with the purposes described in paragraph (3)(B)(i).''

Board's Proposal

Under proposed § 226.43(e)(2)(v) under Alternative 1, creditors would not have been required to consider the consumer's debt-to-income ratio or residual income to make a qualified mortgage. The Board noted several reasons for proposing this approach. First, the Board noted that the debt-to-income ratio and residual income are based on widely accepted standards which, although flexible, do not provide certainty that a loan is a qualified mortgage. The Board believed this approach is contrary to Congress' apparent intent to provide incentives to creditors to make qualified mortgages, since they have less risky features and terms. Second, the Board noted that because the definition of a qualified mortgage under Alternative 1 would not require consideration of current debt obligations or simultaneous loans, it would be impossible for a creditor to calculate the debt-to-income ratio or residual income without adding those requirements as well. Third, the Board stated that data shows that the debt-to-income ratio generally does not have a significant predictive power of loan performance once the effects of credit history, loan type, and loan-to-value ratio are considered.[148] Fourth, the Board noted that although consideration of the mortgage debt-to-income ratio (or ''front-end'' debt-to-income) might help consumers receive loans on terms that reasonably reflect their ability to repay the loans, the Board's outreach indicated that creditors often do not find that ''front-end'' debt-to-income ratio is a strong predictor of ability to repay. Finally, the Board stated its concern that the benefit of including the debt-to-income ratio or residual income in the definition of qualified mortgage may not outweigh the cost to certain consumers who may not meet widely accepted debt-to-income ratio standards, but may have other compensating factors, such as sufficient residual income or other resources to be able to reasonably afford the mortgage. A definition of qualified mortgage that required consideration of the consumer's debt-to-income or residual income could limit the availability of credit to those consumers.

However, under proposed § 226.43(e)(2)(v) under Alternative 2, a qualified mortgage would have been defined as a loan which, among other things, the creditor considers the consumer's monthly debt-to-income ratio or residual income, pursuant to proposed § 226.43(c)(2)(vii) and (c)(7). The Board noted that, without determining the consumer's debt-to-income ratio, a creditor could originate

[148] The proposal cited Yuliya Demyanyk & Otto Van Hemert, *Understanding the Subprime Mortgage Crisis,* 24 Rev. Fin. Stud. 1848 (2011); James A. Berkovec et al., *Race, Redlining, and Residential Mortgage Loan Performance,* 9 J. Real Est. Fin. & Econs. 263 (1994).

a qualified mortgage without any requirement to consider the effect of the new loan payment on the consumer's overall financial picture. The consumer could have a very high total debt-to-income ratio under reasonable underwriting standards, and be predicted to default soon after the first scheduled mortgage payment. Accordingly, the Board believed that including the debt-to-income ratio or residual income in the definition of qualified mortgage might ensure that the consumer has a reasonable ability to repay the loan.

The Board did not propose a quantitative standard for the debt-to-income ratio in the qualified mortgage definition, but solicited comment on the appropriateness of such an approach. The Board's proposal noted several reasons for declining to introduce a specific debt-to-income ratio for qualified mortgages. First, as explained in the 2008 HOEPA Final Rule, the Board was concerned that setting a specific debt-to-income ratio could limit credit availability without providing adequate off-setting benefits. 73 FR 4455 (July 30, 2008). The Board sought comment on what exceptions may be necessary for low-income consumers or consumers living in high-cost areas, or for other cases, if the Board were to adopt a quantitative debt-to-income standard.

Second, outreach conducted by the Board revealed a range of underwriting guidelines for debt-to-income ratios based on product type, whether creditors used manual or automated underwriting, and special considerations for high- and low-income consumers. The Board believed that setting a quantitative standard would require it to address the operational issues related to the calculation of the debt-to-income ratio. For example, the Board would need clearly to define income and current debt obligations, as well as compensating factors and the situations in which creditors may use compensating factors. In addition, the debt-to-income ratio is often a floating metric, since the percentage changes as new information about income or current debt obligations becomes available. A quantitative standard would require guidelines on the timing of the debt-to-income ratio calculation, and what circumstances would necessitate a re-calculation of the debt-to-income ratio. Furthermore, a quantitative standard may also need to provide tolerances for mistakes made in calculating the debt-to-income ratio. The rule would also need to address the use of automated underwriting systems in determining the debt-to-income.

For all these reasons, the Board did not propose a quantitative standard for the debt-to-income ratio. The Board recognized, however, that creditors, and ultimately consumers, may benefit from a higher degree of certainty surrounding the qualified mortgage definition that a quantitative standard could provide. Therefore, the Board solicited comment on whether and how it should prescribe a quantitative standard for the debt-to-income ratio or residual income for the qualified mortgage definition.

Comments

As noted above, the Bureau received comments in response to the Board's 2011 ATR Proposal and in response to the Bureau's May 2012 notice to reopen the comment period. The reopened comment period solicited comment specifically on new data and information obtained from the Federal Housing Finance Agency (FHFA) after the close of the original comment period. In the notice to reopen the comment period, the Bureau, among other things, solicited comment on data and information as well as sought comment specifically on certain underwriting factors, such as a debt-to-income ratio, and their relationship to measures of delinquency or their impact on the number or percentage of mortgage loans that would be a qualified mortgage. In addition, the Bureau sought comment and data on estimates of litigation costs and liability risks associated with claims alleging a violation of ability-to-repay requirements.

Comments on general debt-to-income ratio or residual income requirement. In response to the proposed rule, some industry commenters argued that the final rule should not require consideration and verification of a consumer's monthly debt-to-income ratio or residual income for a qualified mortgage. They argued that such an approach would create a vague, subjective definition of qualified mortgage. Certain industry commenters requested that if the Bureau added consideration and verification of the debt-to-income ratio or residual income to the definition of a qualified mortgage, the Bureau establish flexible standards. These commenters argued that imposing low debt-to-income ratio requirements would be devastating to many potential creditworthy homebuyers.

Other industry commenters suggested that if the Bureau added consideration and verification of the debt-to-income ratio or residual income to the definition of a qualified mortgage, the Bureau provide clear and objective standards. For example, one industry trade group commenter noted that, historically, the debt-to-income ratio has been a key metric used to assess a consumer's ability to repay a mortgage loan, and has been incorporated into both manual and automated underwriting systems used in the industry. Some industry commenters asked that the final rule adopt the VA calculation of residual income. *See also* the section-by-section analysis of section 1026.43(c)(7). Another industry commenter suggested that any mortgage with a residual income of at least $600 be sufficient for a qualified mortgage. Another industry commenter suggested that, at a minimum, residual income considerations would require a workable standard with clear, specific, and objective criteria and be explicitly limited to specific expense items. An industry trade group commenter recommended that if the Bureau requires the use of residual income, creditors be allowed flexibility in considering residual income along with other factors in loan underwriting. Comments that addressed a specific debt-to-income ratio are discussed below.

Several industry commenters recommended that if the Bureau required consideration and verification of the debt-to-income ratio or residual income for a qualified mortgage, creditors be permitted to take compensating factors into account. They suggested that the Bureau provide examples of compensating factors, such as: (1) The property being an energy-efficient home; (2) the consumer having probability for increased earnings based on education, job training, or length of time in a profession; (3) the consumer having demonstrated ability to carry a higher total debt-load while maintaining a good credit history for at least 12 months; (4) future expenses being lower, such as child-support payments to cease for child soon to reach age of majority; or (5) the consumer having substantial verified liquid assets.

Consumer advocates generally supported adding consideration and verification of the debt-to-income ratio or residual income to the definition of a qualified mortgage. They noted that such inclusion would help ensure that consumers receive mortgages they can afford and that such factors are basic, core features of common-sense underwriting that are clearly related to the risk of consumer default. To that point, these commenters contended that residual income is an essential component, especially for lower-income families. One consumer group commenter stressed that residual income standards should be incorporated, and pointed to the FHFA data in the Bureau's notice to reopen the comment period to demonstrate that relying solely on debt-to-income ratios is insufficient to ensure sound lending based on a consumer's ability to repay.

Many industry and consumer group commenters and interested parties supported use of a specific debt-to-income ratio threshold. For example, some suggested that if a consumer's total debt-to-income ratio is below a specified threshold, the mortgage loan should satisfy the qualified mortgage requirements, assuming other relevant conditions are met. At least one industry commenter supported allowing the use of FHA underwriting guidelines to define ''debt'' and ''income.''

Although many commenters supported the use of a specific debt-to-income ratio threshold, both industry and consumer group commenters noted that relying on debt-to-income is only one element of underwriting, and that creditors have used other compensating factors and underwriting criteria. Some commenters acknowledged that a consumer's debt-to-income ratio is a useful measure of loan performance; however, they asserted that the year of origination (*i.e.,* vintage) has more bearing on loan performance. In addition, some commenters argued that measures of consumer credit history and loan-to-value are more predictive, and that broader economic factors largely determine loan performance. Several industry commenters recommended a debt-to-income ratio cutoff that is at the upper end of today's relatively conservative lending standards, while permitting creditors to consider loans that exceed that debt-to-income ratio threshold if the consumer satisfies other objective criteria (such as reserves, housing payment history, and residual income), that help creditors assess the consumer's ability to repay the loan. These commenters argued that the FHFA data in the Bureau's notice to reopen the comment period demonstrate that when loans are properly underwritten, debt-to-income ratios can be relatively high without significantly affecting loan performance.

Numerous commenters argued that the Bureau should consider the costs and benefits of selecting a maximum debt-to-income ratio for qualified mortgages. Many industry and consumer group commenters argued that a debt-to-income threshold that is too low would unnecessarily exclude a large percentage of consumers from qualified mortgages. One joint industry and consumer group comment letter suggested a 43 percent total debt-to-income ratio. In addition to a debt-to-income requirement, some commenters and interested parties suggested that the Bureau should include within the definition of a ''qualified mortgage'' loans with a debt-to-income ratio above a certain threshold if the consumer has a certain amount of assets, such as money in a savings or similar account, or a certain amount of residual income. For example, an industry commenter suggested a 45 percent total debt-to-income ratio, with an allowance for higher total debt-to-income ratios of up to 50 percent for consumers with significant assets (*e.g.,* at least one year's worth of reserves). This commenter asked that the Bureau carve out consumers who have shown ability to maintain a high debt-to-income ratio or who have a nontraditional credit history. This commenter explained that the higher the debt-to-income ratio, the more likely a brief interruption in income or unexpected large expense could compromise repayment ability. The commenter noted that only a numerical standard would provide sufficient certainty for creditors and investors, since they may otherwise end up litigating what is a reasonable debt-to-income ratio. Another industry commenter asked that a 50 percent back-end debt-to-income ratio be sufficient. This commenter noted that without clear and objective standards, creditors trying to make a qualified mortgage would fall back on the qualified residential mortgage standards.

Another industry trade association commenter argued that a total debt-to-income ratio threshold of 43 percent is problematic because according to the FHFA data in the Bureau's notice to reopen the comment period, there is no appreciable difference in performance for loans with a 43 percent debt-to-income ratio and loans with 46 percent debt-to-income ratio. In other words, commenters argued that the FHFA data supports a higher debt-to-income ratio threshold, such as 46 percent. Another commenter noted that the FHFA data does not include data on portfolio loans.

Some consumer group commenters suggested that the Bureau conduct further research into the role of debt-to-income ratios and the relationship between a consumer's debt-to-income ratio and residual income. One commenter noted that the Bureau should consider a tiered-approach for higher-income consumers who can support a higher debt-to-income ratio. Another consumer group commenter argued that residual income should be incorporated into the definition of qualified mortgage. Several commenters suggested that the Bureau use the general residual income standards of the VA as a model for a residual income test, and one of these commenters recommended that the Bureau coordinate with FHFA to evaluate the experiences of the GSEs in using residual income in determining a consumer's ability to repay.

Some commenters opposed including a specific debt-to-income ratio threshold into the qualified mortgage criteria. For example, one commenter argued that though the qualified mortgage criteria should be as objective as possible, a specific debt-to-income threshold should not be imposed because the criteria should be flexible to account for changing markets. Another commenter argued that creditors should be able to consider debt-to-income and residual income ratios, but creditors should not be restricted to using prescribed debt-to-income or residual income ratios. One industry commenter contended that if the Bureau were to impose a 45 percent total debt-to-income ratio, for example, most larger secondary market investors/servicers would impose a total debt-to-income ratio that is much lower (such as 43 percent or 41 percent) as a general rule of risk management.

Final Rule

The Bureau believes, based upon its review of the data it has obtained and the comments received, that the use of total debt-to-income as a qualified mortgage criterion provides a widespread and useful measure of a consumer's ability to repay, and that the Bureau should exercise its authority to adopt a specific debt-to-income ratio that must be met in order for a loan to meet the requirements of a qualified mortgage. The Bureau believes that the qualified mortgage criteria should include a standard for evaluating whether consumers have the ability to repay their mortgage loans, in addition to the product feature requirements specified in the statute. At the same time, the Bureau recognizes concerns that creditors should readily be able to determine whether individual mortgage transactions will be deemed qualified mortgages. The Bureau addresses these concerns by adopting a bright-line debt-to-income ratio threshold of 43 percent, as well as clear and specific standards, based on FHA guidelines, set forth in appendix Q for calculating the debt-to-income ratio in individual cases.

The Bureau believes that a consumer's debt-to-income ratio is generally predictive of the likelihood of default, and is a useful indicator of such. At a basic level, the lower the debt-to-income ratio, the greater the consumer's ability to pay back a mortgage loan would be under existing conditions as well as changed circumstances, such as an increase in an adjustable rate, a drop in future income, or unanticipated expenses or new debts. The Bureau's analysis of FHFA's Historical Loan Performance (HLP) dataset, data provided by the FHA,[149] and data provided by commenters all bear this out. These data indicate that debt-to-income ratio correlates with loan performance, as measured by delinquency rate (where delinquency is defined as being over 60 days late), in any credit cycle. Within a typical range of debt-to-income ratios for prudent underwriting (*e.g.,* under 32 percent debt-to-income to 46 percent debt-to-income), the Bureau notes that generally, there is a gradual increase in delinquency with higher debt-to-income ratio.[150] The record also shows that debt-to-income ratios are widely used as an important part of the underwriting processes of both governmental programs and private lenders.

The Bureau recognizes the Board's initial assessment that debt-to-income ratios may not have significant predictive power once the effects of credit history, loan type, and loan-to-value are considered. In the same vein, the Bureau notes that some commenters suggested that the Bureau include compensating factors in addition to a specific debt-to-income ratio threshold. Even if a standard that takes into account multiple factors produces more accurate ability-to-pay determinations in specific cases, incorporating a multi-factor test or compensating factors into the definition of a qualified mortgage would undermine the goal of ensuring that creditors and the secondary market can readily determine whether a particular loan is a qualified mortgage. Further, the Bureau believes that compensating factors would be too complex to calibrate into a bright-line rule and that some compensating factors suggested by commenters as appropriate, such as loan-to-value ratios, do not speak to a consumer's repayment ability.

Therefore, as permitted by the statute, the Bureau is adopting a specific debt-to-income ratio threshold because this approach provides a clear, bright line criterion for a qualified mortgage that ensures that creditors in fact evaluate consumers' ability to repay qualified mortgages and provides certainty for creditors to know that a loan satisfies the definition of a qualified mortgage. A specific debt-to-income ratio threshold also provides additional certainty to assignees and investors in the secondary market, which should help reduce possible concerns regarding legal risk and potentially promote credit availability. As numerous commenters have urged, there is significant value to providing objective requirements that can be determined based on loan files. As described below, the final rule generally requires creditors to use the standards for defining ''debt'' and ''income'' in appendix Q, which are adapted from current FHA guidelines, to minimize burden and provide consistent standards. The standards set forth in appendix Q provide sufficient detail and clarity to address concerns that creditors may not have adequate certainty about whether a particular loan satisfies the requirements for being a qualified mortgage, and therefore will not deter creditors from providing qualified mortgages to consumers. The Bureau anticipates that the standards will facilitate compliance with the Dodd-Frank Act risk retention requirements, as the 2011 QRM Proposed Rule relied on FHA standards for defining ''debt'' and ''income.'' The Bureau has consulted with the Federal agencies responsible for the QRM rulemaking in developing this rule, and will continue to do so going forward.

Based on analysis of available data and comments received, the Bureau believes that 43 percent is an appropriate ratio for a specific debt-to-income threshold, and that this approach advances the goals of consumer protection and preserving access to credit. The Bureau acknowledges, based on its analysis of the data, that there is no ''magic number'' which separates affordable from unaffordable mortgages; rather, as noted above, there is a gradual increase in delinquency rates as debt-to-income ratios increase. That being said, the Bureau understands that 43 percent is within the range of debt-to-income ratios used by many creditors and generally comports with industry standards and practices for prudent underwriting. As noted above, 43 percent is the threshold used by the FHA as its general boundary. Although the Bureau notes that Fannie Mae's and Freddie Mac's guidelines generally require a 36 percent debt-to-income ratio, without compensating factors, the Bureau believes that a 43 percent debt-to-income threshold represents an appropriate method to define which loans merit treatment as qualified mortgages. In particular, the Bureau believes that 43 percent represents a prudent outer boundary for a categorical presumption of a consumer's ability to repay.

As discussed above, there was significant debate among the commenters about the precise debt-to-income ratio threshold to establish. Although a lower debt-to-income threshold would provide greater assurance of a consumer's ability to repay a loan, many commenters argued, and the Bureau agrees, that establishing a debt-to-income ratio threshold significantly below 43 percent would curtail many consumers' access to qualified mortgages. One commenter estimated that roughly half of conventional borrowers would not be eligible for qualified mortgage loans if the debt-to-income ratio was set at 32 percent, while 85 percent of borrowers would be eligible with a ratio set at 45 percent.

At the same time, the Bureau declines to establish a debt-to-income ratio threshold higher than 43 percent. The Bureau recognizes that some commenters suggested that debt-to-income ratios above 43 percent would not significantly increase the likelihood of default (depending to some extent on the presence of compensating factors), and that some consumers may face greater difficulty obtaining qualified mortgages absent a higher threshold. However, as the debt-to-income ratio increases, the presence of compensating factors becomes more important to the underwriting process and in ensuring that consumers have the ability to repay the loan. The general ability-to-repay procedures, rather than the qualified mortgage framework, is better suited for consideration of all relevant factors that go to a consumer's ability to repay a mortgage loan.

Thus, the Bureau emphasizes that it does not believe that a 43 percent debt-to-income ratio represents the outer boundary of responsible lending. The Bureau notes that even in today's credit-constrained market, approximately 22 percent of mortgage loans are made with a debt-to-income ratio that exceeds 43 percent and that prior to the mortgage boom approximately 20 percent of mortgage loans were made above that threshold. Various governmental agencies, GSEs, and creditors have developed a range of compensating factors that are applied on a case by case basis to assess a consumer's ability to repay when the consumer's debt-to-income ratio exceeds a specified ratio. Many community banks and credit

[149] The FHA's comment letter provided in response to the 2012 notice to reopen the comment period describes this data.

[150] *See, e.g.,* 77 F.R. 33120, 33122–23 (June 5, 2012) (Table 2: Ever 60+ Delinquency Rates, summarizing the HLP dataset by volume of loans and percentage that were ever 60 days or more delinquent, tabulated by the total DTI on the loans and year of origination).

unions have found that they can prudently lend to consumers with a higher debt-to-income ratio based upon their firsthand knowledge of the individual consumer. As discussed below, many of those loans will fall within the temporary exception that the Bureau is recognizing for qualified mortgages. Over the long term, as the market recovers from the mortgage crisis and adjusts to the ability-to-repay rules, the Bureau expects that there will be a robust and sizable market for prudent loans beyond the 43 percent threshold even without the benefit of the presumption of compliance that applies to qualified mortgages. In short, the Bureau does not believe that consumers who do not receive a qualified mortgage because of the 43 percent debt-to-income ratio threshold should be cut off from responsible credit, and has structured the rule to try to ensure that a robust and affordable ability-to-repay market develops over time.

The Bureau also believes that there would be significant negative consequences to the market from setting a higher threshold. For instance, if the qualified mortgage debt-to-income ratio threshold were set above 43 percent, it might sweep in many mortgages in which there is not a sound reason to presume that the creditor had a reasonable belief in the consumer's ability to repay. At a minimum, adopting a higher debt-to-income threshold to define qualified mortgages would require a corresponding weakening of the strength of the presumption of compliance—which would largely defeat the point of adopting a higher debt-to-income threshold. Additionally, the Bureau also fears that if the qualified mortgage boundary were to cover substantially all of the mortgage market, creditors might be unwilling to make non-qualified mortgage loans, with the result that the qualified mortgage rule would define the limit of credit availability. The Bureau believes that lending in the non-qualified mortgage market can and should be robust and competitive over time. The Bureau expects that, as credit conditions ease, creditors will continue making prudent, profitable loans in non-traditional segments, such as to consumers who have sufficient total assets or future earning potential to be able to afford a loan with a higher debt-to-income ratio or consumers who have a demonstrated ability to pay housing expenses at or above the level of a contemplated mortgage.

Finally, the Bureau acknowledges arguments that residual income may be a better measure of repayment ability in the long run. A consumer with a relatively low household income may not be able to afford a 43 percent debt-to-income ratio because the remaining income, in absolute dollar terms, is too small to enable the consumer to cover his or her living expenses. Conversely, a consumer with a relatively high household income may be able to afford a higher debt ratio and still live comfortably on what is left over. Unfortunately, however, the Bureau lacks sufficient data, among other considerations, to mandate a bright-line rule based on residual income at this time. The Bureau expects to study residual income further in preparation for the five-year review of this rule required by the Dodd-Frank Act. *See also* section-by-section analysis of § 1026.43(c)(7).

The Bureau believes that it is important that the final rule provide clear standards by which creditors calculate a consumer's monthly debt-to-income ratio for purposes of the specific debt-to-income threshold in § 1026.43(e)(2)(vi). For this reason, the final rule provides specific standards for defining ''debt'' and ''income'' in appendix Q. These standards are based on the definitions of debt and income used by creditors originating residential mortgages that are insured by the FHA. In particular, appendix Q incorporates the definitions and standards in the HUD Handbook 4155.1, *Mortgage Credit Analysis for Mortgage Insurance on One-to-Four-Unit Mortgage Loans,* to determine and verify a consumer's total monthly debt and monthly income, with limited modifications to remove portions unique to the FHA underwriting process, such as references to the TOTAL Scorecard Instructions. The use of FHA guidelines for this purpose provides clear, well-established standards for determining whether a loan is a qualified mortgage under § 1026.43(e)(2). This approach is also consistent with the proposed approach to defining debt and income in the 2011 QRM Proposed Rule, and therefore could facilitate compliance for creditors. The Bureau has consulted with the Federal agencies responsible for the QRM rulemaking and will continue to do so going forward as that rulemaking is completed, as well as to discuss changes to FHA guidelines that may occur over time.

Accordingly, § 1026.43(e)(2)(vi) provides that, as a condition to being a qualified mortgage under § 1026.43(e)(2), the consumer's total monthly debt-to-income ratio does not exceed 43 percent. For purposes of § 1026.43(e)(2)(vi), the consumer's monthly debt-to-income ratio is calculated in accordance with appendix Q, except as provided in § 1026.43(e)(2)(vi)(B). Section 1026.43(e)(2)(vi)(B) contains additional requirements regarding the calculation of ''debt,'' for consistency with other parts of the qualified mortgage definition and § 1026.43. Specifically, that section provides that the consumer's monthly debt-to-income ratio must be calculated using the consumer's monthly payment on the covered transaction, including mortgage-related obligations, in accordance with § 1026.43(e)(2)(iv), and any simultaneous loan that the creditor knows or has reason to know will be made, in accordance with § 1026.43(c)(2)(iv) and (c)(6). Comment 43(e)(2)(vi)–1 clarifies the relationship between the definition of ''debt'' in appendix Q and the requirements of § 1026.43(e)(2)(vi)(B). Specifically, the comment states that, as provided in appendix Q, for purposes of § 1026.43(e)(2)(vi), creditors must include in the definition of ''debt'' a consumer's monthly housing expense. This includes, for example, the consumer's monthly payment on the covered transaction (including mortgage-related obligations) and simultaneous loans. Accordingly, § 1026.43(e)(2)(vi)(B) provides the method by which a creditor calculates the consumer's monthly payment on the covered transaction and on any simultaneous loan that the creditor knows or has reason to know will be made.

The Bureau notes that the specific 43 percent debt-to-income requirement applies only to qualified mortgages under § 1026.43(e)(2). For the reasons discussed below, the specific debt-to-income ratio requirement does not apply to loans that meet the qualified mortgage definitions in § 1026.43(e)(4) or (f).

43(e)(3) Limits on Points and Fees for Qualified Mortgages

43(e)(3)(i)

TILA section 129C(b)(2)(A)(vii) defines a ''qualified mortgage'' as a loan for which, among other things, the total points and fees payable in connection with the loan do not exceed 3 percent of the total loan amount. TILA section 129C(b)(2)(D) requires the Bureau to prescribe rules adjusting this limit to ''permit lenders that extend smaller loans to meet the requirements of the presumption of compliance.'' The statute further requires the Bureau to ''consider the potential impact of such rules on rural areas and other areas where home values are lower.'' The statute does not define and the legislative history does not provide guidance on the term ''smaller loan'' or the phrase ''rural areas and other areas where home values are lower.''

The Board proposed two alternative versions of § 226.43(e)(3)(i) to implement the 3 percent points and fees cap for qualified mortgages and the adjustment to the cap for smaller loans. For both alternatives, the Board proposed a threshold of $75,000, indexed to inflation, for smaller loans. For loans above the $75,000 threshold, the 3 percent points and fees cap for qualified mortgages would have applied. For loans below $75,000, different limits would have applied, depending on the amount of the loan.

The Board explained that it set the smaller loan threshold at $75,000 because it believed that Congress intended the exception to the 3 percent points and fees cap to apply to more than a minimal, but still limited, proportion of home-secured loans. The Board noted that HMDA data show that 8.4 percent of first-lien, home-purchase (site-built) mortgages in 2008 and 9.7 percent of such mortgages in 2009 had a loan amount of $74,000 or less. The Board also stated that outreach and research indicated that $2,250—3 percent of $75,000—is within range of average costs to originate a first-lien home mortgage. Thus, the Board concluded that $75,000 appears to be an appropriate benchmark for applying the 3 percent limit on points and fees, with higher limits below that threshold offering creditors a reasonable opportunity to recover their origination costs.

Both of the Board's proposed alternatives would have separated loans into tiers based on loan size, with each tier subject to different limits on points and fees. The Board's proposed Alternative 1 would have consisted of five tiers of loan sizes and corresponding limits on points and fees:

- For a loan amount of $75,000 or more, 3 percent of the total loan amount;
- For a loan amount greater than or equal to $60,000 but less than $75,000, 3.5 percent of the total loan amount;
- For a loan amount greater than or equal to $40,000 but less than $60,000, 4 percent of the total loan amount;
- For a loan amount greater than or equal to $20,000 but less than $40,000, 4.5 percent of the total loan amount; and
- For a loan amount less than $20,000, 5 percent of the total loan amount.

Alternative 2 would have consisted of three tiers of loan sizes and corresponding limits on points and fees. The first and third tiers were consistent with Alternative 1. The middle tier was a sliding scale that reduced the points and fees cap (as a percentage of the loan amount) with each dollar increase in loan size. The three tiers of Alternative 2 would have consisted of:

- For a loan amount of $75,000 or more, 3 percent of the total loan amount;
- For a loan amount greater than or equal to $20,000 but less than $75,000, a percentage of the total loan amount yielded by the following formula:
  - Total loan amount − $20,000 = $Z
  - $Z × 0.0036 basis points = Y basis points
  - 500 basis points − Y basis points = X basis points
  - X basis points × 0.01 = Allowable points and fees as a percentage of the total loan amount.
- For a loan amount less than $20,000, 5 percent of the total loan amount.

The approach in Alternative 2 would have smoothed the transition from one tier to another and fixed an anomaly of Alternative 1. Under Alternative 1, for loans just above and below the dividing line between tiers, a greater dollar amount of points and fees would have been allowed on the smaller loans than on the larger loans. For example, the allowable points and fees on a total loan amount of $76,000 would have been $2,280 (3 percent of $76,000), but the permissible points and fees on a total loan amount of $70,000 would have been $2,450 (3.5 percent of $70,000).

The Board noted that its proposal was designed to ensure that if a loan is a qualified mortgage it would not also be a high-cost mortgage based on the points and fees. The Board stated its belief that the statute is designed to reduce the compliance burden on creditors when they make qualified mortgages, in order to encourage creditors to make loans with stable, understandable loan features. The Board expressed concern that creating points and fees thresholds for small loans that might result in qualified mortgages also being high-cost mortgages would discourage creditors from making qualified mortgages because the requirements and limitations of high-cost loans are generally more stringent than for other loans.

The Board requested comment on the proposed alternative loan size ranges and corresponding points and fees limits for qualified mortgages. The Board also requested comment on whether the loan size ranges should be indexed for inflation.

The Board stated that, instead of using a smaller loan threshold with different tiers, it had considered adjusting the criteria for smaller loans by narrowing the types of charges that would be included in points and fees for smaller loans. The Board indicated that outreach participants disfavored this approach because it would have required different ways of calculating points and fees, depending on loan size, and thus likely would have increased the burden of complying with the rules and the risk of error. The Board also stated that it had considered proposing an alternative points and fees threshold for certain geographical areas. As the Board noted, however, property values shift over time, and there is substantial variation in property values and loan amounts within geographical areas. Thus, adjusting the limits on points and fees based solely on geographic areas would have been a less straightforward and less precise method of addressing the statute's concern with smaller loans. No commenters supported these approaches.

Several industry commenters argued that points and fees have little, if any, relationship to consumers' ability to repay their mortgage loans and that qualified mortgages should therefore not be subject to limits on points and fees. Although they acknowledged that the Dodd-Frank Act generally prescribed a 3 percent limit on points and fees for qualified mortgages, they urged the Bureau to use its authority to eliminate this requirement.

Several industry commenters contended that the 3 percent limit on points and fees for qualified mortgages is too low. They maintained that the 3 percent cap would require creditors to increase interest rates to recover their costs and would limit consumers' flexibility to arrange their optimal combination of interest rates and points and fees. Industry commenters also claimed that the 3 percent limit would have a negative impact on consumers' access to affordable credit. Some industry commenters noted that the GSEs' seller/servicer guides contain standards that limit points and fees for loans that the GSEs purchase or securitize, with the current standards limiting points and fees to the greater of 5 percent of the mortgage amount or $1,000. The commenters argued that Bureau should use its authority adopt the GSEs' standards instead of the requirements prescribed by the Dodd-Frank Act. One commenter argued that, because of the complexity of the points and fees test, the Bureau should adopt a tolerance of one-quarter of 1 percent or $250 for the 3 percent limit so that *de minimis* errors in calculating points and fees would not prevent a loan from retaining the legal protection of a qualified mortgage.

With respect to the two proposed alternative versions of section 43(e)(3)(i), industry commenters generally preferred Alternative 1. They explained that Alternative 2 was too complex, would be difficult to implement, and would increase compliance and litigation costs. Some consumer advocates preferred Alternative 2, stating that it would be more beneficial to consumers. Other consumer advocates preferred Alternative 1, asserting that its simplicity would minimize miscalculations that could harm consumers. They stated that the difference to the consumer between Alternative 1 and Alternative 2 was marginal. Some of these consumer advocates argued that the benefit afforded by simplicity would outweigh the small pricing distortions.

Commenters did not object to the Board's general approach of setting a threshold amount for smaller loans and adjusting the points and fees cap for loans below the threshold. Instead, the comments discussed what the threshold loan amount should be for smaller loans and what limits should be imposed on points and fees for loans below the threshold.

Industry commenters contended that the Board's proposed limits on points and fees for smaller loans would be too low and would not permit creditors to recover their costs. They stated that many origination costs are fixed regardless of loan size. They asserted that if a creditor could not cover those costs through points and fees, the creditor would either not make the mortgage or increase the interest rate to cover the costs. Industry commenters expressed concern that, for smaller loans, a rate increase might result in the loan becoming a high-cost mortgage or in some consumers no longer being eligible for the loan. They contended that creditors would be reluctant to make these loans and credit availability would be compromised, in particular for low-income, minority, and rural consumers, and first-time home buyers. One commenter reported that if a consumer were offered a high interest rate to cover costs and the rate were increased to offset the costs of a smaller loan, the consumer would pay thousands of dollars more over the life of the loan. Industry commenters asserted that the proposed alternatives did not capture the congressional intent of providing creditors sufficient incentives to make smaller loans. Industry commenters urged the Bureau to revise the proposal to allow creditors to recover more of their costs through points and fees, either by increasing the threshold for smaller loans or raising the limits for loans below the threshold or by doing both.

Many industry commenters recommended raising the threshold for smaller loans from the $75,000 threshold proposed by the Board. One industry commenter suggested setting the threshold at $100,000, indexed to inflation. Relying on loan balances for median home prices, another industry commenter asked that the Bureau raise the threshold to $125,000. Many other industry commenters recommended raising the threshold to $150,000. One commenter noted that the average loan size in the United States at the end of the second quarter of 2010 was $193,800 and suggested using 80 percent of the average loan size, rounding off to the nearest $10,000.

In addition to urging the Bureau to raise the smaller loan threshold, many industry commenters recommended that the Bureau revise the proposal to permit creditors to charge higher points and fees for loans below the smaller loan threshold for qualified mortgages. Several industry commenters asked that the Bureau set the cap between 3.5 and 5 percent, indexed to inflation, for all loans under the smaller loans threshold. One industry commenter noted that Fannie Mae and Freddie Mac permit points and fees up to 5 percent. An industry commenter suggested a cap equal to the greater of 3 percent or $2,000, indexed to inflation. A combination of industry commenters and consumer advocates recommended a cap equal to the greater of 3 percent or $3,000. One industry commenter advocated a 4 percent cap for all loans below $125,000. Several industry commenters recommended that the cap be set at a fixed amount plus a percentage to lessen the impact of moving from one tier to the next.

In support of their arguments to raise the smaller loan threshold and to raise the limits on points and fees for loans below the threshold, several industry commenters provided data showing that many smaller loans would have exceeded the proposed points and fees caps. For example, a trade association commenter drew on data submitted by a member bank that showed that the majority of loans under $100,000 would exceed the points and fees cap, assuming fees paid to an affiliate title company were included, and that many loans between $100,000 and $150,000 would also exceed the cap. A trade association industry commenter shared data from one of its members, a financial services provider. The member reviewed over 250,000 of its recent loans and found that none of the loans under $75,000 would meet the proposed cap and that 50 percent of the loans under $125,000 would meet the cap. Several industry commenters reported that if the Bureau raised the smaller loan threshold to $150,000, a significantly smaller percentage of loans would exceed the points and fees cap.

A trade association representing the manufactured housing industry noted the Board's concern about setting the points and fees cap so high that some qualified mortgages would be deemed high-cost mortgages under HOEPA. The commenter argued, however, that the Bureau has authority to change high-cost mortgage thresholds and urged the Bureau to exercise this authority. The commenter cited section 1431 of the Dodd-Frank Act for the proposition that the Board may increase the amount of origination costs above $1,000 for loans less than $20,000. The commenter also said that section 1022 of the Dodd-Frank Act may grant the Board authority to exempt certain smaller sized manufactured home loans from the 5 percent points and fees caps on high-cost mortgages for loans above $20,000, based on asset class, transaction volume, and existing consumer protections.

Consumer advocates generally endorsed the $75,000 threshold for smaller loans. They questioned industry concerns that the 3 percent threshold would limit the availability of credit for consumers with comparatively low loan amounts. Instead, the commenters emphasized the importance of ensuring that qualified mortgages are affordable. In their view, the 3 percent points and fees cap is a key factor in ensuring affordability, so the exception for smaller loans should apply to only a limited proportion of loans. Consumer advocates argued that the points and fees cap should not exceed the 5 percent HOEPA trigger. They asserted that points and fees should be reasonable, reflect actual origination costs, and not result in disparate pricing schemes disadvantaging consumers with smaller loans.

One consumer advocate recommended analyzing the impact of a 3 percent points and fees cap on access to credit for low- and moderate-income consumers, in particular for Community Reinvestment Act loans. The commenter asked that the Bureau describe in preamble the results of any analysis of points and fees by loan amount, and for Community Reinvestment Act and non-Community Reinvestment Act loans.

In light of these comments, the Bureau is adopting revised

§ 1026.43(e)(3)(i) to implement the limits on points and fees for qualified mortgages. As noted above, several industry commenters argued that points and fees have little if any bearing on consumers' ability to repay their mortgage loans and that the points and fees limits would result in higher interest rates and reduced access to credit. They urged the Bureau to use its authority to eliminate the limits on points and fees for qualified mortgages. As an alternative to eliminating the points and fees limits entirely, some industry commenters requested that the Bureau adopt the GSEs' standards limiting points and fees for loans that they purchase or securitize. Those standards currently limit points and fees to the greater of 5 percent of the loan amount or $1,000.

The Bureau does not believe it would be appropriate to eliminate the limits on points and fees for qualified mortgages. The Bureau also declines to adopt the GSEs' current standards and raise the general 3 percent limit on points and fees. The goal of TILA section 129C is to assure that consumers are able to repay their mortgages over the term of the loans. Originators that make large sums up front may be less careful in assuring the consumers' ability to repay over time. Moreover, Congress may have believed that the points and fees limits may deter originators from imposing unnecessary or excessive up-front charges. In the absence of persuasive evidence that the points and fees limits will undermine consumers' access to affordable credit, the Bureau does not believe it would be appropriate to eliminate the points and fees limits or to raise the general 3 percent limit. As discussed in more detail below, however, the Bureau is implementing revised points and fees limits for smaller loans. The Bureau also notes that the Dodd-Frank Act did not adopt a tolerance that would allow creditors to exceed the points and fees limits by small amounts and declines to adopt such a tolerance.

As noted above, a consumer advocate requested that the Bureau conduct an analysis of the 3 percent points and fees cap on access to credit for low- and moderate-income consumers, in particular for Community Reinvestment Act loans. Given the lack of available data, it has not been practicable for the Bureau to perform such an analysis while finalizing this and other title XIV rules. The Bureau will consider whether it is possible and valuable to conduct such an analysis in the future.

Revised § 1026.43(e)(3)(i) employs an approach similar to that proposed by the Board to implement the 3 percent cap on points and fees and the adjustment to the cap for smaller loans. Like the Board's proposal, § 1026.43(e)(3)(i) sets a threshold for smaller loans, establishes tiers based on loan size, and sets limits on points and fees within each tier. However, § 1026.43(e)(3)(i) uses a mix of percentage and flat dollar limits to avoid anomalous results at tier margins and also adjusts the definition of smaller loan to include more transactions.

Although most commenters favored this tiering methodology, as noted above, some commenters suggested that the Bureau reject the Board's tiered approach and instead adopt a simpler mechanism, with all loan amounts below the threshold subject to a single percentage cap or dollar amount cap on points and fees. Like the Board, the Bureau believes the tiered approach provides a more flexible and calibrated mechanism for implementing the limits on points and fees for smaller loans. A single percentage cap that would apply to all smaller loans may not allow creditors a reasonable opportunity to recover costs for very small loans. It also may create a distortion in which loans just below the smaller loan threshold would be permitted to have significantly higher points and fees than loans just above the smaller loan threshold. A single dollar amount cap (e.g., $3,000) could result in points and fees that are a very high percentage of the very smallest loans and, as a result, could result in qualified mortgages also triggering the obligations of high-cost mortgages.

Thus, as in the Board's proposal, the final rule sets a threshold for smaller loans and establishes tiers, based on loan size, with different limits on points and fees. Specifically, § 1026.43(e)(3)(i) provides that a transaction is not a qualified mortgage unless the total points and fees payable in connection with the loan do not exceed:

• For a loan amount greater than or equal to $100,000, 3 percent of the total loan amount;

• For a loan amount greater than or equal to $60,000 but less than $100,000, $3,000;

• For a loan amount greater than or equal to $20,000 but less than $60,000, 5 percent of the total loan amount;

• For a loan amount greater than or equal to $12,500 but less than $20,000, $1,000 of the total loan amount;

• For a loan amount of less than $12,500, 8 percent of the total loan amount.

The Bureau's final rule departs from the proposal in two ways. First, § 1026.43(e)(3)(i) raises the threshold for smaller loans to $100,000. Second, for loans below the $100,000 threshold, § 1026.43(e)(3)(i) revises the points and fees caps for smaller loans within the various tiers. The general effect of these revisions will be to increase the points and fees that creditors can charge for smaller loans while still permitting those loans to meet the standard for a qualified mortgage. These two changes are discussed at greater length below.

$100,000 Threshold for Smaller Loans

To fulfill the stated purpose of the adjustment for smaller loans, the threshold should be set at a level that is sufficient to permit creditors making smaller loans a reasonable opportunity to recoup their origination costs and still offer qualified mortgages but not so high as to cause loans to exceed the HOEPA threshold to become high-cost mortgages. As noted above, the Board proposed to set the smaller loan threshold so that three percent of that amount would have provided creditors with a reasonable opportunity to recover their costs, with loans below that threshold subject to higher caps on points and fees. Thus, the Board's proposed $75,000 threshold would have created a benchmark of $2,250. The Board stated that its outreach and research indicated that $2,250 would be within the range of average costs to originate a first-lien home mortgage. However, as noted above, several industry commenters reported, based on recent loan data, that creditors' points and fees often exceed $2,250 for smaller loans and that a significant number of loans above $75,000 would exceed the three percent cap.[151]

This evidence suggests that the $2,250 benchmark (and the corresponding $75,000 smaller loan threshold) in the proposal could have been insufficient to permit creditors to recoup all or even most of their origination costs. The Bureau is aware that the commenters' loan data reflects creditors' points and fees, and not the underlying costs. Nevertheless, the evidence that substantial proportions of smaller loans would have exceeded the points and fees limits raises concerns that the creditors would not be able to recover their costs through points and fees and still originate qualified mortgages. Creditors that are unable to recover their origination costs through points and fees would have to attempt to recover those costs through higher rates. If the higher rates would trigger the additional

[151] As the Board noted, resources that provide data on origination costs tend to use different methodologies to calculate points and fees and do not use the methodology prescribed under TILA as amended by the Dodd-Frank Act. The same concerns apply to commenters' data on points and fees.

regulatory requirements applicable to high-cost loans under HOEPA or would render some potential consumers ineligible, then access to credit for at least some consumers could be compromised. Moreover, for consumers who plan to remain in their homes (and their loans) for a long time, a higher interest rate would result in higher payments over the life of the loan.

Some commenters claimed that a substantial portion of loans up to $125,000 or $150,000 would exceed the 3 percent points and fees cap and that the Bureau should raise the threshold accordingly. The Bureau disagrees for two reasons. First, this would stretch the meaning of ''smaller loans.'' In 2011, slightly under 21 percent of first-lien home mortgages were below $100,000 and another 22 percent were between $100,000 and $150,000. Thus, increasing the threshold to $150,000 would more than double the number of loans entitled to an exception to the congressionally-established points and fees cap and would capture over 40 percent of the market. The Bureau believes that this would be an overly expansive construction of the term ''smaller loans'' for the purpose of the exception to the general rule capping points and fees for qualified mortgages at 3 percent. Such a broad definition of ''smaller loans'' could allow the exception to undermine the cap on points and fees and frustrate congressional intent that qualified mortgages include limited points and fees. The function of the smaller loan exception to the points and fees cap is to make it possible for creditors making smaller loans to originate qualified mortgages. The smaller loan exception should provide creditors a reasonable opportunity to recover most, if not all, of their origination costs for smaller loans and still originate qualified mortgages. It should not be transformed into a mechanism that ensures that creditors can continue to charge the same points and fees they have in the past and still have their loans meet the qualified mortgage standard.

The Bureau concludes that a $100,000 small loan threshold strikes an appropriate balance between congressional goals of allowing creditors offering smaller loans to meet the standard for qualified mortgages and ensuring that qualified mortgages include limited points and fees. The $100,000 threshold (and, as discussed below, the corresponding adjustments to the points and fees limits for loans under that threshold) should provide creditors with a reasonable opportunity to recover most, if not all, of their origination costs through points and fees, reducing the likelihood that any increase in rates would trigger obligations of high-cost loans or would cause loans to be higher-priced covered transactions under § 1026.43(b)(4). At the same time, the $100,000 threshold would not render the smaller loan exception so broad that it undermines the general 3 percent cap on points and fees. It would cover a significant but still limited proportion of mortgages. According to the 2011 Home Mortgage Disclosure Act [152] (HMDA) data, 20.4 percent of first-lien home purchase mortgages and 20.9 percent of first-lien refinances were less than $100,000.[153]

Limits on Points and Fees for Smaller Loans

In addition to raising the smaller loan threshold to $100,000, § 1026.43(e)(3)(i) also differs from the Board's proposal by setting higher limits on points and fees for smaller loans. As noted above, the Bureau is concerned that the Board's proposal would not have provided creditors with a reasonable opportunity to recover their origination costs. Thus, § 1026.43(e)(3)(i) allows creditors higher limits on points and fees for smaller loans. Specifically, for loans of $60,000 up to $100,000, § 1026.43(e)(3)(i) allows points and fees of no more than $3,000. For loans of $20,000 up to $60,000, § 1026.43(e)(3)(i) allows points and fees of no more than 5 percent of the total loan amount. For loans of $12,500 up to $20,000, § 1026.43(e)(3)(i) allows points and fees of no more than $1,000. For loan amounts less than $12,500, § 1026.43(e)(3)(i) allows points and fees of no more than 8 percent of the total loan amount.

In contrast with the Board's proposed Alternative 1, § 1026.43(e)(3)(i) creates smooth transitions between the tiers. As noted above, under Alternative 1, the one-half percent changes in the points and fees cap between tiers would have produced the anomalous result that some smaller loans would have been permitted to include a higher dollar amount of points and fees than larger loans. While proposed Alternative 2 would have avoided this problem, it would also have been somewhat more complex, thereby increasing the risk of errors. The tiers in § 1026.43(e)(3)(i) all feature easy-to-calculate limits, making compliance easier.

Finally, the three lower tiers are tied to the comparable thresholds for high-cost loans to ensure that the points and fees on loans that satisfy the qualified mortgage standard do not trigger the additional obligations of high-cost mortgages. Under TILA as amended, a high-cost mortgage has points and fees equal to 5 percent of the total transaction amount if the transaction is $20,000 or more, and points and fees equal to the lesser of 8 percent of the total transaction amount or $1,000, if the transaction is less than $20,000. *See* TILA section 103(bb)(1)(A)(ii)(I) and (II). Setting the maximum points and fees caps based on the HOEPA triggers will help ensure that a qualified mortgage is not a high-cost mortgage because of the points and fees.

Proposed comment 43(e)(3)(i)–1 would have cross-referenced comment 32(a)(ii)–1 for an explanation of how to calculate the ''total loan amount.'' The Bureau adopts comment 43(e)(3)(i)–1 substantially as proposed, but it adds an explanation for tiers in which the prescribed points and fees limit is a fixed dollar amount rather than a percentage and revises the cross-reference because the explanation of calculating ''total loan amount'' is moved to comment 32(b)(5)(i)–1.

Proposed comment 43(e)(3)(i)–2 would have explained that a creditor must determine which category the loan falls into based on the face amount of the note (the ''loan amount''), but must apply the allowable points and fees percentage to the ''total loan amount,'' which may be an amount that is different than the face amount of the note. The Bureau adopts comment 43(e)(3)(i)–2 substantially as proposed, but it revises some of the limits to reflect the changes described above.

Proposed comment 43(e)(3)(i)–3 would have provided examples of calculations for different loan amounts. The Bureau adopts comment 43(e)(3)(i)–3 with revisions to reflect the changes to some of the limits described above.

Impact on Rural Areas and Other Areas Where Home Values Are Lower

TILA section 129C(b)(2)(D) requires the Bureau to consider the rules' potential impact on ''rural areas and other areas where home values are lower.'' The Bureau considered the concerns raised by industry commenters that if the limits on points and fees for smaller loans were set too low, access to credit could be impaired, in particular

[152] 12 U.S.C. 2801 *et seq.*

[153] The proportion of loans under the $100,000 threshold would of course be larger than under a $75,000 threshold. As indicated in the Board's proposal, in 2008, 8.3 percent of first-lien home purchase mortgages and 7.6 percent of refinances were under $75,000 for owner-occupied, one- to four-family, site-built properties. According to 2011 HMDA data, 10.6 percent of first-lien home purchases and 11 percent of first-lien refinances were under $75,000. Nevertheless, the Bureau believes that the $100,000 threshold is sufficiently limited that it remains faithful to the statute's framework, with the smaller loan exception not undermining the general 3 percent limit on points and fees.

for low income, minority, and rural consumers, and first-time home buyers. Setting the threshold for smaller loans too low may also negatively affect access to credit for manufactured housing, which disproportionately serves lower-income consumers and rural areas. The higher threshold and higher limits on points and fees for smaller loans should help to ensure that creditors are able to offer qualified mortgages in rural areas and other areas where home values are lower.

The Bureau declines to adopt the recommendation of one commenter that it exempt smaller loans for manufactured homes from the points and fees triggers for high-cost mortgages. Section 1431 of the Dodd Frank Act provides that a loan of $20,000 or more is deemed a high-cost mortgage if total points and fees exceed 5 percent of the total transaction amount and that a loan of less than $20,000 is deemed a high-cost mortgage if total points and fees exceed the lesser of 8 percent of the total transaction amount or $1,000, or other such dollar amount as the Bureau may prescribe by regulations. Such a change is beyond the scope of this rulemaking and is more appropriately addressed in the parallel HOEPA rulemaking.

43(e)(3)(ii)

Bona Fide Third-party Charges and Bona Fide Discount Points

As discussed in the section-by-section analysis of § 1026.32(b)(1)(i), the Bureau is moving the provisions excluding certain bona fide third-party charges and bona fide discount points to § 1026.32(b)(1)(i)(D) through (F). The Board had proposed to implement these provisions in proposed § 226.43(e)(3)(ii) through (iv).

Indexing Points and Fees Limits for Inflation

The Board requested comment on whether the loan size ranges for the qualified mortgage points and fees limits should be indexed for inflation. A few industry commenters recommended that the loan size ranges or the permitted dollar amounts of points and fees be adjusted for inflation. The Bureau believes that it is appropriate to adjust the points and fees limits to reflect inflation. In addition, the Bureau notes that, as prescribed by TILA section 103(aa)(3), what was originally a $400 points and fees limit for high-cost loans has been adjusted annually for inflation, and that the dollar amounts of the new high-cost points and fees thresholds in TILA section 103(bb)(1)(A)(ii)(II) will also be adjusted annually for inflation. The Bureau believes the points and fees thresholds for high-cost loans and qualified mortgages should be treated consistently with respect to inflation adjustments. Accordingly, in new § 1026.43(e)(3)(ii), the Bureau provides that the dollar amounts, including the loan amounts, shall be adjusted annually to reflect changes in the Consumer Price Index for All Urban Consumers (CPI–U). The adjusted amounts will be published in new comment 43(e)(3)(ii)–1.

43(e)(4) Qualified Mortgage Defined—Special Rules

As discussed above, the Bureau is finalizing the general qualified mortgage definition in § 1026.43(e)(2). Under that definition, qualified mortgages would be limited to loans that satisfy the qualified mortgage product feature criteria in the statute (including prohibitions on certain risky loan features, limitations on points and fees, and the requirement to underwrite to the maximum rate in the first five years of the loan), for which the creditor considers and verifies the consumer's income and assets and current debt obligations, alimony, and child support, and for which the consumer's total (or ''back-end'') debt-to-income ratio is less than or equal to 43 percent.[154]

The Bureau believes this approach establishes an appropriate benchmark over the long term for distinguishing which loans should be presumed to meet the ability-to-repay requirements under the Dodd-Frank Act, while also leaving room for the provision of responsible mortgage credit over time to consumers with higher debt-to-income ratios under the general ability-to-repay requirements. However, the Bureau acknowledges it may take some time for the non-qualified mortgage market to establish itself in light of the market anxiety regarding litigation risk under the ability-to-repay rules, the general slow recovery of the mortgage market, and the need for creditors to adjust their operations to account for several other major regulatory and capital regimes. In light of these factors, the Bureau has concluded that it is appropriate to provide a temporary alternative definition of qualified mortgage. This will help ensure access to responsible, affordable credit is available for consumers with debt-to-income ratios above 43 percent and facilitate compliance by creditors by promoting the use of widely recognized, federally-related underwriting standards.

Under this temporary provision, as a substitute for the general qualified mortgage definition in § 1026.43(e)(2), which contains a 43 percent debt-to-income ratio threshold, the final rule provides a second definition of qualified mortgage in § 1026.43(e)(4) for loans that meet the prohibitions on certain risky loan features (*e.g.,* negative amortization and interest only features) and the limitations on points and fees under § 1026.43(e)(2) and are eligible for purchase or guarantee by the GSEs, while under the conservatorship of the FHFA, or eligible to be insured or guaranteed by the U.S. Department of Housing and Urban Development under the National Housing Act (12 U.S.C. 1707 *et seq.*) (FHA), the VA, the USDA, or the Rural Housing Service (RHS).[155] The FHA, VA, USDA, and RHS have authority under the statute to define qualified mortgage standards for their own loans, so coverage under § 1026.43(e)(4), will sunset once each agency promulgates its own qualified mortgage standards, and such rules take effect. *See* TILA section 129C(b)(3)(ii). Coverage of GSE-eligible loans will sunset when conservatorship ends.

Even if the Federal agencies do not issue additional rules or conservatorship does not end, the temporary qualified mortgage definition in § 1026.43(e)(4) will expire seven

[154] As noted above, the Board proposed two alternative definitions of qualified mortgage, but also solicited comment on other alternative definitions. The Board specifically requested comment on what criteria should be included in the definition of a qualified mortgage to ensure that the definition provides an incentive to creditors to make qualified mortgages, while also ensuring that consumers have the ability to repay those loans. In addition, as described above, the Board's proposed comment 43(c)-1 would have provided that creditors may look to widely accepted governmental or non-governmental underwriting standards when assessing a consumer's repayment ability under the general ability-to-repay standard, including assessing the eight specific underwriting criteria under proposed §§ 226.43(c)(2) and (e)(2)(v)-Alternative 2. Similarly, proposed comment 43(c)(7)–1 would have provided that, to determine the appropriate threshold for monthly debt-to-income ratio or residual income, the creditor may look to widely accepted governmental and non-governmental underwriting standards. As noted, various commenters suggested that the final rule should look to certain Federal agency underwriting standards for purposes of determining whether a loan has met certain aspects of the qualified mortgage definition (for example, debt-to-income ratios and residual income).

[155] Eligibility standards for the GSEs and Federal agencies are available at: Fannie Mae, *Single Family Selling Guide, https://www.fanniemae.com/content/guide/sel111312.pdf*; Freddie Mac, *Single-Family Seller/Servicer Guide, http://www.freddiemac.com/sell/guide/*; HUD Handbook 4155.1, *http://www.hud.gov/offices/adm/hudclips/handbooks/hsgh/4155.1/41551HSGH.pdf*; Lenders Handbook—VA Pamphlet 26–7, *Web Automated Reference Material System (WARMS), http://www.benefits.va.gov/warms/pam26_7.asp*; *Underwriting Guidelines: USDA Rural Development Guaranteed Rural Housing Loan Program, http://www.rurdev.usda.gov/SupportDocuments/CA-SFH-GRHUnderwritingGuide.pdf*.

years after the effective date of the rule. The Bureau believes that this will provide an adequate period for economic, market, and regulatory conditions to stabilize. Because the Bureau is obligated by statute to analyze the impact and status of the ability-to-repay rule five years after its effective date, the Bureau will have an opportunity to confirm that it is appropriate to allow the temporary provision to expire prior to the sunset. Covered transactions that satisfy the requirements of § 1026.43(e)(4) that are consummated before the sunset of § 1026.43(e)(4) will retain their qualified mortgage status after the temporary definition expires. However, a loan consummated after the sunset of § 1026.43(e)(4) may only be a qualified mortgage if it satisfies the requirements of § 1026.43(e)(2) or (f).

The alternative definition of qualified mortgage recognizes that the current mortgage market is especially fragile as a result of the recent mortgage crisis. It also recognizes the government's extraordinary efforts to address the crisis; GSE-eligible loans, together with the other federally insured or guaranteed loans, cover roughly 80 percent of the current mortgage market. In light of this significant Federal role and the government's focus on affordability in the wake of the mortgage crisis, the Bureau believes it is appropriate, for the time being, to presume that loans that are eligible for purchase, guarantee, or insurance by the designated Federal agencies and the GSEs while under conservatorship have been originated with appropriate consideration of consumers' ability to repay, where those loans also satisfy the requirements of § 1026.43(e)(2) concerning restrictions on product features and total points and fees limitations. The temporary definition is carefully calibrated to provide a reasonable transition period to the general qualified mortgage definition, including the 43 percent debt-to-income ratio requirement. While this temporary definition is in effect, the Bureau will monitor the market to ensure it remains appropriate to presume that the loans falling within those programs have been originated with appropriate consideration of the consumer's repayment ability. The Bureau believes this temporary approach will ultimately benefit consumers by minimizing any increases in the cost of credit as a result of this rule while the markets adjust to the new regulations.

The Bureau believes this temporary alternative definition will provide an orderly transition period, while preserving access to credit and effectuating the broader purposes of the ability-to-repay statute during the interim period. The Bureau believes that responsible loans can be made above a 43 percent debt-to-income ratio threshold, and has consciously structured the qualified mortgage requirements in a way that leaves room for responsible lending on both sides of the qualified mortgage line. The temporary exception has been carefully structured to cover loans that are eligible to be purchased, guaranteed, or insured by the GSEs (while in conservatorship) or Federal agencies regardless of whether the loans are actually so purchased, guaranteed, or insured; this will leave room for private investors to return to the market and secure the same legal protection as the GSEs and Federal agencies. At the same time, as the market recovers and the GSEs and FHA are able to reduce their presence in the market, the percentage of loans that are granted qualified mortgage status under the temporary definition will shrink towards the long-term structure.

In addition to being a loan that is eligible to be made, guaranteed, or insured by the above-described Federal agencies or the GSEs while in conservatorship, to meet the definition of qualified mortgage under § 1026.43(e)(4), the loan must satisfy the statutory qualified mortgage criteria regarding prohibitions on certain risky loan features and limitations on points and fees. Specifically, § 1026.43(e)(4)(i) provides that, notwithstanding § 1026.43(e)(2), a qualified mortgage is a covered transaction that satisfies the requirements of § 1026.43(e)(2)(i) through (iii). As discussed above, those provisions require: that the loan provide for regular periodic payments that do not result in an increase of the principal balance, allow the consumer to defer repayment of principal, or result in a balloon payments; that the loan term does not exceed 30 years; and that the total points and fees payable in connection with the loan do not exceed the threshold set forth in § 1026.43(e)(3). As described further below, the temporary definition does not include requirements to (1) verify and document the consumer's income or assets relied upon in qualifying the consumer; (2) underwrite a fixed rate loan based on a payment schedule that fully amortizes the loan over the term and takes into account all applicable taxes, insurance, and assessments; or (3) underwrite an adjustable-rate loan using the maximum interest rate permitted in the first five years. The Bureau highlights that a loan need not be actually purchased or guaranteed by the GSEs or insured or guaranteed by the above-listed Federal agencies to qualify for the temporary definition in § 1026.43(e)(4). Rather, the loan need only be eligible for such purchase, guarantee, or insurance.

Notably, the temporary qualified mortgage definition does not include ''jumbo loans.'' The Bureau does not believe that creditors making jumbo loans need the benefit of the temporary exception, as the Bureau views the jumbo market as already robust and stable. Jumbo loans can still be qualified mortgages if they meet the general rule (*i.e.* are within the 43 percent debt-to-income ratio and underwritten in accordance with the general qualified mortgage requirements).

Section 1026.43(e)(4)(iii) contains the sunset provisions for the special qualified mortgage definition in § 1026.43(e)(4). Specifically, § 1026.43(e)(4)(iii)(A) provides that each respective special rule in § 1026.43(e)(4)(ii)(B) (FHA loans), (e)(4)(ii)(C) (VA loans), (e)(4)(ii)(D) (USDA loans); and (e)(4)(ii)(E) (RHS loans) shall expire on the effective date of a rule issued by each respective agency pursuant to its authority under TILA section 129C(b)(3)(ii) to define a qualified mortgage. Section 1026.43(e)(4)(iii)(B) provides that, unless otherwise expired under § 1026.43(e)(4)(iii)(A), the special rules in § 1026.43(e)(4) are available only for covered transactions consummated on or before a date that is seven years after the effective date of this rule.

Comment 43(e)(4)–1 provides additional clarification regarding the special qualified mortgage definition. Specifically, the comment provides that, subject to the sunset provided under § 1026.43(e)(4)(iii), § 1026.43(e)(4) provides an alternative definition of qualified mortgage to the definition provided in § 1026.43(e)(2). To be a qualified mortgage under § 1026.43(e)(4), the creditor must satisfy the requirements under §§ 1026.43(e)(2)(i) through (iii), in addition to being one of the types of loans specified in §§ 1026.43(e)(4)(ii)(A) through (E).

Comment 43(e)(4)–2 clarifies the effect that a termination of conservatorship would have on loans that satisfy the qualified mortgage definition under § 1026.43(e)(4) because of their eligibility for purchase or guarantee by Fannie Mae or Freddie Mac. The comment provides that § 1026.43(e)(4)(ii)(A) requires that a covered transaction be eligible for purchase or guarantee by Fannie Mae or Freddie Mac (or any limited-life regulatory entity succeeding the charter of either) operating under the conservatorship or receivership of the FHFA pursuant to section 1367 of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (12 U.S.C. 4617), as amended by the Housing and Economic Recovery Act of 2008). The special rule under § 1026.43(e)(4)(ii)(A) does not apply if Fannie Mae or Freddie Mac (or any limited-life regulatory entity succeeding the charter of either) has ceased operating under the conservatorship or receivership of the FHFA. For example, if either Fannie Mae or Freddie Mac (or succeeding limited-life regulatory entity) ceases to operate under the conservatorship or receivership of the FHFA, § 1026.43(e)(4)(ii)(A) would no longer apply to loans eligible for purchase or guarantee by that entity; however, the special rule would be available for a loan that is eligible for purchase or guarantee by the other entity still operating under conservatorship or receivership.

Comment 43(e)(4)(iii)–3 clarifies that the definition of qualified mortgage under § 1026.43(e)(4) applies only to loans consummated on or before a date that is seven years after the effective date of the rule, regardless of whether Fannie Mae or Freddie Mac (or any limited-life regulatory entity succeeding the charter of either) continues to operate under the conservatorship or receivership of the FHFA. Accordingly, § 1026.43(e)(4) is available only for covered transactions consummated on or before the earlier of either: (i) The date Fannie Mae or Freddie Mac (or any limited-life regulatory entity succeeding the charter of either), respectively, cease to operate under the conservatorship or receivership of the FHFA pursuant to section 1367 of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (12 U.S.C. 4617), as amended by the Housing and Economic Recovery Act of 2008; or (ii) a date that is seven years after the effective date of the rule, as provided by § 1026.43(e)(4)(iii).

Finally, comment 43(e)(4)(iii)–4 clarifies that, to satisfy § 1026.43(e)(4)(ii), a loan need not be actually purchased or guaranteed by the GSEs or insured or guaranteed by the FHA, VA, USFA, or RHS. Rather, § 1026.43(e)(4)(ii) requires only that the loan be eligible for such purchase, guarantee, or insurance. Rather, § 1026.43(e)(4)(ii) requires only that the loan be eligible for such purchase, guarantee, or insurance. For example, for purposes of § 1026.43(e)(4), a creditor is not required to sell a loan to Fannie Mae or Freddie Mac (or any limited-life regulatory entity succeeding the charter of either) to be a qualified mortgage. Rather, the loan must be eligible for purchase or guarantee by Fannie Mae or Freddie Mac (or any limited-life regulatory entity succeeding the charter of either), including satisfying any requirements regarding consideration and verification of a consumer's income or assets, current debt obligations, and debt-to-income ratio or residual income. To determine eligibility, a creditor may rely on an underwriting recommendation provided by Fannie Mae and Freddie Mac's Automated Underwriting Systems (AUSs) or written guide. Accordingly, a covered transaction is eligible for purchase or guarantee by Fannie Mae or Freddie Mac if: (i) The loan conforms to the standards set forth in the Fannie Mae Single-Family Selling Guide or the Freddie Mac Single-Family Seller/Servicer Guide; or (ii) the loan receives an ''Approve/Eligible'' recommendation from Desktop Underwriter (DU); or an ''Accept and Eligible to Purchase'' recommendation from Loan Prospector (LP).

The Bureau is finalizing § 1026.43(e)(4) pursuant to its authority under TILA section 129C(b)(3)(B)(i) to prescribe regulations that revise, add to, or subtract from the criteria that define a qualified mortgage upon the findings described above. The Bureau believes the temporary qualified mortgage definition is necessary and proper to ensure that responsible, affordable mortgage credit remains available to consumers in a manner consistent with the purposes of TILA section 129C and necessary and appropriate to effectuate the purposes of TILA section 129C, which includes assuring that consumers are offered and receive residential mortgage loans on terms that reasonably reflect their ability to repay the loan.

As described above, the Bureau believes that the provision of qualified mortgage status to loans that are eligible for purchase, guarantee, or to be insured by the Federal entities described above will provide a smooth transition to a more normal mortgage market. Similarly, the Bureau believes that including all loans that are eligible to be made, guaranteed, or insured by agencies of the Federal government and the GSEs while under conservatorship, will minimize the risk of disruption as the market adjusts to the ability-to-repay requirements of this rule. This adjustment to the qualified mortgage definition will also facilitate compliance with the ability-to-repay requirements. The Bureau is also finalizing § 1026.43(e)(4) pursuant to its authority under TILA section 105(a) to issue regulations with such requirements, classifications, differentiations, or other provisions, and that provide for such adjustments and exceptions for all or any class of transactions, as in the judgment of the Bureau are necessary and proper to effectuate the purposes of TILA, to prevent circumvention or evasion thereof, or to facilitate compliance therewith. For the reasons described above, the Bureau believes the adjustments to the definition of qualified mortgage are necessary to effectuate the purposes of TILA, which include the above-described purpose of TILA section 129C, among other things, and to facilitate compliance therewith.

The Bureau is exercising this authority to remove certain qualified mortgage statutory criteria, as discussed further below, and to add criteria related to eligibility for Federal agency programs and GSEs while conservatorship, as outlined above, in order to create this qualified mortgage definition.

As noted above, § 1026.43(e)(4) applies to loans that are eligible for guarantee or insurance by the Federal agencies listed above. The provisions of section 1412 apply to all residential mortgage loans, including loans that are eligible for and are guaranteed or insured by the Federal agencies listed above. However, TILA section 129C(b)(3)(B)(ii) provides the Federal agencies listed above with authority, in consultation with the Bureau, to prescribe rules defining the types of loans they insure, guarantee or administer, as the case may be, that are qualified mortgages and such rules may revise, add to, or subtract from the criteria used to define a qualified mortgage upon certain findings. Consistent with this authority, the Bureau leaves to these agencies, in consultation with the Bureau, further prescribing qualified mortgage rules defining the types of loans they respectively insure, guarantee or administer, and their rules may further revise the qualified mortgage criteria finalized in this rule with respect to these loans. In light of the Federal agencies' authority in TILA section 129C(b)(3)(B)(ii), § 1026.43(e)(4) will sunset once each agency has exercised its authority to promulgate their own qualified mortgage standards.

As noted above, the final rule does not specifically include in the temporary definition the statutory requirements to (1) verify and document the consumer's income or assets relied upon in qualifying the consumer; (2) underwrite a fixed rate loan based on a payment schedule that fully amortizes the loan over the term and takes into account all applicable taxes, insurance, and assessments; or (3) underwrite an adjustable-rate loan using the maximum interest rate permitted in the first five years. As discussed above, the Bureau believes it is appropriate, for the time being, to presume that loans that are eligible for purchase, guarantee, or insurance by the designated Federal agencies and the GSEs while under conservatorship have been originated with appropriate consideration of consumers' ability to repay where the loans satisfy the requirements of § 1026.43(e)(2) concerning restrictions on product features and total points and fees limitations. Layering additional and different underwriting requirements on top of the requirements that are unique to each loan program would undermine the purpose of the temporary definition, namely, to preserve access to credit during a transition period while the mortgage industry adjusts to this final rule and during a time when the market is especially fragile. Accordingly, as noted above, the Bureau is using its authority under TILA section 129C(b)(3)(B)(i) to remove these statutory requirements from the qualified mortgage definition in § 1026.43(e)(4). For similar reasons the Bureau is not requiring that loans that meet this qualified mortgage definition meet the 43 percent debt-to-income ratio requirement in § 1026.43(e)(2). The eligibility requirements of the GSEs and Federal agencies incorporate debt-to-income ratio thresholds. However, the GSEs and Federal agencies also permit consideration of certain compensating factors that are unique to each loan program. The Bureau declines to layer an additional debt-to-income ratio requirement to avoid undermining the purpose of the temporary qualified mortgage definition.

43(f) Balloon-Payment Qualified Mortgages Made by Certain Creditors

TILA section 129C(b)(2)(E) authorizes the Bureau to permit qualified mortgages with balloon payments, provided the loans meet four conditions. Specifically, those conditions are that: (1) The loan meets certain of the criteria for a qualified mortgage; (2) the creditor makes a determination that the consumer is able to make all scheduled payments, except the balloon payment, out of income or assets other than the collateral; (3) the loan is underwritten based on a payment schedule that fully amortizes the loan over a period of not more than 30 years and takes into account all applicable taxes, insurance, and assessments; and (4) the creditor meets four prescribed qualifications. Those four qualifications are that the creditor: (1) Operates predominantly in rural or underserved areas; (2) together with all affiliates, has total annual residential mortgage loan originations that do not exceed a limit set by the Bureau; (3) retains the balloon-payment loans in portfolio; and (4) meets any asset-size threshold and any other criteria the Bureau may establish, consistent with the purposes of this subtitle.

The four creditor qualifications are nearly identical to provisions in section 1461 of the Dodd-Frank Act, which authorizes the Bureau under TILA section 129D(c) to exempt small creditors that operate predominantly in rural or underserved areas from a requirement to establish escrow accounts for certain first-lien, higher-priced mortgage loans. Specifically, the statute authorizes creation of an exemption for any creditor that (1) operates predominantly in rural or underserved areas; (2) together with all affiliates has total annual residential mortgage transaction originations that do not exceed a limit set by the Bureau; (3) retains its mortgage debt obligations in portfolio; and (4) meets any asset-size thresholds and any other criteria that the Bureau may establish.

The Board interpreted the two provisions as serving similar but not identical purposes, and thus varied certain aspects of the proposals to implement the balloon-payment qualified mortgage and escrow provisions. Specifically, the Board interpreted the qualified mortgage provision as being designed to ensure access to credit in rural and underserved areas where consumers may be able to obtain credit only from community banks offering balloon-payment mortgages, and the escrow provision to exempt creditors that do not possess economies of scale to cost-effectively offset the burden of establishing escrow accounts by maintaining a certain minimum portfolio size from being required to establish escrow accounts on higher-priced mortgage loans. Accordingly, the two Board proposals would have used common definitions of ''rural'' and ''underserved,'' but did not provide uniformity in calculating and defining various other elements. For the balloon balloon-payment qualified mortgage provisions, for instance, the Board's proposed § 226.43(f) would have required that the creditor (1) in the preceding calendar year, have made more than 50 percent of its balloon-payment mortgages in rural or underserved areas; and (2) have assets that did not exceed $2 billion. The Board proposed two alternatives each for qualifications relating to (1) the total annual originations limit; and (2) the retention of balloon-payment mortgages in portfolio. The proposal also would have implemented the four conditions for balloon-payment qualified mortgages under TILA section 129C(b)(2)(E) and used its adjustment and exception authority to add a requirement that the loan term be five years or longer.

In contrast, the Board's proposal for the escrows exemption under proposed § 226.45(b)(2)(iii) would have required that the creditor have (1) in the preceding calendar year, have made more than 50 percent of its first-lien mortgages in rural or underserved areas; (2) together with all affiliates, originated and retained servicing rights to no more than 100 first-lien mortgage debt obligations in either the current or prior calendar year; and (3) together with all affiliates, not maintained an escrow account on any consumer credit secured by real property. The Board also sought comment on whether to add a requirement for the creditor to meet an asset-size limit and what that size should be.

In both cases, the Board proposed to use a narrow definition of rural based on the Economic Research Service (ERS) of the USDA's ''urban influence codes'' (UICs). The UICs are based on the definitions of ''metropolitan statistical areas'' of at least one million residents and ''micropolitan statistical areas'' with a town of at least 2,500 residents, as developed by the Office of Management and Budget, along with other factors reviewed by the ERS that place counties into twelve separately defined UICs depending on the size of the largest city and town in the county. The Board's proposal would have limited the definition of rural to certain ''non-core'' counties that are not located in or adjacent to any metropolitan or micropolitan area. This definition corresponded with UICs of 7, 10, 11, and 12, which would have covered areas in which only 2.3 percent of the nation's population lives.

In light of the overlap in criteria between the balloon-payment qualified mortgage and escrow exemption provisions, the Bureau considered comments responding to both proposals in determining how to finalize the particular elements of each rule as discussed further below. With regard to permitting qualified mortgages with balloon payments generally, consumer group commenters stated that the balloon-payment qualified mortgage exemption is a discretionary provision, as TILA section 129C(b)(2)(E) states that the Bureau ''may'' provide an exemption for balloon-payment mortgages to be qualified mortgages, and stated that such an exemption should not be provided in the final rule because such exemption would have a negative effect on consumers' access to responsible and affordable credit. Trade association and industry commenters generally supported the balloon-payment qualified mortgage exemption, with some comments related to the specific provisions that are discussed below. One trade association commented that the exemption should extend to all balloon-payment mortgages held in portfolio by financial institutions; as such a broader exemption would achieve Congress's intent as well as reduce the difficulty that creditors would have in complying with the requirements in the proposal. Three trade associations and several industry commenters commented that the balloon-payment qualified mortgage exemption was needed to ensure access to credit for consumers in rural areas because smaller institutions in those areas use balloon-payment mortgages to control interest rate risk.

The Bureau believes Congress enacted the exemption in TILA section 129C(b)(2)(E) because it was concerned that the restrictions on balloon-payment mortgages under the ability to repay and general qualified mortgage provisions might unduly constrain access to credit in rural and underserved areas, where consumers may be able to obtain credit only from a limited number of creditors, including some community banks that may offer only balloon-payment mortgages. Because Congress explicitly set out detailed criteria, indicating that it did not intend to exclude balloon-payment mortgages from treatment as qualified mortgages that meet those criteria, and the Bureau is implementing the statutory exemption for balloon-payment mortgages to be qualified mortgages provided they meet the conditions described below. The Bureau believes those criteria reflect a careful judgment by Congress concerning the circumstances in which the potential negative impact from restricting consumers' access to responsible and affordable credit would outweigh any benefit of prohibiting qualified mortgages from providing for balloon payments. The Bureau therefore believes that the scope of the exemption provided in this final rule implements Congress's judgment as to the proper balance between those two imperatives.

The Bureau believes that there are compelling reasons underlying Congress's decision not to allow balloon-payment mortgages to enjoy qualified-mortgage status except in carefully limited circumstances. It is the rare consumer who can afford to make a balloon payment when due. Thus, ordinarily a consumer facing a balloon payment must obtain new financing. Depending on market conditions at the time and also the consumer's own economic circumstances, consumers may find it difficult to obtain affordable credit. Some consumers may be forced to sell their homes to pay off the balloon-payment mortgage. Others may find it necessary to take on a new loan on terms that create hardships for the consumers. Unscrupulous lenders may seek to take advantage of consumers faced with the necessity of making a balloon payment by offering loans on predatory terms.

On the other hand, in rural and other underserved areas, it is not uncommon for consumers to seek a mortgage loan of a type that cannot be sold on the secondary market, because of special characteristics of either the property in question or the consumer. Many community banks make mortgages that are held in portfolio in these circumstances. To manage interest rate risk and avoid complexities in originating and servicing adjustable rate mortgages, these banks generally make balloon-payment mortgage loans which the banks roll over, at then current market interest rate, when the balloon-payment mortgage comes due. For example, data available through the National Credit Union Administration indicates that among credit unions which make mortgages in rural areas (using the definition of rural described below), 25 percent make only balloon-payment or hybrid mortgages.

There are also substantial data suggesting that the small portfolio creditors that are most likely to rely on balloon-payment mortgages to manage their interest rate risks (or to have difficulty maintaining escrow accounts) have a significantly better track record than larger creditors with regard to loan performance. As discussed in more depth in the 2013 ATR Concurrent Proposal, because small portfolio lenders retain a higher percentage of their loans on their own books, they have strong incentives to engage in thorough underwriting. To minimize performance risk, small community lenders have developed underwriting standards that are different than those employed by larger institutions. Small lenders generally engage in "relationship banking," in which underwriting decisions rely at least in part on qualitative information gained from personal relationships between lenders and consumers. This qualitative information focuses on subjective factors such as consumer character and reliability which "may be difficult to quantify, verify, and communicate through the normal transmission channels of banking organization." [156] While it is not possible to disaggregate the impact of each of the elements of the community banking model, the combined effect is highly beneficial. Moreover, where consumers have trouble paying their mortgage debt obligations, small portfolio creditors have strong incentives to work with the consumers to get them back on track, both to protect the creditors' balance sheets and their reputations in their local communities. Market-wide data demonstrate that loan delinquency and charge-off rates are significantly lower at smaller banks than larger ones.[157]

The Bureau believes that these kinds of considerations underlay Congress's decision to authorize the Bureau to establish an exemption under TILA section 129C(b)(2)(E) to ensure access to credit in rural and underserved areas where consumers may be able to obtain credit only from such community banks offering these balloon-payment mortgages. Thus, the Bureau concludes that exercising its authority is appropriate, but also that the exemption should implement the statutory criteria to ensure it effectuates Congress's intent. Accordingly, as discussed in more detail below, the Bureau adopts § 1026.43(f) largely as proposed but with certain changes described below to implement TILA section 129C(b)(2)(E).

In particular, the Bureau has concluded that it is appropriate to make the specific creditor qualifications much more consistent between the balloon-payment qualified mortgage and escrow exemptions than originally proposed by the Board.[158] The Bureau believes that this approach is justified by several considerations, including the largely identical statutory language, the similar congressional intents underlying the two provisions, and the fact that requiring small creditors operating predominantly in rural or underserved

[156] *See* Allen N. Berger & Gregory F. Udell, *Small Business Credit Availability and Relationship Lending: The Importance of Bank Organizational Structure,* 112 Econ. J. F32 (2002).

[157] *See* 2013 ATR Concurrent Proposal; Fed. Deposit Ins. Corp., *FDIC Community Banking Study,* (Dec. 2012), *available at http://fdic.gov/regulations/resources/cbi/study.html*.

[158] The Bureau has similarly attempted to maintain consistency between the asset size, annual originations threshold, and requirements concerning portfolio loans as between the final rules that it is adopting with regard to balloon qualified mortgages and the escrow exemption and its separate proposal to create a new type of qualified mortgages originated and held by small portfolio creditors. The Bureau is seeking comment in that proposal on these elements and on whether other adjustments are appropriate to the existing rules to maintain continuity and reduce compliance burden. *See* 2013 ATR Concurrent Proposal.

areas to track overlapping but not identical sets of technical criteria for each separate provision could create unwarranted compliance burden that itself would frustrate the intent of the statutes. Although the Bureau has recast and loosened some of the criteria in order to promote consistency, the Bureau has carefully calibrated the changes to further the purposes of each rulemaking and in light of the evidence suggesting that small portfolio lenders' relationship banking model provides significant consumer protections in its own right.

For the foregoing reasons, the Bureau is adopting § 1026.43(f)(1)(vi) to implement TILA section 129C(b)(2)(E)(iv) by providing that a balloon loan that meets the other criteria specified in the regulation is a qualified mortgage if the creditor: (1) In the preceding calendar year made more than 50 percent of its covered transactions secured by a first lien in counties designated by the Bureau as ''rural'' or ''underserved''; (2) together with all affiliates extended 500 or fewer first-lien covered transactions in the preceding calendar year; and (3) has total assets that are less than $2 billion, adjusted annually for inflation. The final rule also creates greater parallelism with the escrow provision with regard to the requirement that the affected loans be held in portfolio by requiring in both rules that the transactions not be subject to a ''forward commitment'' agreement to sell the loan at the time of consummation. These qualifications and the other requirements under the final rule are discussed in more detail below.

43(f)(1) Exemption

The Bureau believes that the provisions of TILA section 129C(b)(2)(E) are designed to require that balloon-payment qualified mortgages meet the same criteria for qualified mortgages as described in TILA section 129C(b)(2)(A), except where the nature of the balloon-payment mortgage itself requires adjustment to the general rules. In TILA section 129C(b)(2)(A), a qualified mortgage cannot allow the consumer to defer repayment of principal. Deferred principal repayment may occur if the payment is applied to both accrued interest and principal but the consumer makes periodic payments that are less than the amount that would be required under a payment schedule that has substantially equal payments that fully repay the loan amount over the loan term. The scheduled payments that fully repay a balloon-payment mortgage over the loan term include the balloon payment itself and, therefore, are not substantially equal. Thus, balloon-payment mortgages permit the consumer to defer repayment of principal. Additionally, a qualified mortgage must explicitly fully amortize the loan amount over the loan term and explicitly cannot result in a balloon payment under TILA section 129C(b)(2)(A). Since TILA section 129C(b)(2)(A) contains these provisions, TILA section 129C(b)(2)(E) exempts balloon-payment qualified mortgages from meeting those requirements. TILA section 129C(b)(2)(E) has additional requirements that a creditor consider the consumer's ability to repay the scheduled payments using a calculation methodology appropriate for a balloon-payment mortgage.

Accordingly, the Bureau is adjusting the ability-to-repay requirements generally applicable to qualified mortgages under § 1026.43(e)(2) for the balloon-payment qualified mortgage exemption. Requirements that are the same in both the generally applicable qualified mortgage requirements and the balloon-payment qualified mortgage exemption are specifically described in paragraph (f)(1)(i). The requirements in the generally applicable qualified mortgage requirements that are inapplicable, for the reasons described below, to the balloon-payment qualified mortgage exemption are replaced by requirements in paragraph (f)(1)(ii), (iii) and (iv) that specifically address the provisions inherent in balloon-payment mortgages.

43(f)(1)(i)

TILA section 129C(b)(2)(E)(i) requires that a balloon-payment qualified mortgage meet all of the criteria for a qualified mortgage, except for the provisions that require the loan to have: (1) Regular periodic payments that provide for the complete repayment of principal over the loan term, (2) terms that do not result in a balloon payment, and (3) a payment schedule that fully amortizes the mortgage over the loan term taking into account all applicable taxes, insurance and assessments. The Board's proposed § 226.43(f)(1)(i) would have implemented this provision by requiring that balloon-payment qualified mortgages meet the same requirements for other qualified mortgages, except for specific provisions of § 226.43(e)(2) that would not have to be considered. Commenters did not address these requirements specifically. The Bureau is adopting § 1026.43(f)(1)(i) to implement TILA section 129C(b)(2)(E)(i) by providing that a balloon-payment qualified mortgage must meet the criteria for a qualified mortgage as required by § 1026.43(e)(2)(i)(A), (e)(2)(ii), (e)(2)(iii), and (e)(2)(v). These requirements are similar to the requirements in the Board's proposal, except that they are stated as affirmative requirements instead of excluding qualified mortgage requirements that are not required to be considered for balloon-payment qualified mortgages.

Section 1026.43(f)(1)(i), by exclusion, exempts balloon-payment qualified mortgages from the requirements in § 1026.43(e)(2)(i)(B), (e)(2)(i)(C), (e)(2)(iv), and (e)(2)(vi), which use calculation methodologies that would make the origination of balloon-payment qualified mortgages difficult, if not impossible. The requirements in subsequent provisions of § 1026.43(f)(1) are adopted below to require the consideration of scheduled payments and the debt-to-income ratio made in conjunction with alternative calculation methodologies that are appropriate for balloon-payment qualified mortgages.

Comment 43(f)(1)(i)–1 clarifies that a balloon-payment qualified mortgage under this exemption must provide for regular periodic payments that do not result in an increase of the principal balance as required by § 1026.43(e)(2)(i)(A), must have a loan term that does not exceed 30 years as required by § 1026.43(e)(2)(ii), must have total points and fees that do not exceed specified thresholds pursuant to § 1026.43(e)(2)(iii), and must satisfy the consideration and verification requirements in § 1026.43(e)(2)(v).

43(f)(1)(ii)

TILA section 129C(b)(2)(E)(ii) requires a creditor making a balloon-payment qualified mortgage to determine that the consumer is able to make all scheduled payments, except the balloon payment, out of income and assets other than the collateral. TILA section 129C(b)(2)(E)(iii) requires a creditor making a balloon-payment qualified mortgage to determine, among other things, that the scheduled payments include mortgage-related obligations. Proposed § 226.43(f)(1)(ii) would have required that the creditor determine that the consumer can make all of the scheduled payments, except for the balloon payment, from the consumer's current or reasonably expected income or assets other than the dwelling that secures the loan. Commenters did not address this requirement specifically. The Bureau is adopting § 1026.43(f)(1)(ii) to implement TILA section 129C(b)(2)(E)(ii) and a portion of TILA section 129C(b)(2)(E)(iii) by requiring a creditor to determine that the consumer can make all of the payments under the terms of the legal obligation, as described in

§ 1026.43(f)(1)(iv)(A), together with all mortgage-related obligations and excluding the balloon payment, from the consumer's income or assets other than the dwelling that secures the loan. Comment 43(f)(1)(ii)–1 provides an example to illustrate the calculation of the monthly payment on which this determination must be based. Comment 43(f)(1)(ii)–2 provides additional clarification on how a creditor may make the required determination that the consumer is able to make all scheduled payments other than the balloon payment.

43(f)(1)(iii)

TILA section 129C(b)(3)(B)(i) permits the addition of additional requirements or revision of the criteria that define a qualified mortgage upon the finds discussed below. The Board's proposal did not include an explicit requirement to consider the consumer's debt-to-income ratio in relation to a balloon-payment qualified mortgage. The Board, however, sought comment on what criteria should be included in the definition of a qualified mortgage to ensure that the definition provides an incentive to creditors to make qualified mortgages, while also ensuring that consumers have the ability to repay qualified mortgages. One commenter advocated eliminating the balloon-payment qualified mortgage exemption completely as they recommended that balloon-payment mortgages should not be permitted at all, but rather suggested that the Board and Bureau take steps to make the balloon-payment qualified mortgage exemption rare.

As discussed above with regard to other categories of qualified mortgages, the Bureau believes consideration of debt-to-income ratio or residual income is fundamental to any determination of ability to repay. A consumer is able to repay a loan if he or she has sufficient funds to pay his or her other obligations and expenses and still make the payments required by the terms of the loan. Thus, debt-to-income comparisons provide a valuable predictive metric in assessing the consumer's repayment ability. The Bureau believes that it would be inconsistent with congressional intent to have balloon-payment qualified mortgages not meet those same requirements, as modified to the particular nature of a balloon-payment mortgage.

Accordingly, the Bureau is adopting § 1026.43(f)(1)(iii) to provide that, to make a balloon-payment qualified mortgage, a creditor must consider and verify the consumer's monthly debt-to-income ratio or residual income in accordance with § 1026.43(c)(7) by using the calculation methodology described in § 1026.43(f)(iv)(A), together with all mortgage-related obligations and excluding the balloon payment. Comment 43(f)(1)(iii)–1 clarifies that the calculation required under § 1026.43(c)(7)(i)(A) should be made using the payment calculation methodology under § 1026.43(f)(1)(iv)(A), together with all mortgage-related obligations and excluding the balloon payment, in order to comply with § 1026.43(f)(1)(iii).

At the same time, however, the Bureau declines to impose a specific debt-to-income or residual threshold for this category of qualified mortgages because, as discussed above, the Bureau believes that small creditors excel at making highly individualized determinations of ability to repay that take into consideration the unique characteristics and financial circumstances of the particular consumer. While the Bureau believes that many creditors can make mortgage loans with consumer debt-to-income ratios above 43 percent that consumers are able to repay, the Bureau believes that portfolio loans made by small creditors are particularly likely to be made responsibly and to be affordable for the consumer even if such loans exceed the 43 percent threshold. The Bureau therefore believes that it is appropriate to presume compliance even above the 43 percent threshold for small creditors who meet the other criteria in § 1026.43(f). The Bureau believes that the discipline imposed when small creditors make loans that they will hold in their portfolio is sufficient to protect consumers' interests in this regard. Because the Bureau is not proposing a specific limit on consumer debt-to-income ratio, the Bureau does not believe it is necessary to require creditors to calculate debt-to-income ratio in accordance with a particular standard such as that set forth in appendix Q.

In adopting this requirement, the Bureau is adding a condition for a balloon-payment qualified mortgage that is not established by TILA section 129C(b)(2)(E). The Bureau adds this condition pursuant to TILA section 129C(b)(3)(B)(i), which authorizes the Bureau ''to revise, add to, or subtract from the criteria that define a qualified mortgage upon a finding that such regulations are necessary or proper to ensure that responsible, affordable mortgage credit remains available to consumers in a manner consistent with the purposes of this section, necessary and appropriate to effectuate the purposes of this section and Section 129B, to prevent circumvention or evasion thereof, or to facilitate compliance with such sections.'' A purpose of TILA section 129C, among other things, is to ensure that consumers are offered and receive loans on terms that they are reasonably able to repay. *See* TILA section 129B(a)(2). The Bureau believes that a creditor considering and verifying the consumer's monthly debt-to-income ratio or residual income in order for the balloon-payment mortgage to qualify as a balloon-payment qualified mortgage is necessary, proper, and appropriate both to effectuate the purposes of TILA section 129C to prevent circumvention or evasion thereof and to ensure that responsible, affordable mortgage credit remains available to consumers in a manner consistent with the purposes of this section. For these reasons, the Bureau believes that § 1026.43(f)(1)(iii), in requiring a creditor considering and verifying the consumer's monthly debt-to-income ratio or residual income in order for the balloon-payment mortgage to qualify as a balloon-payment qualified mortgage, effectuates the purposes of TILA section 129C and prevents circumvention or evasion thereof.

In addition the Bureau invokes its authority under section 105(a) in order to add the above qualification for a balloon-payment qualified mortgage. Section 105(a) authorizes the Bureau to issue regulations that, among other things, contain such additional requirements, other provisions, or that provide for such adjustments for all or any class of transactions, that in the Bureau's judgment are necessary or proper to effectuate the purposes of TILA, which include the above purpose of section 129C, among other things. *See* 15 U.S.C. 1604(a). The Bureau believes that this addition to the qualified mortgage criteria is necessary and proper to achieve this purpose.

43(f)(1)(iv)

TILA section 126C(b)(2)(E)(iii) and the Board proposal require that the loan be underwritten with specific payment calculation methodologies to qualify as a balloon-payment qualified mortgage. The underwriting of a loan is based on the terms of the legal obligation. The general requirements of a qualified mortgage in § 1026.43(e)(2) govern loans secured by real property or a dwelling with multiple methods of payment calculations, terms, and conditions. However, unlike other the types of qualified mortgage, the balloon-payment qualified mortgage deals with a specific type of transaction, a balloon-payment mortgage, with specific characteristics that are described in the legal obligation. Therefore, the Bureau considers the requirement of TILA section 129C(b)(2)(E)(iii) to be requirements relating to the terms of the legal obligation of the loan. Accordingly, the Bureau is adopting § 1026.43(f)(1)(iv), requiring the legal obligation of a balloon-payment qualified mortgage to have the following terms: (1) Scheduled payments that are substantially equal and calculated on an amortization period that does not exceed 30 years; (2) the interest rate does not vary during the loan term, and (3) the loan term is for five years or longer.

Scheduled Payments

TILA section 129C(b)(2)(E)(iii) requires that a balloon-payment qualified mortgage must be underwritten based on a payment schedule that fully amortizes the loan over a period of not more than 30 years and takes into account all applicable taxes, insurance, and assessments. The Board's proposed § 226.43(f)(1)(iii) incorporated this statutory requirement. Commenters did not address this requirement specifically.

The Bureau is adopting the Board's proposal and implements § 1026.43(f)(1)(iv) to require that the scheduled payments, on which the determinations required by § 1026.43(f)(1)(ii) and (f)(1)(iii) are based, are calculated using an amortization period that does not exceed 30 years. The requirement that the payments include all mortgage-related obligations is required as part of § 1026.43(f)(1)(ii), above. The Bureau believes that the underwriting referenced in TILA section 129C(b)(2)(E)(iii) corresponds to the determination of the consumer's repayment ability referenced in TILA section 129C(b)(2)(E)(ii). Comment 43(f)(1)(iv)–1 clarifies that the amortization period used to determine the scheduled periodic payments that the consumer must pay under the terms of the legal obligation may not exceed 30 years.

In its proposal, the Board sought comment on whether a balloon-payment mortgage with interest-only payments should qualify for the balloon-payment exemption. One association of State bank regulators commented that loans with interest-only payments would be properly excluded from the exemption in order to permit the exemption to be available only to those institutions that appropriately utilize the balloon-payment mortgages to mitigate interest rate risk. The Bureau agrees with this assessment and believes that permitting interest-only payments would be contrary to the intent of Congress requiring amortizing payments as a requirement of a qualified mortgage, as interest-only payments do not provide any reduction in principal. Accordingly, the Bureau is adding comment 43(f)(1)(iv)–2 which clarifies that a loan that provides for interest-only payments cannot qualify for the balloon-payment qualified mortgage exemption, because it would not require the consumer to make any payments towards the principal balance of the loan contrary to the requirement that the scheduled payments result in amortization of the loan for a period that does not exceed 30 years.

Fixed Interest Rate

TILA section 129C(b)(3)(B)(i) permits the addition of additional requirements upon the finding that such regulations are necessary or proper to ensure that responsible, affordable mortgage credit remains available to consumers. The Board's proposal did not include any restrictions on the interest rate terms of the loan, but did observe that community banks appear to originate balloon-payment mortgages to hedge against interest-rate risk. The Board sought comment on what criteria should be included in the definition of a qualified mortgage to ensure that the definition provides an incentive to creditors to make qualified mortgages, while also ensuring that consumers have the ability to repay qualified mortgages.

The Bureau believes that the purpose of the exemption was to permit balloon-payment mortgages to be originated for those consumers that still need or want them, and to permit competition between creditors that address interest rate risk through the use of adjustable rate mortgages and those creditors that address interest rate risk through the use of balloon-payment mortgages. The Bureau believes that creditors that have the infrastructure and resources to originate adjustable rate mortgages do not need to resort to the use of balloon-payment mortgages to address interest rate risk. Accordingly, the Bureau is adopting § 1026.43(f)(1)(iv)(B), which requires that the legal obligation of a balloon-payment qualified mortgage must include an interest rate that will not increase during the term of the loan.

In adopting this requirement, the Bureau is adding a condition for a balloon-payment qualified mortgage that is not established by TILA section 129C(b)(2)(E). The Bureau adds this condition pursuant to TILA section 129C(b)(3)(B)(i), which authorizes the Bureau ''to revise, add to, or subtract from the criteria that define a qualified mortgage upon a finding that such regulations are necessary or proper to ensure that responsible, affordable mortgage credit remains available to consumers in a manner consistent with the purposes of this section, necessary and appropriate to effectuate the purposes of this section and Section 129B, to prevent circumvention or evasion thereof, or to facilitate compliance with such sections.'' A purpose of TILA section 129C is to ensure that consumers are offered and receive loans on terms that they are reasonably able to repay. *See* TILA section 129B(a)(2). The Bureau believes that requiring the legal obligation of a balloon-payment qualified mortgage to contain an interest rate that does not increase during the loan term is necessary, proper, and appropriate both to effectuate the purposes of TILA section 129C and to prevent circumvention or evasion thereof and to ensure that responsible, affordable mortgage credit remains available to consumers in a manner consistent with the purposes of this section. For these reasons, the Bureau believes that § 1026.43(f)(1)(iv)(B), in requiring the legal obligation of a balloon-payment qualified mortgage to contain an interest rate that does not increase during the loan term, effectuates the purposes of TILA section 129C and prevents circumvention or evasion thereof.

In addition the Bureau invokes its authority under section 105(a) in order to add the above qualification for a balloon-payment qualified mortgage. Section 105(a) authorizes the Bureau to issue regulations that, among other things, contain such additional requirements, other provisions, or that provide for such adjustments for all or any class of transactions, that in the Bureau's judgment are necessary or proper to effectuate the purposes of TILA, which include the above purpose of Section 129C, among other things. *See* 15 U.S.C. 1604(a). The Bureau believes that this addition to the qualified mortgage criteria is necessary and proper to achieve this purpose.

Loan Term of Five Years or Longer

TILA section 129C(b)(3)(B)(i) permits the adoption of additional requirements upon the finding that such regulations are necessary or proper to ensure that responsible, affordable mortgage credit remains available to consumers. The Board's proposed § 226.43(f)(1)(iv) would have included the addition of a requirement that a balloon-payment qualified mortgage must have a loan term of five years or longer. One association of State bank regulators and an industry trade group commented that the five-year term requirement was appropriate, as the time period is consistent with other provisions of the proposed rule. One industry trade group and one industry commenter commented that three years would be a more appropriate term because some of the creditors that would qualify under proposed § 226.43(f)(1)(v) utilize three-year terms. The Bureau is not persuaded that the exemption was meant by Congress to permit any current business practice of creditors that would satisfy the requirements of proposed § 226.43(f)(1)(v), rather the exemption was meant to provide a reasonable exemption for some balloon-payment mortgages that still meet other requirements of a qualified mortgage. The Bureau notes that the statute requires underwriting for an adjustable-rate qualified mortgage to be based on the maximum interest rate permitted during the first five years. *See* TILA Section 129C(b)(2)(A)(v). Therefore, the Bureau is adopting the Board's proposal by implementing § 1026.43(f)(1)(iv)(C) requiring a loan term of five years or longer because it reflects the statutory intent that five years is a reasonable period to repay a loan. Since other requirements of a qualified mortgage include a review of the mortgage over a five-year term, it would be more consistent with the intent of the exemption for the balloon-payment mortgage to have at least a five-year term.

The Bureau believes that it is appropriate to structure the exemption to prevent balloon-payment mortgages with very short loan terms from being qualified mortgages because such loans would present certain risks to consumers. A consumer with a loan term of less than five years, particularly where the amortization period is especially long, would face a balloon payment soon after consummation, in an amount virtually equal to the original loan amount. The consumer would establish little equity in the property under such terms, and if the pattern is repeated the consumer may never make any significant progress toward owning the home unencumbered. Thus, the greater the difference between a balloon-payment mortgage's amortization period and its loan term, the more likely the consumer would face this problem. The Bureau's requirement of a minimum term therefore complements the 30-year maximum amortization period prescribed by TILA section 129C(b)(2)(E)(iii).

In adopting this requirement, the Bureau is adding a condition for a balloon-payment qualified mortgage that is not established by TILA section 129C(b)(2)(E). The Bureau adds this condition pursuant to TILA section 129C(b)(3)(B)(i), which authorizes the Bureau ''to revise, add to, or subtract from the criteria that define a qualified mortgage upon a finding that such regulations are necessary or proper to ensure that responsible, affordable mortgage credit remains available to consumers in a manner consistent with the purposes of this section, necessary and appropriate to effectuate the purposes of this section and Section 129B, to prevent circumvention or evasion thereof, or to facilitate compliance with such sections.'' A purpose of TILA section 129C is to ensure that consumers are offered and receive loans on terms that they are reasonably able to repay. *See* TILA section 129B(a)(2). For the reasons discussed above, the Bureau believes that a minimum loan term for balloon-payment mortgages is necessary and appropriate both to effectuate the purposes of TILA section 129C and to prevent circumvention or evasion thereof. For these reasons, the Bureau believes that § 1026.43(f)(1)(iv)(C), in limiting the exemption for balloon-payment qualified mortgages to covered transactions with loan terms of at least five years and thus ensuring that such products truly support mortgage affordability, effectuates the purposes of TILA section 129C and prevents circumvention or evasion thereof. The Bureau also believes this minimum loan term for balloon-payment qualified mortgages is necessary, proper, and appropriate to ensure that responsible, affordable mortgage credit remains available to consumers in a manner consistent with the purposes of Section 129C.

In addition the Bureau invokes its authority under section 105(a) in order to add the above qualification for a balloon-payment qualified mortgage. Section 105(a) authorizes the Bureau to issue regulations that, among other things, contain such additional requirements, other provisions, or that provide for such adjustments for all or any class of transactions, that in the Bureau's judgment are necessary or proper to effectuate the purposes of TILA, which include the above purpose of Section 129C, among other things. *See* 15 U.S.C. 1604(a). The Bureau believes that this addition to the qualified mortgage criteria is necessary and proper to achieve this purpose.

43(f)(1)(v) and (vi)

TILA section 129C(b)(2)(E)(iv) includes among the conditions for a balloon-payment qualified mortgage that the creditor (1) operates predominantly in rural or underserved areas; (2) together with all affiliates, has total annual residential mortgage loan originations that do not exceed a limit set by the Bureau; (3) retains the balloon-payment loans in portfolio; and (4) meets any asset-size threshold and any other criteria as the Bureau may establish. The Board proposed § 226.43(f)(1)(v) to impose specific requirements to implement some of these elements and sought comment on alternatives to implement others. Specifically, the Board: (1) Proposed a requirement that the creditor in the preceding year made more than 50 percent of its balloon-payment mortgages in rural or underserved areas; (2) sought comment on whether to adopt an annual originations limit based on either the total volume of mortgages or the total number of mortgages made in the last year by the creditor, together with affiliates, without proposing a specific threshold; (3) sought comment on two alternatives to implement the portfolio requirement by revoking a creditor's ability to make balloon-payment qualified mortgages if the creditor sold any balloon-payment mortgages either in the last year or at any time after the final rule was adopted; and alternatives, and (4) did not have assets that exceeded $2 billion, adjusted annually for inflation.

In contrast, the Board's escrows proposal would have implemented nearly identical statutory requirements under TILA 129D(c) by requiring that the creditor (1) in the preceding calendar year, have made more than 50 percent of its first-lien mortgages in rural or underserved areas; (2) together with all affiliates, originated and retained servicing rights to no more than 100 first-lien mortgage debt obligations in either the current or prior calendar year; and (3) not be permitted to invoke the exception for any first-lien higher-priced mortgage loan that was subject to a ''forward commitment'' to sell the loan at the time of consummation. The Board also sought comment on whether to impose an asset limit without proposing a specific threshold, and proposed to impose a further requirement that the creditor and its affiliates not maintain escrow accounts for any other loans in order to be eligible for the exception.

As stated above, the Bureau has considered the comments received under both proposals regarding implementation of the largely identical statutory criteria, and has concluded that it is appropriate to create a much higher degree of consistency between the elements in the two individual rules. Implementation of each of the statutory elements is discussed further below.

Holding of Balloon-Payment Mortgages in Portfolio

TILA section 129C(b)(E)(iv) requires that the lender keep balloon-payment mortgages in portfolio. The Board proposed to implement this requirement by removing a creditor's eligibility for the exemption under proposed § 226.43(f)(1)(v)(C) if it sold a balloon-payment mortgage during two alternative periods, one that would cover any time after the adoption of the final rule and another that would look only to sales during the preceding or current calendar year. The Board concluded that this was the best approach to implement the statutory requirement in the qualified mortgage context because it would allow a creditor to determine at consummation whether a particular balloon-payment loan was eligible to be a qualified mortgage and allow the loan to maintain such status even if it were sold, while creating strong safeguards against gaming of the exception by revoking the creditor's ability to invoke the provisions if they began selling such loans to other holders.

In contrast, the Board's 2011 Escrows Proposal would have implemented a parallel statutory requirement under TILA section 129D(c)(3) by looking to whether the particular first-lien, higher-priced mortgage loan was subject to sale under a ''forward commitment.'' Forward commitments are agreements entered into at or before consummation of a transaction under which a purchaser is committed to acquire the specific loan or loans meeting specified criteria from the creditor after consummation. The Board believed that the proposal was a reasonable way to implement the statutory requirement because it would allow the creditor and consumer to determine at consummation whether an escrow requirement was required to be established; the Board reasoned that fashioning the rule in a way that would require that an escrow account be established sometime after consummation if the particular loan was transferred to a non-eligible holder would be potentially burdensome to consumers, since the consumer may not have the funds available to make a large lump-sum payment at that time. At the same time, the Board believed the rule would prevent gaming of the escrows exception because it thought that small creditors would be reluctant to make a loan that they did not intend to keep in their portfolios unless they had the assurance of a committed buyer before extending the credit.

Comments received on the escrows proposal had a divergence of opinion on how the forward commitment requirement would work in practice. One trade association commenter stated that the forward commitment requirement would prevent creditors from selling portfolio mortgage debt obligations in the future. This appears to be a misreading of the Board's 2011 Escrows Proposal, as it would not have restricted the sale of higher-priced mortgage loans. Instead, the proposed forward commitment requirement provided that, so long as the higher-priced mortgage loan was not subject to a forward commitment at the time of consummation, the higher-priced mortgage loan could be sold on the secondary market without requiring an escrow account to be established at that time. One consumer advocacy group, concerned about the possibility that creditors would use the provision to skirt the escrow requirements, suggested a blanket rule that higher-priced mortgage loans that are exempt must be maintained in the portfolio of the creditor or, alternatively, that upon sale secondary market purchasers must be required to establish escrow accounts for such mortgage debt obligations.

After consideration of these comments and further analysis of parallels between the two rulemakings, the Bureau believes that it is useful and appropriate to implement the no-forward-commitment requirement in both rules. Accordingly, the Bureau is adding § 1026.43(f)(1)(v) to provide that a loan is not eligible to be a balloon-payment qualified mortgage if it is subject, at consummation, to a commitment to be acquired by another person, other than a person that separately meets the requirements of § 1026.43(f)(1)(vi). Comment 43(f)(1)(v)–1 clarifies that a balloon-payment mortgage that will be acquired by a purchaser pursuant to a forward commitment does not satisfy the requirements of § 1026.43(f)(1)(v), whether the forward commitment refers to the specific transaction or the balloon-payment mortgage meets prescribed criteria of the forward commitment, along with an example. The Bureau believes the rationale for the balloon-payment qualified mortgage exemption is not present when a loan will be or is eligible to be acquired pursuant to a forward commitment, even if the creditor is exempt, as the creditor does not intend to retain the balloon-payment mortgage in its portfolio.

In adopting this requirement, the Bureau is adding a condition for a balloon-payment qualified mortgage that is not established by TILA section 129C(b)(2)(E). The Bureau is adopting § 1026.43(f)(1)(vi) pursuant to TILA section 129C(b)(3)(B)(i), which authorizes the Bureau ''to revise, add to, or subtract from the criteria that define a qualified mortgage upon a finding that such regulations are necessary or proper to ensure that responsible, affordable mortgage credit remains available to consumers in a manner consistent with the purposes of this section, necessary and appropriate to effectuate the purposes of this section and Section 129B, to prevent circumvention or evasion thereof, or to facilitate compliance with such sections.'' A purpose of TILA section 129C is to ensure that consumers are offered and receive loans on terms that they are reasonably able to repay. *See* TILA section 129B(a)(2). The Bureau believes that the prohibition on mortgages originated in conjunction with a forward commitment from qualifying as a balloon-payment qualified mortgage is necessary, proper, and appropriate both to effectuate the purposes of TILA section 129C and to prevent circumvention or evasion thereof. For these reasons, the Bureau believes that § 1026.43(f)(1)(v), in limiting the exemption for balloon-payment qualified mortgages to mortgages that are not originated in conjunction with a forward commitment, effectuates the purposes of TILA section 129C and prevents circumvention or evasion thereof and is necessary, proper, and appropriate to do so. Limiting balloon-payment qualified mortgages to those that are not originated in conjunction with a forward commitment effectively facilitates compliance with the statutory requirement that a balloon-payment qualified mortgage is extended by a creditor that retains the balloon-payment qualified mortgages in portfolio.

In addition the Bureau invokes its authority under section 105(a) in order to add the above qualification for a balloon-payment qualified mortgage. Section 105(a) authorizes the Bureau to issue regulations that, among other things, contain such additional requirements, other provisions, or that provide for such adjustments for all or any class of transactions, that in the Bureau's judgment are necessary or proper to effectuate the purposes of TILA, which include the above purpose of Section 129C, among other things. *See* 15 U.S.C. 1604(a). The Bureau believes that this addition to the qualified mortgage criteria is necessary and proper to achieve this purpose.

''Operates Predominantly in Rural or Underserved Areas''

Under TILA section 129C(b)(2)(E)(iv)(I), to qualify for the exemption, a creditor must ''operate predominantly in rural or underserved areas.'' The Board's proposed § 226.43(f)(1)(v)(A) would have required a creditor to have made during the preceding calendar year more than 50 percent of its total balloon-payment mortgages in ''rural or underserved'' areas. The Board sought comment generally on the appropriateness of the proposed approach to implement the phrase ''operate predominantly.'' Two trade group commenters commented that the balloon exemption should extend to all creditors that retain balloon-payment mortgages in their portfolio, and to eliminate this proposed requirement, which would have the same effect as the extension of the exemption proposed generally, discussed above.

Overall, the Bureau believes Congress enacted the exemption in TILA section 129C(b)(2)(E) to ensure access to credit in rural and underserved areas where consumers may be able to obtain credit only from such community banks or credit unions offering balloon-payment mortgages. The ''operates predominantly in'' requirement serves to limit the exemption to these institutions. To remove this portion of the qualifications of the creditor would be to circumvent Congress's stated requirement that the exemption was intended for creditors operating predominantly in rural and underserved areas and would potentially extend the exemption to, for example, a national bank that makes loans in rural areas and that is fully capable of putting on its balance sheet fixed rate 30-year mortgage loans or adjustable rate mortgage loans. The Bureau believes that ''predominantly'' indicates a portion greater than half, hence the regulatory requirement of more than 50 percent.

The Board also proposed § 226.43(f)(2) to implement this provision by defining the terms ''rural'' and ''underserved,'' which are not defined in the statute. The Board's proposed § 226.43(f)(2) established separate criteria for both rural and underserved areas. Commenters addressing the creditor qualifications under § 226.43(f)(2) discussed the definitions themselves, and did not comment on the necessity of creating definitions for the terms rural and underserved. The Bureau is adopting the Board's approach by implementing section 1026.43(f)(2) which establishes separate criteria for both ''rural'' and ''underserved.'' This means that a property could qualify for designation by the Bureau under either definition, and that covered transactions made by a creditor in either a rural or underserved area will be included in determining whether the creditor operates predominantly in such areas.

''Rural''

As described above, the Board's proposed definition of rural for purposes of both the balloon-payment qualified mortgage and escrows exception relied upon the USDA ERS ''urban influence codes'' (UICs). The UICs are based on the definitions of ''metropolitan'' and ''micropolitan'' as developed by the Office of Management and Budget, along with other factors reviewed by the ERS, which place counties into twelve separately defined UICs depending on the size of the largest city and town in the county. The Board's proposal would have limited the definition of rural to certain ''non-core'' counties that are not located in or adjacent to any metropolitan or micropolitan area. This definition corresponded with UICs of 7, 10, 11, or 12. The population that would have been covered under the Board's proposed definition was 2.3 percent of the United States population under the 2000 census. The Board believed this limited the definition of ''rural'' to those properties most likely to have only limited sources of mortgage credit because of their remoteness from urban centers and their resources. The Board sought comment on all aspects of this approach to defining rural, including whether the definition should be broader or narrower.

Many commenters in both rulemakings, including more than a dozen trade group commenters, several individual industry commenters, one association of State banking regulators, and a United States Senator, suggested that this definition of a rural area was too narrow and would exclude too many creditors from qualifying for the balloon-payment qualified mortgage exemption and constrain the availability of credit to rural properties. The comment from a United States Senator suggested using the eligibility of a property to secure a single-family loan under the USDA's Rural Housing Loan program as the definition of a rural property. A trade association argued that because community banks use balloon-payment mortgages to hedge against interest rate risk, the exemption should not be confined to rural areas.

The Bureau agrees that a broader definition of ''rural'' is appropriate to ensure access to credit with regard to both the escrows and balloon-payment qualified mortgage exemptions. In particular, the Bureau believes that all ''non-core'' counties should be encompassed in the definition of rural, including counties adjacent to a metropolitan area or a county with a town of at least 2,500 residents (*i.e.,* counties with a UIC of 4, 6, and 9 in addition to the counties with the UICs included in the Board's definition). The Bureau also believes that micropolitan areas which are not adjacent to a metropolitan area should be included within the definition of rural, (*i.e.,* counties with a UIC of 8). These counties have significantly fewer creditors originating higher-priced mortgage loans and balloon-payment mortgages than other counties.[159] Including these counties within the definition of rural would result in 9.7 percent of the population being included within rural areas. Under this definition, only counties in metropolitan areas or in micropolitan areas adjacent to metropolitan areas would be excluded from the definition of rural.

The Bureau also considered adopting the definition of rural used to determine the eligibility of a property to secure a single family loan under the USDA's Rural Housing Loan program. For purposes of the Rural Housing Loan program, USDA subdivides counties into rural and non-rural areas. As a result, use of this definition would bring within the definition of rural certain portions of metropolitan and micropolitan counties. Given the size of some counties, particularly in western States, this approach may provide a more nuanced measure of access to credit in some areas than a county-by-

[159] A review of data from HMDA reporting entities indicates that there were 700 creditors in 2011 that otherwise meet the requirements of § 1026.35(b)(2)(iii), of which 391 originate higher-priced mortgage loans in counties that meet the definition of rural, compared to 2,110 creditors that otherwise meet the requirements of § 1026.35(b)(2)(iii) that originate balloon-payment mortgages in counties that would not be rural. The 391 creditors originated 12,921 higher-priced mortgage loans, representing 30 percent of their 43,359 total mortgage loan originations. A review of data from credit unions indicates that there were 830 creditors in 2011 that otherwise meet the requirements of § 1026.35(b)(2)(iii), of which 415 originate balloon-payment and hybrid mortgages in counties that meet the definition of rural, compared to 3,551 creditors that otherwise meet the requirements of § 1026.35(b)(2)(iii) that originate balloon-payment mortgages in counties that would not be rural. The 415 creditors originated 4,980 balloon-payment mortgage originations, representing 20 percent of their 24,968 total mortgage loan originations.

county metric. However, use of the Rural Housing Loan metrics would incorporate such significant portions of metropolitan and micropolitan counties that 37 percent of the United States population would be within areas defined as rural. Based on a review of HMDA data and the location of mortgage transactions originated by HMDA reporting entities, the average number of creditors in the areas that would meet the USDA's Rural Housing Loan program definition of rural is ten. The Bureau believes that a wholesale adoption of the Rural Housing Loan definitions would therefore expand the definition of rural beyond the intent of the escrow and balloon-payment qualified mortgage exemptions under sections 1412 and 1461 of the Dodd-Frank Act by incorporating areas in which there is robust access to credit.

Accordingly, the final rule incorporates the provisions of the escrow final rule providing that a county is rural if it is neither in a metropolitan statistical area, nor in a micropolitan statistical area that is adjacent to a metropolitan statistical area. The Bureau intends to continue studying over time the possible selective use of the Rural Housing Loan program definitions and tools provided on the USDA Web site to determine whether a particular property is located within a ''rural'' area. For purposes of initial implementation, however, the Bureau believes that defining ''rural'' to include more UIC categories creates an appropriate balance to preserve access to credit and create a system that is easy for creditors to implement.

''Underserved''

The Board's proposed § 226.43(f)(2)(ii) would have defined a county as ''underserved'' during a calendar year if no more than two creditors extend consumer credit five or more times in that county. The definition was based on the Board's judgment that, where no more than two creditors are significantly active, the inability of one creditor to offer a balloon-payment mortgage would be detrimental to consumers who would have limited credit options because only one creditor would be left to provide the balloon-payment mortgage. Essentially, a consumer who could only qualify for a balloon-payment mortgage would be required to obtain credit from the remaining creditor in that area. Most of the same commenters that stated that the definition of rural was too narrow, as discussed above, also stated that the definition of underserved was too narrow, as well. The commenters proposed various different standards, including standards that considered the extent to which the property was in a rural area, as an alternate definition.

The Bureau believes the purpose of the exemption is to permit creditors that rely on certain balloon-payment mortgage products to continue to offer credit to consumers, rather than leave the mortgage loan market, if such creditors' withdrawal would significantly limit consumers' ability to obtain mortgage credit. In light of this rationale, the Bureau believes that ''underserved'' should be implemented in a way that protects consumers from losing meaningful access to mortgage credit. The Bureau is proposing to do so by designating as underserved only those areas where the withdrawal of a creditor from the market could leave no meaningful competition for consumers' mortgage business. The Bureau believes that the expanded definition of rural, as discussed above, and the purposes of the balloon-payment qualified mortgage exemption enable continued consumer ability to obtain mortgage credit.

Scope of Mortgage Operations

The Bureau has made one other change to the final rule to make the standards more consistent as between the balloon qualified mortgage and escrows exemption with regard to what type of mortgage loan operations are tracked for purposes of determining whether a creditor operates predominantly in rural or underserved areas. As noted above, the Board's proposed rule for balloon-payment qualified mortgages would have based a creditor's eligibility on the geographic distribution of its balloon-payment mortgages, while the escrows proposal focused on the distribution of first-lien mortgages. Given that the underlying statutory language regarding ''operates predominantly'' is the same in each instance and that tracking each type of mortgage separately would increase administrative burden, the Bureau believes it is appropriate to base the threshold for both rules on the distribution of all first-lien ''covered transactions'' as defined in § 1026.43(b)(1).[160] The Bureau believes that counting all transactions will facilitate compliance, promote consistency in applying the two exemptions under both rulemakings, and be more useful in identifying which institutions truly specialize in serving rural and underserved areas. The Bureau also believes that it is appropriate to measure first-lien covered transactions because the balloon-payment mortgages that will meet the requirements of the balloon-payment qualified mortgage exemption will be first-lien covered transactions, as having subordinate financing along with the balloon-payment mortgage would be rare since it further constrains a consumer's ability to build equity in the property and able to refinance the balloon-payment mortgage when it becomes due. Accordingly, a creditor must have made during the preceding calendar year more than 50 percent of its total covered transactions secured by a first lien on property in a rural or underserved area, which is the same as the requirement of § 1026.35(b)(2)(iii)(A) in the 2013 Escrows Final Rule.

Total Annual Residential Mortgage Loan Origination

TILA section 129C(b)(2)(E)(iv)(II) requires the Bureau to establish a limitation on the ''total annual residential mortgage loan originations'' for a creditor seeking to fall within the balloon-payment qualified mortgage exemption. The Board's proposed § 226.43(f)(1)(v)(B) provided two alternatives to meet the statutory requirement that the creditor ''together with all affiliates, has total annual residential mortgage originations that do not exceed a limit set by the Board.'' TILA section 129C(b)(2)(E)(iv)(II). The first alternative was a volume based limit, and the second alternative was a total annual number of covered transactions limit. The Board's proposal did not propose any specific numeric thresholds for either alternative, but rather sought comment on the appropriate volume or number of loans originated based on the alternatives described in the proposal.

In contrast, the Board's escrow proposal would have restricted eligibility to creditors that, along with their affiliates, originate and service no more than 100 new first-lien loans per calendar year. Although the Dodd-Frank Act requirement to establish escrow accounts applies only to higher-priced mortgage loans that are secured by first liens, the Board reasoned that it was appropriate to base the threshold on all first-lien originations because creditors are free to establish escrow accounts for all of their first-lien mortgages voluntarily in order to achieve the scale necessary to escrow cost effectively. The Board estimated that a minimum servicing portfolio size of 500 is necessary to escrow cost effectively, and assumed that the average life expectancy of a mortgage loan is about five years. Based on this reasoning, the Board reasoned that creditors would no

[160] As discussed above, § 1026.43(b)(1) defines covered transactions as closed-end consumer credit transactions that are secured by a dwelling, other than certain tractions that are exempt from coverage under § 1026.43(a).

longer need the benefit of the exemption if they originated and serviced more than 100 new first-lien loans per year.

In response to the balloon-payment qualified mortgage loan proposal, two trade groups and one association of State bank regulators argued that other criteria, such as the asset-size limit or portfolio requirement, were sufficient and neither a volume nor a total annual number of covered transactions limit would be necessary. One trade group commenter suggested combining the proposed alternatives and permit creditors to pick which limit they would operate under. Other trade group and industry commenters indicated that it would be preferable to base the annual originations limit on the number of transactions rather than volume because of the varying dollar amount of loans originated, which would constrain the number of consumers with limited credit options which could obtain balloon-payment mortgages in rural or underserved areas. Four trade group and industry commenters suggested increasing the threshold for the total annual number of covered transactions by various amounts ranging from 250 to 1,000 transactions. The commenters did not articulate any particular reason or data to support the suggested limits, other than one commenter who indicated its suggestion was intended to be higher than its own amount of total annual covered transactions.

Similarly in the escrows rulemaking, commenters asserted that the 100-loan threshold was not in fact sufficient to make escrowing cost-effective. Suggestions for higher thresholds ranged from 200 to 1,000 mortgage debt obligations per year originated and serviced, though no commenters provided data to support their suggestions for alternative thresholds or to refute the Board's cost analysis. One consumer advocacy commenter suggested the proposed threshold was too high because it counted only first-lien mortgage transactions, instead of all mortgage debt obligations, but offered no specific alternative amount. Two industry commenters also suggested that the origination limit should measure only the number of higher-priced mortgage loans originated and serviced by the creditor and its affiliates.

The Bureau believes that the requirement of TILA section 129C(b)(2)(E)(iv)(II) reflects Congress's recognition that larger creditors who operate in rural or underserved areas should be able to make credit available without resorting to balloon-payment mortgages. Similarly, the requirement of TILA section 129C(d) reflects a recognition that larger creditors have the systems capability and operational scale to establish cost-efficient escrow accounts. In light of the strong concerns expressed in both rulemakings about the potential negative impacts on small creditors in rural and underserved areas, the Bureau conducted further analysis to try to determine the most appropriate thresholds, although it was significantly constrained by the fact that data is limited with regard to mortgage originations in rural areas generally and in particular with regard to originations of balloon-payment mortgages.

The Bureau started with the premise that it would be preferable to use the same annual originations threshold in both rules in order to reflect the consistent language in both statutory provisions focusing on ''total annual mortgage loan originations,'' to facilitate compliance avoiding requiring institutions to track multiple metrics, and to promote consistent application of the two exemptions. This requires significant reconciliation between the two proposals, however, because the escrows proposal focused specifically on loans originated and serviced in order to best gauge creditors' ability to maintain escrow accounts over time, while servicing arrangements are not directly relevant to the balloon-payment qualified mortgage. However, to the extent that creditors chose to offer balloon-payment mortgages to manage their interest rate risk without having to undertake the compliance burdens involved in administering adjustable rate mortgages over time, the Bureau believes that both provisions are focused in a broad sense on accommodating creditors whose systems constraints might otherwise cause them to exit the market.

With this in mind, the Bureau ultimately has decided to adopt a threshold of 500 or fewer annual originations of first-lien loans for both rules. The Bureau believes that this threshold will provide greater flexibility and reduce concerns that the specific threshold that had been proposed in the escrows rulemaking (100 loans originated and serviced annually) would reduce access to credit by excluding creditors who need special accommodations in light of their capacity constraints. At the same time, the increase is not as dramatic as it may first appear because the Bureau's analysis of HMDA data suggests that even small creditors are likely to sell off a significant number of loans to the secondary market. Assuming that most loans that are retained in portfolio are also serviced in house, the Bureau estimates that a creditor originating no more than 500 first-lien loans per year would maintain and service a portfolio of about 670 mortgage debt obligations over time, assuming a life expectancy of five years per mortgage debt obligation.[161] Thus, the higher threshold will help to assure that creditors who are subject to the escrow requirements do in fact maintain portfolios of sufficient size to maintain the accounts on a cost efficient basis over time, in the event that the Board's estimate of a minimum portfolio of 500 loans was too low.[162] However, the Bureau believes that the 500 annual originations threshold in combination with the other requirements will still assure that the balloon-payment qualified mortgage and escrow exceptions are available only to small creditors that focus primarily on a relationship-lending model and face significant systems constraints.

Asset-Size Threshold

Under TILA section 129C(b)(2)(E)(iv)(IV), to qualify for the exemption, a creditor must meet any asset-size threshold established by the Bureau. The Board's proposed § 226.43(f)(1)(v)(D) would have established the threshold for calendar year 2013 at $2 billion, with annual adjustments for inflation thereafter. Thus, a creditor would satisfy this element of the test for 2013 if it had total assets of $2 billion or less on December 31, 2012. This number was based on the limited data available to the Board at the time of the proposal. Based on that limited information, the Board reasoned that none of the entities it identified as operating predominantly in rural or underserved areas had total assets as of the end of 2009 greater than $2 billion, and therefore, the limitation should be set at $2 billion. The Board expressly proposed setting the asset-size threshold

[161] A review of 2011 HMDA data shows creditors that otherwise meet the criteria of § 1026.43(f)(1)(vi) and originate between 200 and 500 or fewer first-lien covered transactions per year average 134 transactions per year retained in portfolio. Over a five year period, the total portfolio for these creditors would average 670 mortgage debt obligations.

[162] Given that escrow accounts are typically not maintained for loans secured by subordinate liens, the Bureau does not believe that it makes sense to count such loans toward the threshold because they would not contribute to a creditor's ability to achieve cost-efficiency. At the same time, the Bureau believes it is appropriate to count all first-lien loans toward the threshold, since creditors can voluntarily establish escrow accounts for such loans in order to increase the cost-effectiveness of their program even though the mandatory account requirements under the Dodd-Frank Act apply only to first-lien, higher-priced mortgage loans. Focusing on all first-lien originations also provides a metric that is useful for gauging the relative scale of creditors' operations for purposes of the balloon-payment qualified mortgages, while focusing solely on the number of higher-priced mortgage loan originations would not.

at the highest level currently held by any of the institutions that appear to be smaller institutions that served areas with otherwise limited credit options. The Board sought comment on what threshold would be appropriate and whether the asset-size test is necessary at all. Conversely, in the escrows proposal the Board did not propose an asset threshold, but rather simply requested comment on whether a threshold should be established and, if so, what it should be.

In response to the Board's 2011 ATR Proposal, one association of State bank regulators suggested that the asset-size threshold be included and be the only requirement for a creditor to qualify for the balloon-mortgage qualified mortgage exemption. Two trade group commenters suggested that a $2 billion asset-size threshold was appropriate, with one also suggesting that the asset-size threshold be the only requirement for a creditor to qualify for the balloon-mortgage qualified mortgage exemption. One industry commenter suggested that the asset-size threshold be $10 billion.

In response to the Board's 2011 Escrows Proposal, the association of State bank regulators again suggested that an asset-size threshold be the only requirement to qualify for the escrow exception, but did not propose a specific dollar threshold. A trade association suggested a threshold of $1 billion, but did not provide a rational for that amount.

For reasons discussed above, the Bureau is adopting a mortgage origination limit as contemplated by the statute. Given that limitation, restricting the asset size of institutions that can claim the exemption is of limited importance. Nonetheless, the Bureau believes that an asset limitation is still helpful because very large institutions should have sufficient resources to adapt their systems to provide mortgages without balloon payments and with escrow accounts even if the scale of their mortgage operations is relatively modest. A very large institution with a relatively modest mortgage operation also does not have the same type of reputational and balance-sheet incentives to maintain the same kind of relationship-lending model as a smaller community-based lender. Accordingly, the Bureau believes that the $2 billion asset limitation by the Board remains an appropriate limitation and should be applied in both rulemakings. Accordingly, the creditor must have total assets of less than $2 billion [163] as of December 31, 2012, which is the same as the requirement of § 1026.35(b)(2)(iii)(C) in the 2013 Escrows Final Rule.

Criteria Creditor Also Must Satisfy in the Final Rule Adopted From the Board's 2011 Escrows Proposal

The Bureau notes that the three criteria discussed above are the same in both TILA 129C(b)(2)(E)(iv) and 129D(c). Commenters in both the Board's 2011 ATR Proposal and the Board's 2011 Escrows Proposal also made a note of the need to have consistent application of requirements and definitions across the Title XIV Rulemakings. The comments received in both of the Board's proposals identified the same concerns and made similar suggestions for each of the criteria in both the Board's 2011 ATR Proposal and 2011 Escrows Proposal. The Bureau believes the balloon-payment qualified mortgage exemption is designed to ensure access to credit in rural and underserved areas where consumers may be able to obtain credit only from a limited number of creditors. One way to ensure continued access to credit for these consumers is to reduce and streamline regulatory requirements for creditors so that creditors maintain participation in or enter these markets. One method by which this can be accomplished is by having one set of requirements that are consistent between differing regulatory purposes. These criteria, since they are identical in TILA, can be adopted once in one section of Regulation Z and referenced by the other section.

Accordingly, the Bureau is adopting § 1026.43(f)(1)(vi) to require the creditor to meet the satisfy the requirements stated in § 1026.35(b)(iii)(A), (B), and (C), adopted in the 2013 Escrows Final Rule, in order to originate a balloon-payment qualified mortgage under § 1026.43(f)(1). Comment 43(f)(1)(vi)–1.i clarifies that the Bureau publishes annually a list of counties that qualify as rural or underserved in accordance with § 1026.35(b)(2)(iii)(A). The comment further clarifies that the Bureau's annual determination of rural or underserved counties are based on the definitions set forth in § 1026.35(b)(2)(iv). Comment 43(f)(1)(vi)–1.ii clarifies that the creditor along with all affiliates must not originate more than 500 first lien transactions during the preceding calendar year in accordance with § 1026.35(b)(2)(iii)(B). Comment 43(f)(1)(vi)–1.iii clarifies that the initial asset-size threshold for a creditor is $2 billion for calendar year 2013 and will be updated each December to publish the applicable threshold for the following calendar year in accordance with§ 1026.35(b)(2)(iii)(C). The comment further clarifies that a creditor that had total assets below the threshold on December 31 of the preceding year satisfies this criterion for purposes of the exemption during the current calendar year.

43(f)(2) Post-Consummation Transfer of Balloon-Payment Qualified Mortgage

As noted in the discussion related to paragraph (f)(1)(v) above, TILA section 129C(b)(E)(iv) requires that the lender keep balloon-payment mortgages in portfolio, which addressed in both the Board's 2011 ATR Proposal and 2011 Escrows Proposal in different ways. In light of the differences between the two rulemakings and in particular the important ramifications of qualified mortgage status over the life of the loan, however, the Bureau believes that it is also appropriate for this final rule to contain additional safeguards concerning post-consummation sales that are not pursuant to a forward commitment in order to prevent gaming of the balloon-payment qualified mortgage exception. As noted above, the Board had proposed an approach under which the creditor would lose its eligibility to originate balloon-payment qualified mortgages once it sold any balloon-payment mortgages. Under one alternative, a single sale after the effective date of the rule would have permanently disqualified the creditor from invoking the exception, while the other alternative would have disqualified the creditor from invoking the exception for two calendar years.

In addition to the comments received on the Board's 2011 Escrows Proposal related to the forward commitment requirement discussed in paragraph (f)(1)(v), above, two trade group commenters and one industry commenter indicated that the second alternative was preferable, but urged the Bureau only to look at the last calendar year, instead of the current or prior years. Of these commenters, one trade group and the industry commenter suggested adding a *de minimis* number of permitted transfers of balloon-payment qualified mortgages. One trade group commenter noted that the statute requires that only balloon-payment qualified mortgages be kept in portfolio. Another trade group commenter

[163] The $2 billion threshold reflects the purposes of the balloon-payment qualified mortgage exemption and the structure of the mortgage lending industry. The choice of $2 billion in assets as a threshold for purposes of TILA section 129C(b)(2)(E) does not imply that a threshold of that type or of that magnitude would be an appropriate way to distinguish small firms for other purposes or in other industries.

questioned the impact that either of the Board's alternatives would have on a rural creditors' ability to sell a balloon-payment mortgage if the creditor was directed to do pursuant to action requirements of prudential regulators, such as a prompt corrective action notice.

The Bureau agrees with commenters that the first alternative would work against the stated purpose of the balloon-payment qualified mortgage exemption, as creditors that would not qualify would forever be excluded from this exemption in the future. Over time, this would further reduce the creditors originating balloon-payment qualified mortgages and thereby reduce the availability of credit to those markets. In addition, the Bureau believes the Board's second alternative mitigates but does not eliminate these difficulties. Under the second alternative the disqualification from originating balloon-payment qualified mortgages would be temporary rather than permanent, but even so creditors who found it necessary to sell off a balloon-payment mortgage would pay a steep price in terms of their ability to originate loans in the future, and credit availability would be negatively impacted. Commenters that supported the second alternative did so with the stated preference for the second alternative to the first, instead of the requirements of the second alternative itself.

The Bureau believes these concerns can be eliminated or reduced by providing, as a general rule, that if a balloon-payment qualified mortgage is sold, that mortgage loses its status as a qualified mortgage, but the creditor does not lose its ability to originate balloon-payment qualified mortgages in the future. The rule would be subject to four exceptions to permit a balloon-payment qualified mortgage to be sold in narrowly defined circumstances without losing its qualified mortgage status. The first exception would allow for a sale to any person three years after consummation; this would require the creditor to keep the balloon-payment qualified mortgage for the same period of time that a consumer could bring a claim for violation of § 1026.43 under TILA section 130(e). This facilitates managing interest rate risk by selling seasoned balloon-payment qualified mortgages, but encourages responsible underwriting because the originating creditor would keep all risk of affirmative claims while those claims could be asserted. The second exemption would permit creditors to sell to other qualifying creditors, which would provide flexibility and consistency with the portfolio requirement. The third exception would address the need of creditors to sell loans to comply with requirements of prudential regulators, conservators, receivers and others who have the responsibility to ensure creditors are operating within the bounds of the law. The fourth exemption addresses changes in the ownership of the creditor itself, so that the balloon-payment qualified mortgages held by the creditor do not lose their qualified mortgage status solely because of the change in ownership of the creditor.

Accordingly, the Bureau is adopting § 1026.43(f)(2) to require a creditor to retain a balloon-payment qualified mortgage in its portfolio, otherwise the balloon-payment qualified mortgage will no longer be a qualified mortgage, with four exceptions as set forth above. Comment 43(f)(2)–1 clarifies that creditors must generally hold a balloon-payment qualified mortgage in portfolio, subject to four exceptions. Comment 43(f)(2)–2 clarifies that the four exceptions apply to all subsequent transfers, and not just the initial transfer of the balloon-payment qualified mortgage, and provides an example. Comment 43(f)(2)(i)–1 clarifies the application of the exception relating to transfers of the balloon-payment qualified mortgage three years or more after consummation. Comment 43(f)(2)(ii)–1 clarifies the application of the exemption relating to the transfer of a balloon-payment qualified mortgage to a creditor that meets the requirements of § 1026.43(f)(1)(vi). Comment 43(f)(2)(iii)–1 clarifies the application of the exemption related to the transfer of a balloon-payment qualified mortgage pursuant to the requirements of a supervisory regulator and provides an example. Comment 43(f)(2)(iv)–1 clarifies the application of the exemption related to the transfer of a balloon-payment qualified mortgage as a result or the merger or sale of the creditor and provides an example.

43(g) Prepayment Penalties

As discussed above regarding treatment of prepayment penalties under the points and fees test for qualified mortgages and for high-cost loans under HOEPA in § 1026.32(b)(1) and the definition of prepayment penalty under § 1026.32(b)(6), the Dodd-Frank Act restricts prepayment penalties in a number of ways. Section 1026.43(g) implements TILA section 129C(c), which establishes general limits on prepayment penalties for all residential mortgage loans. Specifically, TILA section 129C(c) provides that:

- Only a qualified mortgage may contain a prepayment penalty;
- A qualified mortgage with a prepayment penalty may not have an adjustable rate and may not have an annual percentage rate that exceeds the threshold for a higher-priced mortgage loan;
- The prepayment penalty may not exceed three percent of the outstanding balance during the first year after consummation, two percent during the second year after consummation, and one percent during the third year after consummation;
- There can be no prepayment penalty after the end of the third year after consummation; and
- A creditor may not offer a consumer a loan with a prepayment penalty without offering the consumer a loan that does not include a prepayment penalty.

Taken together, the Dodd-Frank Act's amendments to TILA relating to prepayment penalties mean that most closed-end, dwelling-secured transactions: (1) May provide for a prepayment penalty only if the transaction is a fixed-rate, qualified mortgage that is neither high-cost nor higher-priced under §§ 1026.32 and 1026.35; (2) may not, even if permitted to provide for a prepayment penalty, charge the penalty more than three years following consummation or in an amount that exceeds two percent of the amount prepaid; and (3) may be required to limit any penalty even further to comply with the points and fees limitations for qualified mortgages, or to stay below the points and fees trigger for high-cost mortgages. Section 1026.43(g) now reflects these principles.

The Board proposal implemented TILA section 129C(c) in § 226.43(g) without significant alteration, except that under proposed § 226.43(g)(2)(ii), the Board proposed to apply the percentage tests outlined in the statute to the amount of the outstanding loan balance prepaid, rather than to the entire outstanding loan balance, to provide tighter restrictions on the penalties allowed on partial prepayments.

Commenters generally supported the Board's proposal, though some industry commenters expressed concern that limitations on prepayment penalties would reduce prices on the sale of mortgages in the secondary market due to increased prepayment risk. Consumer advocates generally supported limiting prepayment penalties, as described by amended TILA section 129C(c), as an important element in ensuring affordability. Other industry commenters expressed concern that such a limitation on the imposition of prepayment penalties would lead to fewer creditors conditionally waiving closing costs, noting that this implication might limit access to credit. At least one industry commenter argued that the Board's proposal to limit prepayment penalties was too broad in scope, stating the legislative history demonstrated that the true target of the prepayment penalty prohibition of TILA section 129C(c) was limited to mortgages with teaser rates and/or balloon payments and to protect subprime consumers, not those consumers who chose a product with a lower interest rate in exchange for a prepayment penalty provision. The Bureau does not find this argument persuasive, given the plain language of amended TILA section 129C(c).

After review, the Bureau is adopting most of the Board's proposal, although as discussed below the Bureau is altering the prepayment limitation in the first year after consummation to reflect the separate limitations enacted in sections 1431 and 1432 of the Dodd-Frank Act, regarding high-cost mortgages.

Scope; Reverse Mortgages and Temporary Loans

Section 1026.43(g) implements TILA section 129C(c), which applies to a ''residential mortgage loan,'' that is, to a consumer credit transaction secured by a dwelling, including any real property attached to the dwelling, other than an open-end credit plan or a transaction secured by a consumer's interest in a timeshare plan. *See* TILA section 103(cc)(5). Consequently, the regulation refers to ''covered transaction,'' which as defined in § 1026.43(b)(1) and discussed further in the section-by-section analysis of § 1026.43(a) excludes open-end credit plans and transactions secured by timeshares from coverage consistent with statutory exclusions. However, neither the definition of ''residential mortgage loan'' nor the TILA section 129C(c)(1) prepayment penalty prohibition excludes reverse mortgages or temporary or ''bridge'' loans with a term of 12 months or less, such as a loan to finance the purchase of a new dwelling where the consumer plans to sell a current dwelling. *See* TILA sections 103(cc)(5), 129C(a)(8), 129C(c). Moreover, because under TILA section 129C(c)(1)(A), only a qualified mortgage may have a prepayment penalty and reverse mortgages and temporary loans are excluded from the ability-to-repay and qualified mortgage requirements of the Dodd-Frank Act (and thus may not be qualified mortgages), prepayment penalties would not be permitted on either product absent further accommodation.

The Board proposal sought comment on whether further provisions addressing the treatment of reverse mortgages were warranted. Because reverse mortgages are not subject to the ability-to-repay requirements, the Board did not propose to define a category of closed-end reverse mortgages as qualified mortgages, though it sought comment on the possibility of using its authority to do so, given that qualified mortgage status affects both application of the Dodd-Frank Act prepayment penalty provisions and certain provisions concerning securitization and ''qualified residential mortgages.'' *See* TILA section 129C(b)(2)(A)(ix) and (b)(3)(B).[164] The Board specifically requested comment on whether special rules should be created to permit certain reverse mortgages to have prepayment penalties. In particular, the Board sought comment on how it might create criteria for a ''qualified mortgage'' reverse mortgage that would be consistent with the purposes of qualified mortgages under TILA section 129C(b), and requested any supporting data on the prepayment rates for reverse mortgages.

Consumer advocates generally supported the Board's proposal to apply the prepayment penalty requirements to reverse mortgages, and industry commenters did not object. Moreover, commenters did not provide data or other advocacy to refute the Board's reasoning for including reverse mortgages within the scope of § 1026.43(g): (1) That the overwhelming majority of reverse mortgages being originated in the current market are insured by the FHA, which does not allow reverse mortgages to contain prepayment penalties; and (2) excluding ''qualified'' reverse mortgages from coverage of the prepayment penalty prohibition would not be necessary or appropriate to effectuate the purposes of TILA section 129C, absent an articulated reason why such exclusion would ''assure that consumers are offered and receive residential mortgage loans on terms that reasonably affect their ability to repay the loans and that are understandable and not unfair, deceptive, or abusive.'' *See* TILA section 129B(a)(2).

While the Board did not specifically seek comment with respect to whether further provisions addressing the treatment of bridge loans under § 1026.43(g) were warranted, commenters nevertheless discussed the intersection of bridge loans and prepayment penalties. As discussed in the section-by-section analysis of § 1026.32(b)(6), some industry commenters expressed concern that the availability of, or cost of, construction-to-permanent loans might suffer, should the rule restrict the permissible prepayment penalty charges levied by a creditor if a consumer does not convert the construction loan into a permanent loan with the same creditor within a specified time period. As discussed in the section-by-section analysis of § 1026.32(b)(6), some commenters may have been mistaken with respect to whether certain fees were, in fact, a prepayment penalty. To the extent fees charged by a bridge loan are a prepayment penalty, however, they are prohibited as of the effective date. According to § 1026.43(a)(3)(iii), the construction phase of a construction-to-permanent loan cannot be a qualified mortgage, and thus under § 1026.43(g)(1)(ii)(B) such a loan cannot include a prepayment penalty. Construction-to-permanent loans are discussed in more detail in the section-by-section analysis of § 1026.43(a).

Accordingly, the Bureau is finalizing the rule at this time without special provisions to otherwise alter the general scope of this rule, as discussed in the section-by-section analysis of § 1026.43(a), such as by allowing the application of prepayment penalties for either reverse mortgages or temporary loans. The Bureau may revisit the issue in subsequent years, either as part of a future rulemaking to evaluate application of all title XIV requirements to reverse mortgages or as part of the five-year review of significant rules required under section 1022(d) of the Dodd-Frank Act.

43(g)(1) When Permitted

TILA section 129C(c)(1)(A) provides that a covered transaction must not include a penalty for paying all or part of the principal balance before it is due unless the transaction is a qualified mortgage as defined in TILA section 129C(b)(2). TILA section 129C(c)(1)(B) further restricts the range of qualified mortgages on which prepayment penalties are permitted by excluding qualified mortgages that have an adjustable rate or that meet the thresholds for ''higher-priced mortgage loans'' because their APRs exceed the average prime offer rate for a

[164] Open-end credit plans are excluded from the definition of ''residential mortgage loan,'' and thus open-end reverse mortgages are not subject to the prepayment penalty requirements under TILA section 129C(c). TILA section 103(cc)(5).

comparable transaction by a specified number of percentage points.[165]

To implement TILA section 129C(c)(1), the Board proposed § 226.43(g)(1), which provided that a covered transaction may not include a prepayment penalty unless the prepayment penalty is otherwise permitted by law, and the transaction: (1) Has an APR that cannot increase after consummation; (2) is a qualified mortgage, as defined in § 226.43(e) or (f); and (3) is not a higher-priced mortgage loan, as defined in § 226.45(a). The Board proposed under § 226.43(g)(1)(i) that a prepayment penalty must be otherwise permitted by applicable law. The Board reasoned that TILA section 129C(c) limits, but does not specifically authorize, including a prepayment penalty with a covered transaction. Thus, TILA section 129C(c) does not override other applicable laws, such as State laws, that may be more restrictive with respect to prepayment penalties, so a prepayment penalty would not be permitted if otherwise prohibited by applicable law. This approach is consistent with prepayment penalty requirements for high-cost mortgages under § 1026.32(d)(7)(i) and higher-priced mortgage loans under § 1026.35(b)(2)(i).

The Board proposed § 226.43(g)(1)(ii)(A) to interpret the statutory language to apply to covered transactions for which the APR may increase after consummation. This regulatory language is consistent with other uses of ''variable-rate'' within Regulation Z, such as comment 17(c)(1)–11, which provides examples of variable-rate transactions.

Some consumer advocates did not support the Board's proposal, arguing that for certain mortgages (specifically step-rate mortgages) the interest rate can increase after consummation without affecting the APR. These commenters argued that the purpose of TILA section 129C(c)(1)(B)(i) is to avoid allowing a creditor to lock a consumer into a rising-cost mortgage via a prepayment penalty and a rising interest rate. Consumer groups expressed concern that a consumer might become ''trapped'' by a prepayment penalty on the one hand, and a rising interest rate on the other. The Bureau does not find this argument persuasive. TILA section 129C(1)(B)(i) prohibits a transaction with ''an adjustable rate'' from including a prepayment penalty. Longstanding rules under Regulation Z for closed-end transactions generally categorize transactions based on the possibility of APR changes, rather than interest rate changes.[166] This distinction is relevant because covered transactions may have an APR that cannot increase after consummation even though a specific interest rate, or payments, may increase after consummation. For example, the APR for a ''step-rate mortgage'' without a variable-rate feature does not change after consummation, because the rates that will apply and the periods for which they will apply are known at consummation. *See* § 1026.18(s)(7)(ii) (defining ''step-rate mortgage'' for purposes of transaction-specific interest rate and payment disclosures). Thus, the danger of an interest rate/prepayment penalty ''trap'' is mitigated in a step-rate loan because the consumer knowledge of the exact payments to expect each month for the 36 months following consummation during which a prepayment penalty might apply. The Bureau therefore is adopting § 1026.43(g)(1)(ii)(A) as proposed. A fixed-rate mortgage or a step-rate mortgage therefore may have a prepayment penalty, but an adjustable-rate mortgage may not have a prepayment penalty. *See* § 1026.18(s)(7)(i) through (iii) (defining ''fixed-rate mortgage,'' ''step-rate mortgage,'' and ''adjustable-rate mortgage'').

Balloon-Payment Mortgages

Under TILA section 129C(c)(1)(A), a covered transaction may not include a prepayment penalty unless the transaction is a qualified mortgage under TILA section 129C(b)(2). The Board proposed to implement TILA section 129C(c)(1)(A) in § 226.43(g)(1)(ii)(B) and noted that, under section 129C(b)(2)(e), a covered transaction with a balloon payment may be a qualified mortgage if the creditor originates covered transactions primarily in ''rural'' or ''underserved'' areas, as discussed in detail above in the section-by-section analysis of § 1026.43(f); thus, a consumer could face a prepayment penalty if the consumer attempts to refinance out of a balloon-payment qualified mortgage before the balloon payment is due. The Board solicited comment on whether it would be appropriate to use its legal authority under TILA sections 105(a) and 129B(e) to provide that a balloon-payment qualified mortgage may not have a prepayment penalty in any case. Most commenters generally supported the Board's decision not to extend the prepayment penalty ban to all balloon-payment loans, noting the need for such financial products in rural and underserved areas. In light of the access concerns, the Bureau declines to exercise its exception authority under TILA sections 105(a) and 129B(e) to add a blanket prohibition of prepayment penalties for all balloon-payment loans. Accordingly, the Bureau is adopting § 1026.43(g)(1)(ii)(B) as proposed. The Bureau will continue to monitor the use of balloon-payment qualified mortgages and their use of prepayment penalties.

Threshold for a Higher-Priced Mortgage Loan

Under TILA section 129C(c)(1)(B), a covered transaction may not include a prepayment penalty unless the transaction's APR is below the specified threshold for ''higher-priced mortgage loans.'' As discussed above, those thresholds are determined by reference to the applicable average prime offer rate. The Board proposed under § 226.43(g)(1)(ii)(C) that a creditor would determine whether a transaction is a higher-priced mortgage loan based on the transaction coverage rate rather than the APR, for purposes of the prepayment penalty restriction, because APRs are based on a broader set of charges, including some third-party charges such as mortgage insurance premiums, than average prime offer rates. The Board expressed a concern that using the APR metric posed a risk of over-inclusive coverage beyond the subprime market and instead proposed using the transaction coverage rate.

In August 2012, the Bureau extended the notice-and-comment period for comments relating to the proposed adoption of the more inclusive finance charge, including the transaction coverage rate. At that time, the Bureau noted that it would not be finalizing the more inclusive finance charge in January 2013. *See* 77 FR 54843 (Sept. 6, 2012). The Bureau therefore does not address in this rulemaking the numerous public comments that it received concerning the proposed alternatives for the APR coverage test. The Bureau instead will address such comments in connection with its finalization of the 2012 TILA–RESPA

[165] The applicable APR threshold depends on whether a first lien or subordinate lien secures the transaction and whether or not the transaction's original principal obligation exceeds the maximum principal obligation for a loan eligible for purchase by Freddie Mac, that is, whether or not the covered transaction is a ''jumbo'' loan. Specifically, the APR threshold is: (1) 1.5 percentage points above the average prime offer rate, for a first-lien, non-''jumbo'' loan; (2) 2.5 percentage points above the average prime offer rate, for a first-lien ''jumbo'' loan; and (3) 3.5 percentage points above the average prime offer rate, for a subordinate-lien loan.

[166] *See, e.g.,* § 1026.18(f) (requiring disclosures regarding APR increases), § 1026.18(s)(7)(i) through (iii) (categorizing disclosures for purposes of interest rate and payment disclosures), § 1026.36(e)(2)(i) and (ii) (categorizing transactions for purposes of the safe harbor for the anti-steering requirement under § 1026.36(e)(1)).

Integration Proposal, thus resolving that issue together with the Bureau's determination whether to adopt the more inclusive finance charge. The Bureau is thus adopting the definition of a higher-priced loan as defined in § 1026.35(a), which corresponds to the thresholds specified in TILA section 129C(1)(B)(ii).

43(g)(2) Limits on Prepayment Penalties

TILA section 129C(c)(3) provides that a prepayment penalty may not be imposed more than three years after the covered transaction is consummated and limits the maximum amount of the prepayment penalty. Specifically, TILA section 129C(c)(3) limits the prepayment penalty to (1) three percent of the outstanding principal balance during the first year following consummation; (2) two percent during the second year following consummation; and (3) one percent during the third year following consummation.

The Board's proposed § 226.43(g)(2) was substantially similar to TILA section 129C(c)(3) except that the Board proposed to determine the maximum penalty amount by applying the percentages established in the statute to the amount of the outstanding loan balance prepaid, rather than to the entire outstanding loan balance. The Board reasoned that calculating the maximum prepayment penalty based on the amount of the outstanding loan balance that is prepaid, rather than the entire outstanding loan balance, would effectuate the purposes of TILA section 129C(c) to facilitate partial (and full) prepayment by more strictly limiting the amounts of prepayment penalties imposed.

The Board noted in its proposal that under HOEPA as amended by the Dodd-Frank Act, TILA section 103(bb)(1)(A)(iii) now defines a ''high-cost mortgage'' as any loan secured by the consumer's principal dwelling in which the creditor may charge prepayment fees or penalties more than 36 months after the closing of the transaction, or in which the fees or penalties exceed, in the aggregate, more than two percent of the amount prepaid. Moreover, under amended TILA section 129(c)(1), high-cost mortgages are prohibited from having prepayment penalties. Accordingly, any prepayment penalty in excess of two percent of the amount prepaid on any closed-end mortgage would both trigger and violate HOEPA's high-cost mortgage protections. The Board did not propose to implement these limitations on prepayment penalties in § 226.43(g)(2), but did solicit comment on whether the proposed text should be modified to incorporate the limitation of prepayment penalty amounts to two percent of the amount prepaid, as provided under TILA sections 103(bb)(1)(A)(iii) and 129(c)(1). The Board also solicited comment on whether to adopt some other threshold to account for the limitations on points and fees, including prepayment penalties, to satisfy the requirements for ''qualified mortgages,'' under TILA section 129C(b)(2)(A)(vii) and proposed § 226.43(e)(2)(iii).

The Bureau did not receive significant comment on the proposed adjustment of determining the maximum penalty amount by applying the percentages established in the statute to the amount of the outstanding loan balance prepaid, rather than to the entire outstanding loan balance, and therefore is adopting § 1026.43(g)(2) to measure prepayment penalties using the outstanding loan balance prepaid, as proposed. The Bureau is making this adjustment pursuant to its authority under TILA section 105(a) to issue regulations with such requirements, classifications, differentiations, or other provisions, and that provide for such adjustments and exceptions for all or any class of transactions, as in the judgment of the Bureau are necessary and proper to effectuate the purposes of TILA, to prevent circumvention or evasion thereof, or to facilitate compliance therewith. For instance, the Bureau believes that it would be inconsistent with congressional intent to strong disfavor and limit prepayment penalties for the Bureau to allow creditors to charge one or two percent of the entire outstanding loan balance every time that a consumer pays even a slightly greater amount than the required monthly payment due.

The Bureau did not receive significant comment on how to resolve the differing prepayment thresholds for high-cost mortgages and qualified mortgages, as described by the Board. But the Bureau believes that it is imperative to provide clear guidance to creditors with respect to all new limitations on prepayment penalties in dwelling-secured credit transactions, as imposed by the Dodd-Frank Act. As noted by the Board, new TILA section 129C(c)(3) limits prepayment penalties for fixed-rate, non-higher-priced qualified mortgages to three percent, two percent, and one percent of the outstanding loan balance prepaid during the first, second, and third years following consummation, respectively. However, amended TILA sections 103(bb)(1)(A)(iii) and 129(c)(1) for high-cost mortgages effectively prohibit prepayment penalties in excess of two percent of the amount prepaid at any time following consummation for most credit transactions secured by a consumer's principal dwelling by providing that HOEPA protections (including a ban on prepayment penalties) apply to mortgage loans with prepayment penalties that exceed two percent of the outstanding loan balance prepaid. The Bureau concludes that, to comply with both the high-cost mortgage provisions and the qualified mortgage provisions, creditors originating most closed-end mortgage loans secured by a consumer's principal dwelling would need to limit the prepayment penalty on the transaction to: (1) No more than two percent of the amount prepaid during the first and second years following consummation, (2) no more than one percent of the amount prepaid during the third year following consummation, and (3) zero thereafter.

Accordingly, the Bureau is modifying the final rule to reflect the two percent cap imposed by the Dodd-Frank Act amendments to HOEPA. As adopted in final form, § 1026.43(g)(2) amends the maximum prepayment penalty threshold for qualified mortgages during the first year following consummation, specified as three percent in TILA section 129C(c), to two percent, to reflect the interaction of the qualified mortgage and HOEPA revisions. In addition to finalizing this provision as a matter of reasonable interpretation of how the statutory provisions work together, the Bureau is making this adjustment pursuant to its authority under TILA section 105(a) to issue regulations with such requirements, classifications, differentiations, or other provisions, and that provide for such adjustments and exceptions for all or any class of transactions, as in the judgment of the Bureau are necessary and proper to effectuate the purposes of TILA, to prevent circumvention or evasion thereof, or to facilitate compliance therewith. The Bureau is exercising this adjustment to prevent creditor uncertainty regarding the interaction of qualified mortgages and high-cost mortgage rules, thus facilitating compliance. For example, assume a creditor issues a loan that meets the specifications of a § 1026.43(e) qualified mortgage. The loan terms specify that this creditor may charge up to three percent of any prepaid amount in the year following consummation. If the Bureau implements TILA section 129C(c) and sections 103(bb)(1)(A)(iii) and 129(c)(1) for high-cost mortgages, which effectively prohibit prepayment penalties in excess of two percent of the amount prepaid at any time following consummation, then the creditor will have complied with certain provisions of TILA while violating others. Thus, to avoid this complex interaction, the Bureau is eliminating the possibility of simultaneous compliance with and violation of TILA by reducing the maximum prepayment penalty allowed in the year following consummation to two percent under § 1026.43(g)(2)(ii)(A).

Comment 43(g)(2)–1 clarifies that a covered transaction may include a prepayment penalty that may be imposed only during a shorter period or in a lower amount than provided in § 1026.43(g)(2). Comment 43(g)(2)–1 provides the example of a prepayment penalty that a creditor may impose for two years after consummation that is limited to one percent of the amount prepaid. The Bureau is changing the prepayment example in comment 43(g)(2)–1 to reflect the Bureau's adjustment in § 1026.43(g)(2)(ii)(A) of the maximum prepayment penalty in the first year after consummation from three percent to two percent.

The Bureau recognizes that TILA section 129C(b)(2)(A)(vii) indirectly limits the amount of a prepayment penalty for a qualified mortgage, by limiting the maximum ''points and fees'' for a qualified mortgage to three percent of the total loan amount. *See* § 1026.43(e)(2)(iii), discussed above. The definition of ''points and fees'' includes the maximum prepayment penalty that may be charged, as well as any prepayment penalty incurred by the consumer if the loan refinances a previous loan made or currently held by the same creditor or an affiliate of the creditor. *See* TILA section 103(bb)(4)(E), § 1026.32(b)(1), and accompanying section-by-section analysis. Thus, if a creditor wants to include the maximum two percent prepayment penalty as a term of a qualified mortgage, it generally would have to forego any other charges that are included in the definition of points and fees. *See* the section-by-section analysis of § 1026.32(b)(1).

43(g)(3) Alternative Offer Required

Under TILA section 129C(c)(4), if a creditor offers a consumer a covered transaction with a prepayment penalty, the creditor also must offer the consumer a covered transaction without a prepayment penalty. The Board proposed § 226.43(g)(3), which contained language to implement TILA section 129C(c)(4) and added provisions to ensure comparability between the two alternative offers. Specifically, the proposed rule would mandate that the alternative covered transaction without a prepayment penalty must: (1) Have an APR that cannot increase after consummation and the same type of interest rate as the covered transaction with a prepayment penalty (that is, both must be fixed-rate mortgages or both must be step-rate mortgages); (2) have the same loan term as the covered transaction with a prepayment penalty; (3) satisfy the periodic payment conditions for qualified mortgages; and (4) satisfy the points and fees conditions for qualified mortgages. Proposed § 226.43(g)(3) also provided that the alternative covered transaction must be a transaction for which the consumer likely qualifies.

The Bureau did not receive significant comment on the proposal and is adopting § 1026.43(g)(3) as proposed. The Bureau is adding the additional conditions proposed by the Board to those specified in TILA section 129C(c)(4) to ensure that the alternative covered transactions is a realistic alternative for the consumer: A loan under substantially similar terms as the loan with a prepayment penalty for which the consumer likely qualifies. The Bureau is including these additional requirements pursuant to the Bureau's authority under TILA section 105(a) to prescribe regulations that contain such additional requirements, classifications, differentiations, or other provisions, or provide for such adjustments or exceptions for all or any class of transactions, as in the judgment of the Bureau are necessary or proper to effectuate the purposes of TILA, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.

The Bureau believes that requirements designed to ensure that the alternative covered transactions effectuate the purposes of TILA section 129C(c)(4) by enabling the consumer to focus on a prepayment penalty's risks and benefits without having to consider or evaluate other differences between the alternative covered transactions. For example, under final § 1026.43(g)(3), a consumer is able to compare a fixed-rate mortgage with a prepayment penalty with a fixed-rate mortgage without a prepayment penalty, rather than with a step-rate mortgage without a prepayment penalty. Also, the Bureau believes requiring that the alternative covered transaction without a prepayment penalty be one for which the consumer likely qualifies effectuates the purposes of and prevents circumvention of TILA section 129C(c)(4), by providing for consumers to be able to choose between options that likely are available.

Under § 1026.43(g)(1)(i), a covered transaction with an APR that may increase after consummation may not have a prepayment penalty. The Board proposed in § 226.43(g)(3)(i) that, if a creditor offers a covered transaction with a prepayment penalty, the creditor must offer an alternative covered transaction without a prepayment penalty and with an APR that may not increase after consummation. The Board also proposed that the covered transaction with a prepayment penalty and the alternative covered transaction without a prepayment penalty must have the same type of interest rate. The Board offered these proposals to ensure that a consumer is able to choose between substantially similar alternative transactions. The Bureau did not receive significant comment on the proposal and is adopting the Board's proposal regarding the APR and the type of interest rate for the alternative transaction.

Higher-priced mortgage loans. The Board proposed that, under § 226.43(g)(3), if a creditor offers a covered transaction with a prepayment penalty, which may not be a higher-priced mortgage loan, the creditor may offer the consumer an alternative covered transaction without a prepayment penalty that is a higher-priced mortgage loan. The Board reasoned that TILA section 129C(c)(4) is intended to ensure that a consumer has a choice whether to obtain a covered transaction with a prepayment penalty, not to limit the pricing of the alternative covered transaction without a prepayment penalty that the creditor must offer. In fact, all things being equal, one would expect a creditor to cover the increased risk of prepayment by increasing the rate, thereby increasing the likelihood that the transaction might be a higher-priced mortgage loan. Furthermore, the Board noted that restricting the pricing of the required alternative covered transaction without a prepayment penalty might result in some creditors choosing to offer fewer loans. The Board thus did not propose to limit rate increases for the alternative covered transaction. The Bureau did not receive significant comment on this aspect of the proposal and is adopting the rule as proposed.

Timing of offer. The Board proposal concerning the alternative offer without a prepayment penalty that a creditor is required to offer under TILA section 129C(c)(4) did not specify that the creditor makes this alternative offer at or by a particular time. The Board proposal was consistent with § 1026.36(e)(2) and (3), which provide a safe harbor for the anti-steering requirement if a loan originator presents certain loan options to the consumer. These rules also do not contain a timing requirement. The Board solicited comment on whether it would be appropriate to require that creditors offer the alternative covered transaction without a prepayment penalty during a specified time period, such as before the consumer pays a non-refundable fee or at least fifteen calendar days before consummation. The Board also solicited comment on whether, if a timing requirement were included for the required alternative offer, whether a timing requirement should also be included under the safe harbor for the anti-steering requirement, for consistency. The Bureau did not receive significant comment on the proposal and is not including a specific timing requirement. The Bureau will continue to study required alternative offers to ensure that creditors offer consumers a meaningful alternative transaction that does not contain a prepayment penalty, in accordance with the purposes of TILA section 129C(c)(4). In the course of its review, if the Bureau determines that more specific timing requirements would provide more consumer choice, the Bureau may propose to revise § 1026.43(g)(3) accordingly.

The Board proposed comment 43(g)(3)(i)–1 to clarify that the covered transaction with a prepayment penalty and the alternative covered transaction without a prepayment penalty both must be either fixed-rate mortgages or step-rate mortgages. The Bureau did not receive significant comment on the proposal and is adopting the comment with some revisions for clarification only. For purposes of § 1026.43(g)(3)(i), the term ''type of interest rate'' means whether the covered transaction is a fixed-rate mortgage, as defined in § 1026.18(s)(7)(iii), or a step-rate mortgage, as defined in § 1026.18(s)(7)(ii).

Substance of offer. As discussed above, § 1026.43(g)(1)(ii)(B) provides that a covered transaction with a prepayment penalty must be a qualified mortgage, as defined in § 1026.43(e)(2), (e)(4), or (f). The Board proposal concerning the alternative offer without a prepayment penalty that a creditor is required to offer under TILA section 129C(c)(4) did not mandate that the alternative covered transaction offered without a prepayment penalty must also be a qualified mortgage. But under proposed § 226.43(g)(3)(ii) through (iv), the Board proposed to incorporate three conditions of qualified mortgages on the alternative offer, so that consumers may choose between alternative covered transactions that are substantially similar. Accordingly, the Board proposed that the alternative covered transaction without a prepayment penalty must: (1) Have the same loan term as the covered transaction with a prepayment penalty; (2) satisfy the periodic payment conditions in § 1026.43(e)(2)(i); and (3) satisfy the points and fees condition under § 1026.43(e)(2)(iii), based on the information known to the creditor at the time the transaction is offered. The Bureau did not receive significant comment on the proposal and is adopting the Board's proposal. The Bureau is including this provision both as part of its interpretation of TILA section 129C(c)(4) and using its authority under TILA sections 105(a), which provides that the Bureau's regulations may contain such additional requirements, classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for all or any class of transactions as in the Bureau's judgment are necessary or proper to effectuate the purposes of TILA, prevent circumvention or evasion thereof, or facilitate compliance therewith. 15 U.S.C. 1604(a), 1639b(e). This approach is further supported by the authority under TILA section 129B(e) to condition terms, acts or practices relating to residential mortgage loans that the Bureau finds necessary and proper to ensure that responsible, affordable mortgage credit remains available to consumers in a manner consistent with the purposes and to effectuate the purposes of section 129B and 129C, and that are in the interest of the consumer, among other things. 15 U.S.C. 1639b(e). The purposes of TILA include the purposes that apply to 129B and 129C, to assure that consumers are offered and receive residential mortgage loans on terms that reasonably reflect their ability to repay the loan. *See* 15 U.S.C. 1639b(a)(2). The Bureau believes that requiring the creditor that offers the consumer a loan with a prepayment penalty to also offer the consumer the ability to choose an alternative covered transaction that is otherwise substantially similar, besides not including a prepayment penalty, is necessary and proper to fulfill such purposes by ensuring that the consumer is offered a reasonable alternative product that the consumer can repay and which does not include a prepayment penalty. For this reason, this provision is also in the interest of the consumer.

The Board proposed comment 43(g)(3)(iv)–1 to provide guidance for cases where a creditor offers a consumer an alternative covered transaction without a prepayment penalty under § 1026.43(g)(3) and knows only some of the points and fees that will be charged for the loan. For example, a creditor may not know that a consumer intends to buy single-premium credit unemployment insurance, which would be included in the points and fees for the covered transaction. Proposed comment 43(g)(3)(iv)–1 clarified that the points and fees condition is satisfied if the creditor reasonably believes, based on the information known to the creditor at the time the offer is made, that the amount of points and fees to be charged for an alternative covered transaction without a prepayment penalty will be less than or equal to the amount of points and fees allowed for a qualified mortgage under § 1026.43(e)(2)(iii). The Bureau did not receive significant comment on the proposal and is adopting the comment largely as proposed.

The Board proposed comment 43(g)(3)(v)–1 to clarify what is meant by an alternative transaction for which the consumer likely qualifies. In this example, the creditor has a good faith belief the consumer can afford monthly payments of up to $800. If the creditor offers the consumer a fixed-rate mortgage with a prepayment penalty for which monthly payments are $700 and an alternative covered transaction without a prepayment penalty for which monthly payments are $900, the requirements of § 1026.43(g)(3)(v) are not met. Proposed comment 43(g)(3)(v)–1 also clarified that, in making the determination the consumer likely qualifies for the alternative covered transaction, the creditor may rely on information provided by the consumer, even if the information subsequently is determined to be inaccurate. The Bureau did not receive significant comment on the proposal and is adopting the Board's comment as proposed. Comment 43(g)(3)(v)–1 is substantially similar to comment 36(e)(3)–4, which provides clarification under the rules providing a safe harbor for the anti-steering requirements if, among other things, a loan originator presents the consumer with loan options for which the consumer likely qualifies.[167] In addition to agreeing with

[167] Section 1026.36(e) generally prohibits, in a consumer credit transaction, a loan originator from ''steering'' a consumer to consummate a transaction based on the fact that the originator will receive greater compensation from the creditor in that transaction than in other transactions the originator offered or could have offered to the consumer, unless the consummated transaction is in the consumer's interest. Section 1026.36(e)(3) explains that there is a safe harbor for this anti-steering requirement when the loan originator presents the

the Board's reasoning, the Bureau is adopting this rule and comment to promote consistency and further the Bureau's initiative to provide streamlined regulatory guidance.

43(g)(4) Offer Through a Mortgage Broker

The requirement to offer an alternative covered transaction without a prepayment penalty applies to a ''creditor.'' *See* TILA section 129C(c)(4). TILA section 103(f), in relevant part, defines ''creditor'' to mean a person who both: (1) Regularly extends consumer credit which is payable by agreement in more than four installments or for which the payment of a finance charge is or may be required, and (2) is the person to whom the debt arising from the consumer credit transaction is initially payable on the face of the evidence of indebtedness (or, if there is no such evidence of indebtedness, by agreement). 15 U.S.C. 1602(f).

The Board proposed § 226.43(g)(4), which would apply when a creditor offers a covered transaction with a prepayment penalty through a mortgage broker, as defined in § 1026.36(a)(2), to account for operational differences in offering a covered transaction through the wholesale channel versus through the retail channel.[168] The Board proposed under § 226.43(g)(4) that, if a creditor offers a covered transaction to a consumer through a mortgage broker, as defined in § 1026.36(a)(2), the creditor must present to the mortgage broker an alternative covered transaction without a prepayment penalty that meets the conditions in § 1026.43(g)(3). The Board reasoned that the requirement to offer an alternative covered transaction without a prepayment penalty properly is applied to creditors and not to mortgage brokers, because creditors ''offer'' covered transactions, even if mortgage brokers present those offers to consumers. Further, the Board noted that, if Congress had intended to apply TILA section 129C(c)(4) to mortgage brokers, Congress would have explicitly applied that provision to ''mortgage originators'' in addition to creditors.[169] The Board's proposal also provided under proposed § 226.43(g)(4)(ii) that the creditor must establish, by agreement, that the mortgage broker must present the consumer an alternative covered transaction without a prepayment penalty that meets the conditions in § 1026.43(g)(3) offered by (1) the creditor, or (2) another creditor, if the transaction has a lower interest rate or a lower total dollar amount of origination points or fees and discount points.

The Bureau did not receive significant comment on proposed § 226.43(g)(4) and is adopting § 1026.43(g)(4) largely as proposed. By providing for the presentation of a loan option with a lower interest rate or a lower total dollar amount of origination points or fees and discount points than the loan option offered by the creditor, § 1026.43(g)(4) facilitates compliance with § 1026.43(g)(3) and with the safe harbor for the anti-steering requirement in connection with a single covered transaction, as governed by § 1026.36(e)(3)(i). Section 1026.43(g)(4) does not affect the conditions that a loan originator must meet to take advantage of the safe harbor for the anti-steering requirement, however. Thus, if a loan originator chooses to use the safe harbor, the originator must present the consumer with: (1) The loan option with the lowest interest rate overall, (2) the loan option with the lowest interest rate without certain risky features, including a prepayment penalty, and (3) the loan option with the lowest total origination points or fees and discount points. *See* § 1026.36(e)(3)(i). The Bureau believes that requiring a mortgage broker to present to a consumer the creditor's alternative covered transaction without a prepayment penalty could confuse the consumer if he or she is presented with numerous other loan options under § 1026.36(e). Presenting a consumer with four or more loan options for each type of transaction in which the consumer expresses an interest may not help the consumer to make a meaningful choice. When compared with other loan options a mortgage broker presents to a consumer, a creditor's covered transaction without a prepayment penalty might not have the lowest interest rate (among transactions either with or without risky features, such as a prepayment penalty) or the lowest total dollar amount of origination points or fees and discount points, and thus might not be among the loan options most important for consumers to evaluate. Also, the creditor may have operational difficulties in confirming whether or not a mortgage broker has presented to the consumer the alternative covered transaction without a prepayment penalty.

The Board proposed comment 43(g)(4)–1 to clarify that the creditor may satisfy the requirement to present the mortgage broker such alternative covered transaction without a prepayment penalty by providing the mortgage broker a rate sheet that states the terms of such an alternative covered transaction without a prepayment penalty. The Board proposed comment 43(g)(4)–2 to clarify that the creditor's agreement with the mortgage broker may provide for the mortgage broker to present both the creditor's covered transaction and a covered transaction offered by another creditor with a lower interest rate or a lower total dollar amount of origination points or fees and discount points. Comment 43(g)(4)–2 also cross-references comment 36(e)(3)–3 for guidance in determining which step-rate mortgage has a lower interest rate. The Board proposed comment 43(g)(4)–3 to clarify that a creditor's agreement with a mortgage broker for purposes of § 1026.43(g)(4) may be part of another agreement with the mortgage broker, for example, a compensation agreement. The comment clarifies that the creditor thus need not enter into a separate agreement with the mortgage broker with respect to each covered transaction with a prepayment penalty. The Bureau did not receive significant comment on proposed comments 43(g)(4)–1 through –3 and is adopting these comments largely as proposed.

Provisions Not Adopted

As explained in the preamble to the Board's proposal, the Board did not propose specific rules under proposed § 226.43(g)(4) to apply in the case where the loan originator is the creditor's employee. The Bureau did not receive significant comment on that omission and likewise is not adopting special provisions under § 1026.43(g)(4) to apply where the loan originator is the creditor's employee. The Bureau believes that, in such cases, the employee likely can present alternative covered transactions with and without a prepayment penalty to the consumer without significant operational difficulties.

consumer with: (1) The loan option with the lowest interest rate overall, (2) the loan option with the lowest interest rate without certain risky features, including a prepayment penalty, and (3) the loan option with the lowest total origination points or fees and discount points. *See* § 1026.36(e)(3)(i).

[168] For ease of discussion, the terms ''mortgage broker'' and ''loan originator'' as used in this discussion have the same meaning as under the Bureau's requirements for loan originator compensation. *See* § 1026.36(a)(1), (2).

[169] TILA section 103(cc), as added by section 1401 of the Dodd-Frank Act, defines ''mortgage originator'' to mean any person who, for direct or indirect compensation or gain, or in the expectation of direct or indirect compensation or gain, takes a residential mortgage loan application, assists a consumer in obtaining or applying to obtain a residential mortgage loan, or offers or negotiates terms of a residential mortgage loan. 15 U.S.C. 1602(cc). The term ''mortgage originator'' is used, for example, for purposes of the anti-steering requirement added to TILA by section 1403 of the Dodd-Frank Act. *See* TILA section 129B(c).

The Board solicited comment on whether additional guidance was needed regarding offers of covered transactions through mortgage brokers that use the safe harbor for the anti-steering requirement, under § 226.36(e)(2) and (3). The Bureau did not receive significant comment on the proposal and concludes that additional guidance is not currently required. The Bureau will continue to study the interaction between prepayment penalty restrictions, as applied to mortgage brokers under § 1026.43(g)(4) and the safe harbor for the anti-steering requirement, under § 1026.36(e)(2) and (3) to ensure that brokers are operating with sufficient guidance. In the course of its review, if the Bureau determines that more guidance would provide clarity or otherwise reduce compliance burden, then the Bureau may propose to add additional guidance.

43(g)(5) Creditor That Is a Loan Originator

The Board proposed § 226.43(g)(5) to address table funding situations, where a creditor does not provide the funds for a covered transaction out of its own resources but rather obtains funds from another person and, immediately after consummation, assigns the note, loan contract, or other evidence of the debt obligation to the other person. Such a creditor generally presents to a consumer loan options offered by other creditors, and this creditor is a loan originator subject to the anti-steering requirements in § 1026.36(e). *See* § 1026.36(a)(1); comment 36(a)(1)–1. Like other loan originators, such a creditor may use the safe harbor for the anti-steering requirements under § 1026.36(e)(2) and (3). The Board proposed that, if the creditor is a loan originator, as defined in § 1026.36(a)(1), and the creditor presents a consumer a covered transaction with a prepayment penalty offered by a person to which the creditor would assign the covered transaction after consummation, the creditor must present the consumer an alternative covered transaction without a prepayment penalty offered by (1) the prospective assignee, or (2) another person, if the transaction offered by the other person has a lower interest rate or a lower total dollar amount of origination points or fees and discount points. The Board reasoned that its proposal provided flexibility with respect to the presentation of loan options, which facilitates compliance with § 1026.43(g)(3) and with the safe harbor for the anti-steering requirement in connection with the same covered transaction. *See* § 1026.36(e)(3)(i).

The Bureau did not receive significant comment on the proposal and is adopting the Board's proposal. Like § 1026.43(g)(4), § 1026.43(g)(5) does not affect the conditions that a creditor that is a loan originator must meet to take advantage of the safe harbor for the anti-steering requirement. Accordingly, if a creditor that is a loan originator chooses to use the safe harbor, the creditor must present the consumer (1) the loan option with the lowest interest rate overall, (2) the loan option with the lowest interest rate without certain risky features, including a prepayment penalty, and (3) the loan option with the lowest total origination points or fees and discount points. *See* § 1026.36(e)(3)(i).

The Board proposed comment 43(g)(5)–1 to clarify that a loan originator includes any creditor that satisfies the definition of the term but makes use of ''table-funding'' by a third party. The Bureau did not receive significant comment on the proposed comment and is adopting it as proposed. The Board proposed comment 43(g)(5)–2 to cross-reference guidance in comment 36(e)(3)–3 on determining which step-rate mortgage has a lower interest rate. The Bureau did not receive significant comment on the proposal and is adopting the Board's proposed comment.

43(g)(6) Applicability

TILA section 129C(c)(1)(A) provides that only a qualified mortgage may contain a prepayment penalty and TILA section 129C(c)(4) further requires the creditor to offer the consumer an alternative offer that does not contain a prepayment penalty. The Board proposed § 226.43(g)(6) to provide that § 226.43(g) would apply only if a transaction is consummated with a prepayment penalty and would not be violated if (1) a covered transaction is consummated without a prepayment penalty or (2) the creditor and consumer do not consummate a covered transaction. The Bureau did not receive significant comment on the proposal and is adopting the Board's proposal under § 1026.43(g)(6).

Section 1026.43(g)(2) limits the period during which a prepayment penalty may be imposed and the amount of any prepayment penalty. As provided in § 1026(g)(6), those prepayment penalty limitations apply only if a covered transaction with a prepayment penalty is consummated. Similarly, § 1026.43(g)(3) requires a creditor that offers a consumer a covered transaction with a prepayment penalty to offer the consumer an alternative covered transaction without a prepayment penalty. Where a consumer consummates a covered transaction without a prepayment penalty, § 1026(g)(6) states that it is unnecessary to require that the creditor offer the consumer an alternative covered transaction without a prepayment penalty. Thus § 1026.43(g) applies only if the consumer consummates a covered transaction with a prepayment penalty.

43(h) Evasion; Open-End Credit

TILA section 129C, which addresses the ability-to-repay requirements and qualified mortgages, applies to residential mortgage loans. TILA section 103(cc)(5) defines ''residential mortgage loans'' as excluding open-end credit plans, such as HELOCs. In its proposal, the Board recognized that the exclusion of open-end credit plans could lead some creditors to attempt to evade the requirements of TILA section 129C by structuring credit that otherwise would have been structured as closed-end as open-end instead.

The Board proposed § 226.43(h) to prohibit a creditor from evading the requirements of § 226.43 by structuring a transaction that does not meet the definition of open-end credit in § 226.2(a)(20) as open-end credit, such as a HELOC. The Board proposed comment 43(h)–1 to explain that where a loan is documented as open-end credit but the features and terms, or other circumstances, demonstrate that the loan does not meet the definition of open-end credit, then the loan is subject to the rules for closed-end credit, including § 226.43. The Board proposed these provisions using its authority under TILA sections 105(a) and 129B(e) to prevent circumvention or evasion. The Board noted that an overly broad anti-evasion rule could limit consumer choice by casting doubt on the validity of legitimate open-end plans, and the Board thus solicited comment on whether to limit the anti-evasion rule's application, for example, to HELOCs secured by first liens where the consumer draws down all or most of the entire line of credit immediately after the account is opened.

Consumer groups generally supported the proposed anti-evasion provision; some consumer groups suggested that the provision should be expanded to require all HELOCs to comply with all Dodd-Frank Act requirements, expressing concern over the potential for consumer abuse. Industry commenters generally sought clarification on the anti-evasion rule, noting that ambiguity with respect to the provision might limit creditors' ability, or willingness, to offer HELOCs or other open-end credit products.

The Bureau is adopting the Board's proposal largely as proposed. Section 1026.43(h) is also consistent with the Board's 2008 HOEPA Final Rule, § 1026.35(b)(4), which provides a similar anti-evasion provision with respect to higher-priced mortgage loans. The Bureau is including this provision both as part of its interpretation of TILA section 129C and using its authority under TILA section 105(a), which provides that the Bureau's regulations may contain such additional requirements, classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for all or any class of transactions as in the Bureau's judgment are necessary or proper to effectuate the purposes of TILA, prevent circumvention or evasion thereof, or facilitate compliance therewith, and TILA section 129B(e) to prevent circumvention or evasion. 15 U.S.C. 1604(a), 1639b(e). The purposes of TILA include the purposes that apply to section 129C, to assure that consumers are offered and receive residential mortgage loans on terms that reasonably reflect their ability to repay the loan. *See* 15 U.S.C. 1639b(a)(2). While some industry commenters requested further clarification on this provision, so as to avoid limiting consumer choice, the Bureau believes that no further commentary is required. A creditor that offers a consumer an open-end line of credit in the ordinary course of business need not be concerned with running afoul of the anti-evasion requirement, and a creditor need not undertake any additional compliance or reporting steps to do so. A creditor only violates § 1026.43(h) when the creditor structures credit secured by a consumer's dwelling that does not meet the definition of open-end credit in § 1026.2(a)(20) as an open-end plan in order to evade the ability-to-repay requirements. The Bureau's approach should allow creditors acting in good faith to continue to provide credit to consumers in the manner best fit for business needs and consumer demand, without concern of accidentally running afoul of the anti-evasion requirement.

VI. Effective Date

This final rule is effective on January 10, 2014. The rule applies to transactions for which the creditor received an application on or after that date. As discussed above in part III.C, the Bureau believes that this approach is consistent with the timeframes established in section 1400(c) of the Dodd-Frank Act and, on balance, will facilitate the implementation of the rules' overlapping provisions, while also affording creditors sufficient time to implement the more complex or resource-intensive new requirements.

As noted above, in response to the proposal, some industry commenters requested that the Bureau provide additional time for compliance because the Bureau is finalizing several mortgage rules at the same time. These commenters expressed concern over both the breadth and complexity of new rules expected from the Bureau and from other regulators. Some commenters stated that small institutions, in particular, might face a higher cost of compliance under the timeframes established in section 1400(c) of the Dodd-Frank Act. One industry commenter explained that the new rules would require creditors to alter financial products, modify compliance systems, and train staff. Another industry commenter noted that some credit unions and other institutions that rely on third-party providers, such as software vendors, to assist with compliance might face particular challenges with implementing necessary changes over a short time period since such third parties will need time to incorporate necessary updates and conduct testing, and include the changes in their scheduled releases. Some commenters urged the Bureau to coordinate publishing and effective dates among the title XIV rules and the QRM rulemaking, in order to assist creditors in minimizing compliance burden.

For the reasons already discussed above, the Bureau believes that an effective date of January 10, 2014 for this final rule and most provisions of the other title XIV final rules will ensure that consumers receive the protections in these rules as soon as reasonably practicable, taking into account the timeframes established by the Dodd-Frank Act, the need for a coordinated approach to facilitate implementation of the rules' overlapping provisions, and the need to afford creditors and other affected entities sufficient time to implement the more complex or resource-intensive new requirements.

VII. Dodd-Frank Act Section 1022(b)(2) Analysis

A. Overview

In developing the final rule, the Bureau has considered potential benefits, costs, and impacts.[170] In addition, the Bureau has consulted, or offered to consult with, the prudential regulators, SEC, HUD, FHFA, the Federal Trade Commission, and the Department of the Treasury, including regarding consistency with any prudential, market, or systemic objectives administered by such agencies. The Bureau also held discussions with or solicited feedback from the United States. Department of Agriculture, Rural Housing Service, the Federal Housing Administration, and the Department of Veterans Affairs regarding the potential impacts of the final rule on those entities' loan programs.

The Board issued the 2011 ATR Proposal prior to the transfer of rulemaking authority to the Bureau. As the Board was not subject to Dodd-Frank Act section 1022(b)(2), the 2011 ATR Proposal did not contain a proposed Dodd-Frank Act section 1022 analysis.

The Dodd-Frank Act and the final rule establish minimum standards for consideration of a consumer's repayment ability for creditors originating certain closed-end, residential mortgage loans. These underwriting requirements are similar, but not identical, to the ability-to-repay requirements that apply to high-cost and higher-priced mortgage loans under current regulations.[171] In general, the Act and the final rule prohibit a creditor from making a covered transaction unless the creditor makes a reasonable and good faith determination, based on verified and documented information, that the consumer has a reasonable ability to repay the loan according to its terms.

These documentation and verification requirements effectively prohibit no documentation and limited documentation loans that were common in the later years of the housing bubble. The final rule generally requires the creditor to verify the information relied on in considering a consumer's debts relative to income or residual income after paying debts, using reasonably reliable third-party records, with special

[170] Specifically, section 1022(b)(2)(A) of the Dodd-Frank Act calls for the Bureau to consider the potential benefits and costs of a regulation to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services; the impact on depository institutions and credit unions with $10 billion or less in total assets as described in section 1026 of the Dodd-Frank Act; and the impact on consumers in rural areas.

[171] The Bureau notes that under the final rule, ''higher-priced covered transaction'' is defined in § 1026.43(b)(4). ''Higher-priced mortgage loan'' (HPML) is defined in § 1026.35. ''High-cost mortgage'' is defined in § 1026.32. The Bureau further notes that interest rate thresholds specified in the ''higher-priced covered transaction'' definition (higher-priced threshold) are similar to the HPML thresholds, except the final rule's higher-priced threshold does not include a specified rate threshold for ''jumbo'' loans, as provided in § 1026.35.

rules for verifying a consumer's income or assets. The creditor must calculate the monthly mortgage payment based on the greater of the fully-indexed rate or any introductory rate, assuming monthly, fully amortizing payments that are substantially equal. The final rule provides special payment calculation rules for loans with balloon payments, interest-only loans, and negative amortization loans.

The final rule provides special rules for complying with the ability-to-repay requirements for a creditor refinancing a ''non-standard mortgage'' into a ''standard mortgage.'' Under the final rule, a non-standard mortgage is defined as an adjustable-rate mortgage with an introductory fixed interest rate for a period of one year or longer, an interest-only loan, or a negative amortization loan. Under this provision, a creditor refinancing a non-standard mortgage into a standard mortgage does not have to consider the specific underwriting criteria a lender must otherwise consider under the general ability-to-repay option, if certain conditions are met.

To provide creditors more certainty about their potential liability under the ability-to-pay standards while protecting consumers from unaffordable loans, the Dodd-Frank Act creates a presumption of compliance with the ability-to-pay requirement when creditors make ''qualified mortgages.'' According to the statute, covered transactions, in general, are qualified mortgages where: the loan does not contain negative amortization, interest-only payments, or balloon payments (except in certain limited circumstances); the term does not exceed 30 years; points and fees (excluding up to two bona fide discount points) do not exceed three percent of the total loan amount; the income or assets and debt obligations are considered and verified; the underwriting is based on the maximum rate during the first five years, uses a payment schedule that fully amortizes the loan over the loan term, and takes into account all mortgage-related obligations.

Under the final rule creditors have three options for originating a qualified mortgage. Under the first option, the loan must satisfy basic documentation and verification requirements for income or assets and debt, and the consumer must have a total (or ''back-end'') debt-to-income ratio that is less than or equal to 43 percent. With respect to a loan that satisfies these criteria and is not a higher-priced covered transaction, there is a conclusive presumption that the creditor satisfied the ability-to-pay requirements so that the loan qualifies for a legal safe harbor under the ability-to-repay requirements. A loan that satisfies these criteria and is a higher-priced covered transaction receives a rebuttable presumption of compliance with the ability-to-repay requirements.

The second option for originating a qualified mortgage provides a temporary expansion of the general definition. Through this option, a loan is a qualified mortgage if it meets the prohibitions on certain loan features, the limitations on points and fees and loan terms that apply under the general definition and also meets one of the following requirements: is eligible for purchase or guarantee by the Federal National Mortgage Association (Fannie Mae) or the Federal Home Loan Mortgage Corporation (Freddie Mac) (collectively, the GSEs), while operating under the conservatorship or receivership of the FHFA; is eligible to be purchased or guaranteed by any limited-life regulatory entity succeeding the charter of either the GSEs; or is eligible to be insured by the FHA, VA or USDA or USDA RHS. This temporary provision expires with respect to GSE-eligible loans when conservatorship of the GSEs ends and expires with respect to each other category of loans on the effective date of a rule issued by each respective Federal agency pursuant to its authority under TILA section 129C(b)(3)(ii) to define a qualified mortgage. Alternatively, if GSE conservatorship continues or the Federal agencies do not issue rules defining qualified mortgage pursuant to TILA section 129C(b)(3)(ii), the temporary qualified mortgage definition expires seven years after the effective date of the rule.

Unlike loans that are qualified mortgages under the general definition, there is no specific monthly debt-to-income ratio threshold to be a qualified mortgage under this temporary provision, except as may be required to be eligible for purchase or guarantee or to be insured by the GSEs or Federal agencies. The temporary qualified mortgage definition does not specifically include documentation and verification requirements or a specific payment calculation requirement. The Bureau understands that, to be eligible for purchase or guarantee by the GSE's or to be eligible to be guaranteed or insured by the Federal agencies, a loan must first satisfy certain payment calculation requirements and repayment ability analyses (which include consideration of a consumer's total monthly debt-to-income ratio) and the information on which the calculation is based must be documented and verified. As is true with respect to the first category of qualified mortgages described above, a loan that satisfies these criteria and is not a higher-priced covered transaction receives a legal safe harbor under the ability-to-repay requirements. A loan that satisfies these criteria and is a higher-priced covered transaction receives a rebuttable presumption of compliance with the ability-to-repay requirements.

The third option for qualified mortgages exists only for small creditors operating predominantly in rural or underserved areas, who are allowed under the rule to originate a balloon-payment qualified mortgage. Specifically, this option exists for lenders originating 500 or fewer covered transactions, secured by a first lien, in the preceding calendar year, with assets equal to or under $2 billion (to be adjusted annually), and who made more than 50 percent of their total covered transactions secured by first liens on properties in counties that are ''rural'' or ''underserved.'' These creditors are allowed to offer loans with balloon payments assuming the loan also meets certain loan-specific criteria: the creditor must satisfy the requirements under the general qualified mortgage definition regarding consideration and verification of income or assets and debt obligations; the loan cannot permit negative amortization; the creditor must determine that the consumer can make all of the scheduled payments (other than the final balloon payment) under the terms of the legal obligation from the consumer's current or reasonably expected income or assets other than the dwelling that secures the transaction; the loan must have a term of least five years and no more than 30 years; the interest rate is fixed during the term of the loan; the creditor must base the payment calculation on the scheduled periodic payments, excluding the balloon payment; and the loan must not be subject to a forward commitment at the time of consummation.

Unlike loans that are qualified mortgages under the general definition, there is no specific debt-to-income ratio requirement for balloon-payment qualified mortgages. However, creditors must generally consider and verify a consumer's monthly debt-to-income ratio. Like the other qualified mortgage definitions, a loan that satisfies the criteria for a balloon-payment qualified mortgage and is not a higher-priced covered transaction receives a legal safe harbor under the ability-to-repay requirements for as long as the loan is held in portfolio by the creditor who originated the loan. The safe harbor also applies to balloon-payment qualified mortgages which are sold three years or more after consummation. A loan that satisfies the balloon payment qualified mortgage criteria and is a higher-priced covered transaction receives a rebuttable presumption of compliance with the ability-to-repay requirements.

As discussed above, the final rule provides a conclusive presumption of compliance with the ability-to-repay requirements for loans that satisfy the definition of a qualified mortgage and are not higher-priced covered transactions (*i.e.,* APR does not exceed Average Prime Offer Rate (APOR) + 1.5 percentage points for first liens or 3.5 percentage points for subordinate liens).[172] The final rule provides a rebuttable presumption of compliance with ability-to-repay requirements for all other qualified mortgage loans, meaning qualified mortgage loans that are higher-priced covered transactions. A consumer who seeks to rebut the presumption must prove that, at the time of consummation, in light of the consumer's income and debt obligations, the consumer's monthly payment (including mortgage-related obligations) on the covered transaction and any simultaneous loans of which the creditor was aware, would leave the consumer with insufficient residual income to pay living expenses, including recurring and material obligations or expenses of which the creditor was aware.

Finally, the final rule implements the Dodd-Frank Act limits on prepayment penalties, lengthens the time creditors must retain records that evidence compliance with the ability-to-repay and prepayment penalty provisions, and prohibits evasion of this rule, in connection with credit that does not meet the definition of open-end credit, by structuring a closed-end extension of credit as an open-end plan.

A consumer who brings an action against a creditor for a violation of the ability-to-repay requirements within three years from when the violation occurs may be able to recover special statutory damages equal to the sum of all finance charges and fees paid by the consumer, unless the creditor demonstrates that the failure to comply is not material; actual damages; statutory damages in an individual action or class action, up to a prescribed threshold; and court costs and attorney fees that would be available for violations of other TILA provisions. After the expiration of the three-year time period, the consumer is precluded from bringing an affirmative claim against the creditor. At any time, when a creditor or an assignee initiates a foreclosure action, a consumer may assert a violation of these provisions ''as a matter of defense by recoupment or setoff.'' There is no time limit on the use of this defense, although the recoupment or setoff of finance charge and fees is limited to the first three years of finance charges and fees paid by the consumer under the mortgage.

B. Data and Quantification of Benefits, Costs and Impacts

Section 1022 of the Dodd-Frank Act requires that the Bureau, in adopting the rule, consider potential benefits and costs to consumers and covered persons resulting from the rule, including the potential reduction of access by consumers to consumer financial products or services resulting from the rule, as noted above; it also requires the Bureau to consider the impact of proposed rules on covered persons and the impact on consumers in rural areas. These potential benefits and costs, and these impacts, however, are not generally susceptible to particularized or definitive calculation in connection with this rule. The incidence and scope of such potential benefits and costs, and such impacts, will be influenced very substantially by economic cycles, market developments, and business and consumer choices, that are substantially independent from adoption of the rule. No commenter has advanced data or methodology that it claims would enable precise calculation of these benefits, costs, or impacts. Moreover, the potential benefits of the rule on consumers and covered persons in creating market changes anticipated to address market failures are especially hard to quantify.

In considering the relevant potential benefits, costs, and impacts, the Bureau has utilized the available data discussed in this preamble, where the Bureau has found it informative, and applied its knowledge and expertise concerning consumer financial markets, potential business and consumer choices, and economic analyses that it regards as most reliable and helpful, to consider the relevant potential benefits and costs, and relevant impacts. The data relied upon by the Bureau includes the public comment record established by the proposed rule, as well as the data described in the Bureau's **Federal Register** notice reopening the comment for this rule,[173] and the public comments thereon.

However, the Bureau notes that for some aspects of this analysis, there are limited data available with which to quantify the potential costs, benefits, and impacts of the final rule. For example, data on the number and volume of various loan products originated for the portfolios of bank and non-bank lenders exists only in certain circumstances. Data regarding many of the benefits of the rule such as the benefits from prevented defaults or from prevented injuries to the financial system are also limited.

In light of these data limitations, the analysis below generally provides a qualitative discussion of the benefits, costs, and impacts of the final rule. General economic principles, together with the limited data that are available, provide insight into these benefits, costs, and impacts. Where possible, the Bureau has made quantitative estimates based on these principles and the data that are available. For the reasons stated in this preamble, the Bureau considers that the rule as adopted faithfully implements the purposes and objectives of Congress in the statute. Based on each and all of these considerations, the Bureau has concluded that the rule is appropriate as an implementation of the Act.

C. Baseline for Analysis

The provisions of Dodd Frank concerning minimum loan standards and the ability-to-repay requirement are self-effectuating, and the Dodd-Frank Act does not require the Bureau to adopt a regulation to implement these amendments. The Act does require the Bureau to issue regulations to ''carry out the purposes of'' the subsection governing qualified mortgages, which includes the ''presumption of compliance'' accorded those mortgages. In the absence of such regulations, the statutory provisions would take effect on January 21, 2013, and there would be no clarification beyond the statute as to the meaning of the ability-to-repay requirement, which mortgages meet the statutory criteria for a qualified mortgage, and the nature of the presumption of compliance with respect to such mortgages. Thus, many costs and benefits of the final rule considered below would arise largely or entirely from the statute, not from the final rule. The final rule would provide substantial benefits compared to allowing these provisions to take effect alone by clarifying parts of the statute that are ambiguous. Greater clarity on these

[172] The Average Prime Offer Rate means ''the average prime offer rate for a comparable transaction as of the date on which the interest rate for the transaction is set, as published by the Bureau.'' TILA section 129C(b)(2)B).

[173] *See* 77 FR 33120 (June 5, 2012)

issues should reduce the compliance burdens on covered persons by reducing costs for attorneys and compliance officers as well as potential costs of over-compliance and unnecessary litigation.

Section 1022 of the Dodd-Frank Act permits the Bureau to consider the benefits and costs of the rule solely compared to the state of the world in which the statute takes effect without an implementing regulation. To provide the public better information about the benefits and costs of the statute, however, the Bureau has nonetheless chosen to evaluate the benefits, costs, and impacts of the major provisions of the final rule against a pre-statutory baseline. That is, the Bureau's analysis below considers the benefits, costs, and impacts of the relevant provisions of the Dodd-Frank Act combined with the final rule implementing those provisions relative to the regulatory regime that pre-dates the Act and remains in effect until the final rule takes effect. As noted, current regulations have parallel but not identical ability-to-repay rules applied to higher-price and high-cost mortgage loans.[174]

In the analysis, in addition to referring to present market conditions, the Bureau refers at times to data from other historical periods—the market as it existed from 1997 to 2003 and the years of the bubble and the collapse—to provide the public a fuller sense of the potential impacts of the rule in other market conditions.[175] Considering the current state of the market makes clear the near term benefits and costs of the provisions. However, at this point in the credit cycle, the market is highly restrictive and operating under very tight credit conditions.[176] Against this background, the benefits and the costs of the rule may appear smaller than otherwise.

The Bureau considers the mortgage market as it existed from 1997 through 2003 useful to assess some of the rule's possible effects when credit conditions, and the economy more generally, return to normal. During this period, home prices were generally rising and the housing market was in a positive phase. Notably, interest rates were falling in 2002 and 2003, which created a very large surge in refinancing activity. This period may not be perfectly representative of an ''average'' market, but these years span almost a full business cycle, capturing the end of 1990's expansion, the early 2000's recession and the beginning of the next expansion.[177]

The analysis also uses data from the period 2004 through 2009. Beginning in 2004, the mortgage market in the United States was in the height of the housing bubble. In 2007 home prices, mortgage lending, and the economy more generally collapsed. The period that covers the ''bubble'' years and the crash that followed is also useful to gauge the impacts of the final rule. It is exactly the lending conditions during those years, and the damage they caused, that the statute and the final rule are primarily designed to prevent. Examining the performance and effects of the mortgages offered during this period, loans that were largely originated based on the perceived value of collateral, offers insights into the potential benefits and costs of the rule.

D. Coverage of the Final Rule

The provisions of the final rule require creditors to determine a consumer's ability to repay a ''residential mortgage loan, '' excluding reverse mortgages and temporary bridge loans of 12 months or less, (referred to as ''covered transactions'') ''and establish new rules and prohibitions on prepayment penalties. For these purposes, this rule covers with some exceptions, any dwelling-secured consumer credit transaction, regardless of whether the consumer credit transaction involves a home purchase, refinancing, home equity loan, first lien or subordinate lien, and regardless of whether the dwelling is a principal residence, second home, vacation home (other than a timeshare residence), a one- to four-unit residence, condominium, cooperative, mobile home, or manufactured home. However, the Dodd-Frank Act specifically excludes from these provisions open-end credit plans or extensions of credit secured by an interest in a timeshare plan. The final rule generally also excludes reverse mortgages, residential construction loans, and bridge loans with a term of 12 months or less.

E. Potential Benefits and Costs to Consumers and Covered Persons

In the analysis of benefits, costs and impacts, the Bureau has chosen to consider the ability-to-repay provisions together with the various qualified mortgage provisions. The discussion below first addresses the economics of an ability-to-repay standard, and considers the specific market failures that the statute and the rule aim to address. In general, market failures may include incomplete markets, externalities, imperfect competition, imperfect information, or imperfect information processing by consumers and several of those are discussed here.[178] The benefits and costs of the requirement to assess ability to repay based upon documented and verified information are then discussed along with the impacts of the new liabilities, and the presumption of compliance that mitigates those liabilities established under the Dodd-Frank Act.

Additional provisions of the rule are considered including the impacts of the provisions related to points and fees, prepayment penalties and the definition of ''rural or underserved''. The relationship between these provisions and other mortgage related rulemakings is discussed. The benefits, costs and impacts of the final rule in relation to several major alternatives are then discussed.

1. Economics of Ability To Repay

The basic requirement of Section 1411 of the Dodd-Frank Act is that a covered transaction may only be made when the creditor has made a ''reasonable and good faith'' determination that the consumer will be able to repay the loan. In the absence of any market imperfections, when negotiating a loan, both the lender and borrower would understand and consider the probability of default and the related costs should such a default occur. Creditors would extend credit if, and only if, the ''price'' of the loan, *i.e.,* the risk-adjusted return (the return taking into account the expected loss from default) is high enough to justify the investment. Informed consumers would accept the loan if, and only if, the benefits of financing the property are worth the costs, including any expected costs in the likelihood that they default and

[174] The Bureau has chosen, as a matter of discretion, to consider the benefits and costs of those provisions that are required by the Dodd-Frank Act in order to better inform the rulemaking. The Bureau has discretion in future rulemakings to choose the relevant provisions to discuss and to choose the most appropriate baseline for that particular rulemaking.

[175] The statute and final rule are designed to ensure a minimal level of underwriting across various states of the housing market and credit cycle. As a result, the Bureau determined, as a matter of discretion, that it was beneficial to compare certain aspects of the rule against different scenarios, using different historical data.

[176] *See* Board of Governors of the Federal Reserve System, ''Monetary Policy Report to the Congress,'' (July 17, 2012), *available at http://www.federalreserve.gov/monetarypolicy/files/20120717_mprfullreport.pdf.*

[177] Reliable loan level data from earlier time periods is generally unavailable.

[178] For a general discussion of market failures, including incomplete markets, *see* Chapter 4 (''Market Failure'') in Joseph E. Stiglitz. *Economics of the Public Sector,* 3d edition. New York: W. W. Norton & Company, Inc. (2000).

cannot maintain access to the specific property.

The primary benefits or costs from an ability-to-repay requirement therefore derive from situations, where, absent such a requirement, these conditions are not met or where certain externalities may exist. These may include situations where the originator or creditor is not fully informed or has incorrect information about the transaction. More likely, a fully informed originator or creditor may not fully internalize all of the relevant costs, and is willing to extend credit even though the consumer may lack the ability to repay. Since the consumer willingly enters into the transaction, he or she must also be uninformed of either the true likelihood or true costs of default, or must not fully internalize all of the relevant costs. As discussed below, some of these situations arise when the lender or the borrower, fully understanding the risks of the loan and the inherent costs to themselves, do not factor costs borne by parties outside the transactions into their decisions.

Collateral based or ''hard money'' lending is one possible case where such lending could occur. If the lender is assured (or believes he is assured) of recovering the value of the loan by gaining possession of the asset, the lender may not pay sufficient attention to the ability of the borrower to repay the loan or to the impact of default on third parties. For very low loan-to-value (LTV) mortgages, *i.e.,* those where the value of the property more than covers the value of the loan, the lender may not care at all if the borrower can afford the payments. Even for higher LTV mortgages, if prices are rising sharply, borrowers with even limited equity in the home may be able to gain financing since lenders can expect a profitable sale or refinancing of the property as long as prices continue to rise.

Other cases may involve loan originators who do not bear the credit risk of the loan, and therefore do not bear the ultimate costs of default. The common case is lenders who sell their loans: these lenders earn upfront origination fees from consumers and gains on sale but (absent complete contracts that provide otherwise) may not generally bear the costs of a later borrower default. As the relative size of the upfront fees increase, the potential agency problems do as well. The market recognizes the informational issues in these transactions and has developed mechanisms to mitigate adverse selection and moral hazard. For example, purchasers of loans engage in due diligence, either directly or by hiring third parties, validating the information provided about the loans and ensuring that the seller has provided only loans that meet agreed upon criteria. In addition, contracts provide that ex-post, should a loan perform poorly, the originator may have to repurchase the loan. This contracting feature is also designed to ensure that the initial creditor of the loan has the proper incentives to verify the borrower's ability to repay or the collateral value. Still, not all information about the loan may be captured and passed among sequential owners of the loan; some tacit information, not passed on, may give the creditor an informational advantage over others and diminishes the creditors' incentives to verify the consumer's ability to repay.[179]

However, even lenders who maintain loans in portfolio may pay insufficient attention to the borrower's ability to repay. Cases where the loan creditor can earn sufficiently high up-front compensation, or where incentives of the individual loan originators and the creditor differ, may lead to lending that does not include a realistic assessment of the borrower's ability to repay. For example, a retail loan originator who earns commission may not have the same incentives as the owners of the bank that employs the loan originator and who will bear the ultimate cost of the loan once on portfolio. Even if such loan originators do not have final decision-making authority as to whether the creditor will make the loan, the loan originator controls the information that the underwriter receives and may have an information advantage that could systematically bias underwriting decisions.[180] This information problem, and therefore the risk of poorly underwritten portfolio loans, may be even greater where the originator is not an employee of the creditor as is true in the brokerage and correspondent lending contexts.

In all these cases, the common problem is the failure of the originator or creditor to internalize particular costs, often magnified by information failures and systematic biases that lead to underestimation of the risks involved. The first such costs are simply the pecuniary costs from a defaulted loan—if the loan originator or the creditor does not bear the ultimate credit risk, he or she will not invest sufficiently in verifying the consumer's ability to repay. Even in cases where the lender does bear those costs, he or she will usually not fully internalize the private costs that a defaulting borrower will incur should default occur. Further, there are social costs from default that creditors may not internalize, as discussed below.[181]

As noted earlier, the borrower also must decide whether to enter into the mortgage, and fully informed, perfectly rational consumers should consider their own risk of default and private costs in the event of default. However, as with lenders, borrowers may not fully anticipate the future probability or costs of default, either because they are uninformed or for other reasons. Consumers may underestimate the true costs of homeownership or be overly optimistic about their own future (or even current) financial condition. This can be exacerbated in the case of less sophisticated consumers negotiating with more informed mortgage professionals who have an interest in closing the loan and who may falsely reassure consumers about the consumers' ability to repay.

Consumers (and as noted above, creditors) may also misjudge the current or future value of the property securing the loan.[182] This latter phenomenon was very much in evidence during the later years of the housing bubble as many consumers simply assumed that in times of financial stress, they could always sell or refinance. Further, consumers may not understand or may underestimate the costs they will incur in the event of default, such as the loss of the borrower's own home, costs of relocation, and the borrower's loss of future credit, employment and other

[179] Some consumers may also benefit from informational asymmetries that lead to the secondary market purchasing their mortgages without full information about the characteristics of the loan.

[180] Examples of empirical evidence of the persistence of moral hazard among employees in commercial and retail lending, include originators of residential mortgages, appears in Sumit Agarwal and and Itzhak Ben-David, ''Do Loan Officers' Incentives Lead to Lax Lending Standards?'' Federal Reserve Bank of Chicago working paper (2012); Aritje Berndt; and Burton Hollifield, and Patrik Sandas, 2010, The Role of Mortgage Brokers in the Subprime Crisis, Working paper, Carnegie Mellon University. Cole, Shawn, Martin Kanz, and Leora Klapper (2010), Rewarding Calculated Risk-Taking: Evidence from a Series of Experiments with Commercial Bank Loan Officers, Working paper, Harvard Business School.

[181] With these market failures, even if regulation limits opportunities for lenders to extend credit without retaining a portion of the risk, there may be cases where lenders will not pay enough attention to a borrower's ability to repay.

[182] *See* Foote, Christopher L., Kristopher S. Gerardi, and Paul S. Willen, ''Why Did So Many People Make So Many *Ex Post* Bad Decisions? The Causes of the Foreclosure Crisis,'' Public Policy Discussions Papers, Federal Reserve Bank of Boston (2012), *available at http://www.bostonfed.org/economic/ppdp/2012/ppdp1202.pdf.*

opportunities for which credit reports or credit scores weigh in the decision.[183]

As noted above, neither party to the transaction is likely to internalize costs to third parties. Even among very informed consumers and creditors, most will not internalize the social costs that delinquency or foreclosure can have.[184] Research has consistently shown that a foreclosure will have a negative effect on the other homeowners in the vicinity either through the displacement of demand that otherwise would have increased the neighborhood prices, reduced valuations of future sales if the buyers and/or the appraisers are using the sold foreclosed property as a comparable, vandalism, and disinvestment.[185] While the estimated magnitudes and the breadth of the impact differ, researchers seem to agree that there is a negative impact on houses in the vicinity of the foreclosure, and this impact is the highest for the houses that are the closest to the foreclosed house and for the houses that get sold within a short period of time of the foreclosed sale.[186]

Research is also beginning to examine other spillover effects from foreclosures including increases in neighborhood crime [187] and social effects on family members such as hampered school performance.[188] Social policy has long favored homeownership for the societal benefits that may ensue; the negative spillovers from foreclosures can be seen as the inverse of this dynamic.[189]

The Dodd-Frank Act and the final rule address these potential market failures through minimum underwriting requirements at origination and new liability for originators and assignees in cases where the standards are found not to be met. For qualified mortgages that have earned the conclusive presumption, meeting the qualified mortgage product criteria and underwriting requirements and pricing of the loan at a prime rate are judged in the rule to be enough to ensure that the lender made a reasonable and good faith determination that the borrower will be able to repay the loan. For loans where the final rule creates a presumption of compliance but leaves room for the borrower to rebut the presumption of compliance, or loans for which there is no presumption (*i.e.,* loans that are not qualified mortgages) the lender may exert greater care in underwriting the loan than would be true in the absence of any liability for extending a loan which the consumer cannot afford to repay. Lenders therefore face an initial market tradeoff when choosing the optimal level of costs to bear in documenting and underwriting the loan and assessing the ability to repay (subject to the minimum standards all loans must meet): some increased effort (and therefore increased cost) at the time of origination may lower costs resulting from possible liability should the borrower become delinquent or default. Since assignees now share this liability, they have an additional incentive to monitor the behavior of the original creditor. The ex-post liability to the consumer mitigates the incentives for the creditor to shirk on the ex-ante investments in the underwriting.

Even creditors making the optimal choice of effort when documenting, verifying and underwriting the loan may still face some legal challenges from consumers ex-post. This will occur when a consumer proves unable to repay a loan and wrongly believes (or chooses to assert) that the creditor failed to properly assess the consumer's ability to repay before making the loan. This will likely result in some litigation expense, although the Bureau believes that over time, that expense will likely diminish as experience with litigation resolves more precise guidelines regarding what level of compliance is considered complete. After some experience, litigation expense will most likely result where compliance is insufficient or from limited novel sets of facts and circumstances where some ambiguity remains.[190] Regardless of which party incurs the costs, the economic costs of these actions are the resources used to litigate these cases, thereby helping to ensure compliance and limiting the incidence of loosely documented originations. The reimbursement of interest and fees, along with the statutory damages, paid to the borrower, constitute, in economic terms, a transfer—a cost to the originator or assignee and a benefit to the compensated borrower.[191]

2. Potential Benefits of the Ability-To-Repay Provisions for Consumers and Covered Persons

The final rule will help to ensure that loans are not made without regard for the borrower's ability to repay and thereby protect consumers and as noted above, others affected by defaults and foreclosures. (These others are themselves consumers and the adverse spillover effect from defaults and foreclosures very much impacts their economic well being.) Historically, the conditions under which credit is extended have been cyclical in nature. Periods of tight credit, such as the

[183] See for example, Kenneth P. Brevoort and Cheryl R. Cooper, Foreclosure's Wake: The Credit Experiences of Individuals Following Foreclosure, Working Paper, 2010 available at *http://works.bepress.com/kbrevoort/2.*

[184] Section 1022 requires consideration of benefits and costs to consumers and covered persons. The ability to pay rule also has important potential benefits and costs for other individuals and firms, and for society at large. The Bureau discusses these benefits and costs here because they are particularly important to the Bureau's development, and public understanding of, the final rule. The rule implements statutory provisions, enacted in the wake of the financial crisis, that seem clearly intended to help prevent the potential negative social externalities of poor underwriting while preserving the potential positive social externalities of mortgage lending. The Bureau reserves discretion in the case of each rule whether to discuss benefits and costs other than to consumers and covered persons.

[185] There are several papers documenting various magnitudes of the negative effect on the nearby properties. Data in Massachusetts from 1987 to 2009 indicate that aside from a 27% reduction in the value of a house (possibly due to losses associated with abandonment), foreclosures lead to a 1% reduction in the value of every other house within 5 tenths of a mile. See John Y. Campbell, Stefano Giglio, and Parag Pathak, Forced Sales and House Prices, American Economic Review 101(5) (2011), abstract available at: *http://www.aeaweb.org/articles.php?doi=10.1257/aer.101.5.2108.* Data from Fannie Mae for the Chicago MSA, show that a foreclosure within 0.9 kilometers can decrease the price of a house by as much as 8.7%, however the magnitude decreases to under 2% within five years of the foreclosure. See Zhenguo Lin, Eric Rosenblatt, and Vincent W. Yao. ''Spillover Effects of Foreclosures on Neighborhood Property Values,'' *The Journal of Real Estate Finance and Economics,* 2009, 38(4), 387–407. Similarly, data from a Maryland dataset for 2006–2009 show that a foreclosure results in a 28% increase in the default risk to its nearest neighbors. *See* Charles Towe and Chad Lawley, 2011, ''The Contagion Effect of Neighboring Foreclosures,'' SSRN Working Paper 1834805.

[186] Frame, W. Scott (2010): Estimating the effect of mortgage foreclosures on nearby property values: A critical review of the literature, Economic Review, Federal Reserve Bank of Atlanta, ISSN 0732–1813, Vol. 95, *http://hdl.handle.net/10419/57661.*

[187] See for example, Ingrid Gould Ellen, Johanna Lacoe, and Claudia Sharygin, Do Foreclosures Cause Crime?, Working Paper 2011.

[188] A summary of recent and ongoing research is presented in Julia B. Isaacs, *The Ongoing Impact of Foreclosures on Children,* First Focus/The Brookings Institution, April 2012. *See* also Samuel R. Dastrup and Julian R. Betts, Elementary Education Outcomes and Stress at Home: Evidence from Mortgage Default in San Diego.

[189] See for example, the literature summarized in Dwight Jaffee and John M. Quigley, The future of the government sponsored enterprises: the role for government in the U.S. mortgage market, NBER Working Paper Series, Working Paper 17685, available at *http://www.nber.org/papers/w17685.*

[190] The Bureau recognizes that there may always be some frivolous lawsuits for which lenders will pay legal expenses. In addition, uncertainty inherent in the legal system also implies a base level of litigation.

[191] In a cost benefit accounting, the ex-post realization of the contingent payment from the creditor to the borrower is a transfer, a cost on one side and a benefit on the other. For risk-averse consumers, the ex-ante insurance value of the contingent payment is also a benefit. In other words, consumers are better off knowing that if they are harmed, they will recover some damages.

conditions that exist in the current mortgage market, are marked by reduced loan activity, very stringent lending standards, and extreme care in underwriting. In such periods, the benefits of a regime designed to require prudent underwriting, may be less apparent, and, in the near term, adopting such a regime, as the final rule does, will likely have little direct and immediate effect either on consumers or covered persons. As explained further in the discussion of costs to consumers and covered persons, lenders generally are already doing what the rule requires and a large majority of their loans will qualify for the conclusive presumption of compliance.

However, as credit expands, as it almost inevitably will, the final rule will help to ensure that loans are made properly and with regard for the borrower's ability to repay. To assess the benefits of the final rule, therefore, it is useful to examine the provisions of the final rule in the context of the recent housing bubble and its collapse in 2007.

There is growing evidence that many of the market failures in the previous discussion were in play in the years leading up to the housing collapse. In some cases, lenders and borrowers entered into loan contracts on the misplaced belief that the home's value would provide sufficient protection. These cases included subprime borrowers who were offered loans because the lender believed that the house value either at the time of origination or in the near future could cover any default. Some of these borrowers were also counting on increased housing values and a future opportunity to refinance; others likely understood less about the transaction and were at an informational disadvantage relative to the lender. These cases also included Alt-A loans taken by borrowers hoping to speculate on housing values.

In both of these situations, these loans frequently involved less traditional products, loans structured with minimal monthly payments in order to allow the borrower to qualify and to carry the loan for a period of time with minimal expense. Many of these loans were sold into the secondary market, limiting the lenders' credit risk, but many lenders also retained these loans on their own portfolios either with the intent of earning the full anticipated profits from such loans over time or with the intent to hold the loans for a period of time before selling them. And throughout the housing boom, most lenders and borrowers entering into such agreements failed to consider the costs that default would inflict on other properties (and the consumers who inhabited them) and on the financial system and economy writ large.

The benefits from the ability-to-repay requirements therefore come from further limiting and deterring unaffordable lending, above and beyond the current ability-to-pay requirements for higher-priced mortgage loans, and thereby reducing the ensuing private and social costs of excess delinquency and default. For example, the basic requirement that all loans be underwritten based on documented income and debt would have eliminated many of the loans made later in the bubble that led to crisis. Described as ''stated-income'' loans or ''liar-loans,'' these mortgages became very prevalent in the later years of the expansion and had very poor, and worse than expected, performance when the markets collapsed.[192] There is also growing evidence that incomes on many mortgage applications were overstated in the years before the crash.[193] Importantly, while limited and reduced documentation loans were a large segment of the subprime market, many of these loans were also made to prime, higher credit score borrowers and on properties with lower loan-to-value ratios.[194] This suggests a substantial benefit to the documentation and verification requirements across all segments of the market, particularly the substantial majority of covered transactions that current ability-to-pay requirements do not cover now and are not expected to cover in the future.

As prices rose, aspiring homeowners borrowed money by misstating their income; many loan originators were at least indifferent to or even complicit or proactive in these endeavors. The systemic effects were evident: the extension of credit against inflated incomes expanded the supply of credit, which in turn continued the rapid rise of house prices in the later years of the housing boom and exacerbated the eventual crash.[195]

The statute and the final rule also require that creditors must underwrite based on an amortizing payment using the fully indexed rate (or the maximum rate in five years for qualified mortgages) and including, with limited exceptions, any balloon payments in the first five years. This effectively bans the practice of underwriting loans based upon low upfront payments, either the lower interest-only payments on interest-only loans or negatively amortizing option ARMs or the teaser rates on hybrid ARMs.

In their later incarnations, interest-only and negatively amortizing loans (along with loans with terms greater than 30 years) were often sold on the basis of the consumer's ability to afford the initial payments and without regard to the consumer's ability to afford subsequent payments once the rate was recast. At the peak of the market, between 2004 and 2006, the percentage of loans that were interest-only, option ARMs or 40-year mortgages rose from just 7 percent of originations to 29 percent. The lower payment possibility for these loans allows borrowers to qualify for loans that they otherwise may not have been able to afford; but this comes with the same risks just described. The performance of many of these loans was also very poor, and worse than expected, with the onset of the downturn.[196] The final rule does not

[192] From 2000 to 2009, reduced documentation loans grew from 2 percent of outstandings to 9 percent. *See* FCIC Report pgs 110–111 for discussion of these loans. Other research documents the poor performance of these loans and that the increased risk was not properly priced. See, for example, Michael LaCour-Little and Jing Yang, Taking the Lie Out of Liar Loans: The Effect of Reduced Documentation on the Performance and Pricing of Alt-A and Subprime Mortgages, 2012, Working Paper and Wei Jiang, Ashlyn Aiko Nelson, and Edward Vytlacil, Liar's Loan? Effects of Origination Channel and Information Falsification on Mortgage Delinquency, 2011, Working Paper. Some authors have tried to understand the differences between cases where lenders offered these loans as a benefit to certain customers and cases where customers simply chose a higher-priced limited doc alternative. See Irina Paley and Konstantinos Tzioumis, Rethinking Stated-income Loans: Separating the Wheat from The Chaff, Working Paper, 2011. For evidence that the risk on these loans was not fully priced, *see* Cost of Freddie Mac's Affordable Housing Mission, presentation to Board of Directors, 2009 at *http://fcic-static.law.stanford.edu/cdn_media/fcic-docs/2009-06-04FreddieMac-CostofAffordableHousingMission.pdf* p.12 analyzing the ''unexpectedly poor performance of * * * Alt-A purchases''

[193] For example, see Robert B. Avery, Neil Bhutta, Kenneth P. Brevoort, and Glenn B. Canner, The Mortgage Market in 2011: Highlights from the Data Reported under the Home Mortgage Disclosure Act, FEDS Working Paper Series, 2012. *See also* FCIC Report, pgs. 110–111; LaCour-Little and Yang, 2012; Jiang, Nelson, and Vytlacil, 2011; Paley and Tzioumis, 2011.

[194] *See* FCIC Report, pgs. 110–111; LaCour-Little and Yang, 2012; Jiang, Nelson, and Vytlacil, 2011; Paley and Tzioumis, 2011.

[195] *See* Financial Stability Oversight Council, Macroeconomic Effects of Risk Retention Requirements, January 2011, at 12. (''[T]here is some evidence that the increased supply in subprime mortgage credit was in part responsible for greater home price appreciation * * * [and] increases in home prices may have reinforced expectations for future appreciation, which may have fueled more lending. Increases in loan volume, in turn, may have precipitated further increases in home prices.''); Mian, Atif and Amir Sufi, ''The Consequences of Mortgage Credit Expansion: Evidence from the U.S. Mortgage Default Crisis,'' Quarterly Journal of Economics, vol. 124, no. 4 (2009).

[196] *See* Amromin, Gene, Jennifer Huang, Clemens Sialm, and Edward Zhong, ''Complex Mortgages,''

Continued

ban such products outright, but rather requires that lenders that make such loans have a ''reasonable and good faith'' belief in the borrower's ability to repay and that in formulating such a belief the lender must calculate the monthly payment based on the fully indexed rate and fully amortizing payments, and does not allow these loans to enjoy the presumption of compliance associated with qualified mortgage status. The new underwriting requirements, coupled with the liability for violating these rules, should deter improper loans and ensure proper underwriting and diligence when making such loans; again limiting cases of personal or social harm.

Underwriting hybrid ARMs to the teaser rate was also a very common practice, in particular among subprime loans of the early 2000's. So called ''2/28'' and ''3/27'' loans were often underwritten based on the low initial payment,[197] and exposed the borrower to potential payment shocks, and a need to refinance, two or three years into the mortgage.[198] For example, in 2005, the teaser rate on subprime ARMs with an initial fixed-rate period of two or three years was 3.5 percentage points below the fully indexed rate.[199] As a result, mortgages originated in that year faced a potentially large change in the interest rate and payment, or ''payment shock,'' at the first adjustment even absent any change in the index.

The evidence is mixed on whether payment shock at the initial interest rate adjustment causes default.[200] And indeed, for some borrowers, these loans can be efficient contracts that allow for the extension of credit (see discussion below).[201] However, the widespread use of the product put many borrowers in precarious financial positions and may also have fueled the systemic rise in home prices.[202] The elimination of these products should limit both the individual and the systemic harms which ultimately translate, in the largest part, into harms to individual consumers.

The final rule reduces the likelihood that these products will reemerge on a broad scale and thus should limit the potential for individual and the systemic harms. The final rule bans no-doc and the old low-doc loans since the level of documentation is lower than that required by the rule). * * * The rule reduces the incentive to offer these other alternative mortgage products by requiring that underwriting be done assuming a fully amortizing payment at the fully indexed rate. The final rule also does not provide any legal protection for the lender that makes these loans (or the investor that acquires or guarantees them) as the loans are categorically disqualified from being qualified mortgage. These non-amortizing products will likely persist only in narrow niches for more sophisticated borrowers who want to match their mortgage payment to changes in their expected income stream and who have the resources to qualify for the products under the stringent underwriting assumptions the statute and regulation require. But these products will not likely be marketed as broadly as they were during the bubble.

In addition to the products just described, loans with points and fees (except for bona fide discount points) that exceed three percent of the total amount cannot be qualified mortgages, except as applicable for smaller loans as defined. Creditors may take more care in originating a loan when more of the return derives from performance over time (interest payments) rather from upfront payments (points and fees). As such, this provision may offer lenders more incentive to underwrite these loans carefully. As loans with higher points and fees are usually assumed to be offered to borrowers in weaker financial circumstances, this provision offers protection to that class of borrowers.[203]

As discussed above, the various liability provisions provide the incentives for lenders to take proper care judging the borrower's ability to repay. This incentive is strongest for loans that are not qualified mortgages. Within the qualified mortgage space, higher priced mortgage loans (HPMLs) are still subject to ability-to-repay liability but afforded a rebuttable presumption of compliance. This liability already exists under rules that took effect in October 2009 for HPMLs, so that relative to existing rules, there are few benefits (or costs) associated with the liability provisions for such loans. However, there are some material differences in the underwriting requirements and smaller differences in the scope of the presumption where the liability now applies where it did not in the past. The new assignee liability may also strengthen the incentives relative to the existing rules.

Comparing the rebuttable presumption for higher priced qualified mortgages to the conclusive presumption (safe harbor) provision for qualified mortgages below the higher-priced threshold highlights the benefit of leaving the possibility of rebuttal in place. Borrowers paying higher rates on mortgage loans that meet the qualified mortgage product features are most likely to have lower credit scores, lower incomes and/or other risk factors; as such, it is among these subprime borrowers that a greater possibility exists for lenders to place the borrower into a loan that he or she may not have the ability to repay. The ability of the borrower to rebut the presumption of compliance leaves lenders with the additional incentive to ''double check'' the loan to examine further the borrower's financial condition and residual income, and to ensure that these higher risk borrowers have the means to live in the home they just purchased or refinanced.

Where a consumer is unable to afford his or her mortgage—and proves that the lender lacked a reasonable and good faith belief in the consumer's repayment ability at the time the loan was made—the damages the borrower recovers are a benefit to that party. The same damages should also be considered a

Federal Reserve Bank of Chicago Working Paper 2010–17 (2010), *available at http://www.chicagofed.org/digital_assets/publications/working_papers/2010/wp2010_17.pdf*.

[197] See for example, Christopher Mayer, Karen Pence, and Shane M. Sherlund, ''The Rise in Mortgage Defaults,'' *Journal of Economic Perspectives* 23, no. 1 (Winter 2009): Table 2, Attributes for Mortgages in Subprime and Alt-A Pools, p. 31. (showing that from 2003 to mid-2007, about 70 percent of subprime loans in securitized pools were hybrid adjustable rate mortgage loans.)

[198] Brent W. Ambrose & Michael LaCour-Little, *Prepayment Risk in Adjustable Rate Mortgages Subject to Initial Year Discounts: Some New Evidence,* 29 Real Est. Econs. 305 (2001) (showing that the expiration of teaser rates causes more ARM prepayments, using data from the 1990s). The same result, using data from the 2000s and focusing on subprime mortgages, is reported in Shane Sherland, *The Past, Present and Future of Subprime Mortgages,* (Div. of Research & Statistics and Div. of Monetary Affairs, Fed. Reserve Bd., Washington, DC 2008); The result that larger payment increases generally cause more ARM prepayments, using data from the 1980s, appears in James Vanderhoff, *Adjustable and Fixed Rate Mortgage Termination, Option Values and Local Market Conditions,* 24 Real Est. Econs. 379 (1996).

[199] *See* Christopher Mayer, Karen Pence, & Shane Sherlund, *The Rise in Mortgage Defaults,* 23 J. Econ. Persps. 27, 37 (2009).

[200] Mayer, Pence, & Sherlund, *supra* note 125, at 37 provide data from the 2000s that does not find a causal relationship between payment shock at the initial interest rate adjustment and default. In contrast, see Anthony Pennington-Cross & Giang Ho, *The Termination of Subprime Hybrid and Fixed-Rate Mortgages,* 38 Real Est. Econs. 399, 420 (2010), for evidence that among consumers with certain hybrid ARMs originated in the 2000s, a substantial number experienced an increase in monthly payment of at least 5% at the initial interest rate adjustment, and that the default rate for these loans was three times higher than it would have been if the payment had not changed.

[201] See for example, Gary Gorton, The Panic of 2007, paper presented at the Federal Reserve Bank of Kansas City's Jackson Hole Conference, August 2008, p. 12–18.

[202] .*See* for example, Mian and Sufi, 2009.

[203] In general, smaller dollar loans are more likely to be impacted by the points and fees provisions.

cost to the lender and as such, estimates regarding the frequency of such actions and the dollar amounts involved are in the next section discussing costs.

Another impact of the differentiated structure of the final rule, where certain loans enjoy a conclusive presumption, others are given a rebuttable presumption and still others are subject to ability to repay scrutiny without the benefit of a presumption, is that some borrowers may gain ''better'' loans as lenders choose to make loans that qualify for the highest level of legal protection. Lenders in less competitive environments who have some flexibility over product offerings and/or pricing power may find it more profitable to offer a borrower a qualified mortgage rather than a non-qualified mortgage if, for such lenders, the expected value of the heightened legal protection is enough of an expected cost savings to offset any revenue reduction from making the qualified mortgage. For example, a creditor may restructure the price of a transaction with points and fees otherwise just above the points and fees limit for a qualified mortgage to have fewer upfront costs, and a higher interest rate, so that the loan is then under the limit and a qualified mortgage. Similarly, situations could exist where lowering the price on a loan would make the loan eligible for the safe harbor rather than the rebuttable presumption. The prevalence of these situations, or others similar situations, is hard to predict and depends on the future prices for mortgages in each of these segments, the competitive nature of the segments, and the individual lender's and borrower's situation.

The benefits of the rule, as discussed above, will be widely shared among individual borrowers, creditors, investors, and the public (consumers) generally. As discussed above, the loss that occurs when a consumer is unable to repay a loan is felt by the consumer, the holder(s) of that loan, and other parties outside the transaction including other consumers and would-be-consumers. Ensuring that lenders make a reasonable and good faith determination of the borrower's ability to repay should prevent a widespread deterioration of underwriting standards, the extension of excess credit and the broader negative effects that can have on these parties. To the extent lenders are deterred from making unaffordable loans, or encouraged to make more affordable loans, all of these parties will benefit.

3. Potential Costs of the Ability-To-Repay Provisions to Consumers and Covered Persons

In this part the Bureau considers costs to consumers and covered persons of the ability to repay provisions of the statute and final rule, including any potential cost in the form of reduced access to credit for consumers. The primary ongoing costs of the requirements of the final rule rest in the underwriting costs, including costs at origination to verify information on which the lender relies in the underwriting decision and the increased liability on lenders and assignees. As previously noted, in the current environment, lenders are already largely complying with these requirements and thus the rule should impose minimal, if any, ex ante costs. But in other credit environments, when creditors may wish to lower their underwriting criteria and require less documentation and perform less verification, the rule would require them to make a good faith and reasonable determination of ability to repay and to require them to incur ex-ante costs to document, verify and consider income and debt (and credit history). This should increase the quality of underwriting of mortgages at origination and thereby limit the prevalence of future delinquency and default, and the level of ex-post costs. (Of course, exogenous or unanticipated events and borrower behavior will still result in some delinquent and defaulting loans and some possible legal actions.) In this scheme, the possibility of legal recourse by the borrower serves as an incentive for better lender assessment of repayment ability as well as offering borrowers redress for wrongdoing. Lenders will determine the optimal combination of upfront underwriting cost and ex-post liability costs; to the extent these costs increase and competitive conditions allow lenders to pass this cost onto borrowers, some borrowers will pay more for their loans. At the margin, certain loans that were made in the past, namely those where the borrower has limited ability to repay, will not be made.

a. Costs of the Documentation and Underwriting Requirements

Two distinct requirements of the final rule—the requirement to verify income or assets, debt, and credit history, and the requirement to underwrite a mortgage based on an assessment of debt load using the fully indexed rate and fully amortizing payment—create costs for certain creditors and consumers. The final rule follows the statute in requiring that all creditors verify borrowers' income, debt and credit history. Reduced documentation loans were originally offered to high credit quality borrowers with substantial incomes. However, in the 2000's, the prevalence of these loans increased substantially and the borrowers to whom they were offered changed. Anecdotally, some of these loans could have been made with full documentation; however, for that subset of loans, it was precisely the reduced processing times and paperwork costs of originating these loans that made them popular among mortgage brokers and originators during the boom.

From this perspective, for certain consumers and creditors, requiring full documentation and verification may result in the loan being made with a less efficient contractual form, or possibly in the loan not being made. In these latter cases, consumers would lose the benefits they get from the mortgage (the benefits of owning a home, for example, or the benefits of obtaining better terms on a loan through a refinancing) and creditors would lose any profits on the loan. However, for most other originators, and consumers, reduced documentation loans were a way to grant credit to unqualified borrowers who did not have the means to afford the mortgage. As discussed in the benefits section, the elimination of these loans in these circumstances is a principal benefit of the rule.[204]

For borrowers for whom the most efficient outcome (from a societal perspective) is, in fact, a reduced documentation mortgage, the requirements in the final rule have two possible costs. The time and material to verify the required underwriting elements with documents are true resource costs; depending on competitive conditions, the lender or the borrower may bear the actual costs. Precise estimates of these costs from time and motion studies or cost function analyses are not available, but the required pay stubs or tax records should not be a large burden. The final rule allows income to be verified utilizing copies of tax returns which the consumer can provide the creditor and permits debts to be verified utilizing a credit report. For those with more idiosyncratic income sources that would somehow not be reflected on a tax return, the costs may be slightly higher. However, it is also possible that certain loans that would be made absent the documentation requirements would not be made under the rule. This could happen, for example, in cases where the

[204] In these cases, the requirements of the final rule are the benefits that were described earlier.

cost of documenting the required factors is sufficiently high or where the borrower pays an exorbitant ''privacy'' cost in disclosing the documents. The final rule only requires that income or assets be verified to the extent they are relied upon by the creditor in assessing the consumer's ability to repay; thus the consumer is not required to disclose or document income or assets except if the consumer prefers to have her ability to repay assessed without regard to the undisclosed information. In the event that there are cases in which, despite these rules, a consumer who could qualify for a mortgage is unwilling to incur the privacy cost in documenting income or assets, the transaction will not occur: and the benefit to consumers and lenders from these 'lost' transactions is the relevant cost.

Relative to industry practice today, these requirements are likely to impose only a very limited burden for creditors. With the exception of the two situations discussed below, most loans today are made under very stringent, and perhaps inefficiently high, documentation requirements.[205] The Bureau understands that full documentation is required for all purchase loans and many refinance loans being supported by government programs such as FHA. In addition, both Fannie Mae and Freddie Mac currently require full documentation. The Bureau believe that only a small subset of loans that creditors intend to hold on portfolio are underwritten today without the documentation that meets or is very close to the documentation required by the final rule. For this limited set of loans, the rule imposes the costs already described: The direct compliance costs to collect the required documentation in order to verify the information provided by the consumer and any costs from forgone transactions.

One exception to the stringent documentation requirements now prevailing in the market (and exceeding the requirements of the rule) are certain streamlined refinance programs aimed at aiding the housing market recovery and certain targeted housing support programs offered to low and moderate income borrowers. The Bureau recognizes that the requirements of the final rule could greatly increase costs for these programs and hinder their success. It also recognizes that the possibility of consumer harm is likely limited in these contexts. As a result, elsewhere in today's **Federal Register** the Bureau is proposing certain exemptions from these requirements and seeking comment on the scope of such exemptions.

There may also be some situations where lenders may have systems to document and verify the required information, but who do so in a manner that varies slightly from the provisions of the rule. These lenders may have to bear some costs to modify their systems or practices, but as noted above the Bureau understands there to be few such cases. Lenders who do collect information as required by the final rule, but who may use it differently may also incur some costs. For example, certain lenders may have systems or procedures in which the calculation of the DTI ratio does not conform to the requirements in appendix Q. Such a creditor could continue its current practices, which should they satisfy the ability-to-repay requirements, albeit without the benefit of a presumption of compliance. Lenders that prefer to make qualified mortgages with a presumption of compliance would have to bear the costs to modify systems or make other changes in order to calculate the required figures according to the rule. Modifications to information technology systems may also be necessary to enable lenders to label and track qualified mortgages.

More broadly, the Bureau also recognizes that the establishment of the ability-to-pay requirements and the related distinction for qualified mortgages under the Act, will require modifications to existing compliance systems and to creditors' other management policies and procedures. For example, review and monitoring procedures may have to be altered to ensure compliance with the new requirements. Again, given the current state of the mortgage market, it is likely that many of these procedures are largely already in place.

If measured relative to the benchmark of the earlier periods, either the period from 1997 to 2003 or the later years of the bubble, the requirements of the final rule could be seen to impose more substantial costs. Over the former period, there were more limited documentation loans than today, however it appears that many of these arose in the situations described where such lending is efficient. By the latter period, there were even more such loans and the balance appears to have shifted to one where many if not most of the limited documentation loans had misstated income and other deficiencies.

During those periods there were likely some lenders, as evidenced by the existence of no-income, no-asset (NINA) loans, that used underwriting systems that did not look at or verify income, debts, or assets, but rather relied primarily on credit score and LTV. Under the final rule, these lenders would be impacted in two ways: They would have to collect and verify income, assets and debts; and more importantly, they would have to change much of their underlying business model to consider the required factors. As noted, the Bureau does not believe such lending is currently being practiced, and the benefits of preventing such lending may be substantial (as discussed above).

The requirements that all loans be underwritten assuming a fully amortizing payment and the fully indexed rate (or to obtain qualified mortgage status the maximum rate within 5 years of origination) have costs similar in nature to the documentation requirements. There are some individuals or households with projected increases in income that will match the projected increased housing costs; the final rule allows the creditor to factor expected future income into the denominator of the debt-to-income calculation but does require that the numerator be calculated on the fully-indexed payment. There also may be individuals with constant income but a housing need that is shorter than the introductory period. In at least these latter cases, there may be some loans where it is efficient to qualify the borrower only on the current payment or some other amount. It is difficult to quantify the set of borrowers affected in this way, however to the extent that those loans are not made, both the lender and borrower will incur the costs of lost profits and lost consumer benefits, respectively.

The provisions of the rule requiring extended retention times for documentation sufficient to show compliance with the rule (from two years to three years) will also impose some very limited costs on creditors. Electronic storage, communication and backup are very inexpensive and are likely to decrease in costs further.

b. Liability Costs

Creditor may trade off the ex-ante underwriting cost just discussed with ex-post liability costs that stem from TILA's liability provisions and their interaction with the rule's qualified mortgage and presumption of compliance provisions.[206] Qualified

[205] To the extent that these requirements are inefficiently high, the cost is due to current practice and not to the final rule discussed here.

[206] The Bureau's regulations are accompanied by some form of liability for non-compliance, and the Bureau generally does not address litigation costs and liability as part of its analysis under Section

mortgages with interest rates below the threshold for higher-priced covered transactions enjoy a conclusive presumption of compliance (although disputes may arise as to whether a particular loan meets the qualified mortgage test); qualified mortgages above the specified interest rate threshold enjoy a rebuttable presumption of compliance with the ability-to-repay requirements; and, loans that are not qualified mortgages are subject to general ability-to-repay provisions, under which the borrower will bear the burden of proof for establishing a violation. Within each segment, lenders and borrowers (or their attorneys in contingency arrangements) must pay for the costs of litigation, whether such litigation arises in the context of a private right of action brought by the borrower, or a defense raised by the borrower to a foreclosure. Originators and assignees also face various contingencies that may arise if such a claim is raised or succeeds.

Within each segment, the additional costs increase proportionally with borrowers' probability of delinquency or default. For example, the additional cost for qualified mortgages with a rebuttable presumption of compliance is smallest for lower debt-to-income (DTI) ratio loans (since these borrowers are less likely to be in a position to need or want to bring claims) and increases as the DTI ratio (keeping other factors constant) rises. The same is true as the interest rate of a loan increases, assuming that interest rate is accurately calibrated to risk.

In estimating empirically the long-run additional liability costs from alleged or actual violations of the final rule, the Bureau examines the mortgage market as it existed from 1997 to 2003. The Bureau applies that market data and the pre-statute baseline to compare the liability for creditors under the final rule to the liability they would have incurred under the legal regime that existed under federal law just before passage of the Act.

i. Size of the Market Segments

The data used in estimating liability costs comes from several sources. Data regarding the loans guaranteed or purchased by Fannie Mae and Freddie Mac are from the Historical Loan Performance (HLP) dataset maintained by FHFA. The FHFA shared a one percent random sample of these loans with the Bureau, along with information about their characteristics and performance. In the notice to reopen the comment period for this rulemaking, the Bureau detailed these data and requested comment. Commenters were generally supportive of using these data, but suggested looking at other sources as well including proprietary industry datasets available for sale. These data cover a large but select portion of GSE loans. In contrast, the HLP data cover the entire universe of GSE loans and even the one percent sample is more representative. As such, the Bureau believes the HLP data are the better data for the GSE segment of the market and has consulted with the suggested sources in other parts of the analysis. Over the 1997–2003 period loans guaranteed or purchased by the GSEs comprised roughly 47 percent of the mortgage market.

Similarly, information on loans insured by the FHA was provided by the FHA in response to the June 5, 2012 notice. The data cover the years from 1997 to 2011 and exclude Home Equity Conversion Mortgages (HECM) as well as mortgages with seller-funded downpayment.[207] Combined with loan insured by the Veterans Administration or the Rural Housing Service, these loans comprised an estimated 9 percent of the market during this period. The Bureau did not get loan-level data from the VA or RHS.[208]

Data on mortgages in non-agency securitizations were taken from proprietary industry sources that the Bureau has licensed. While less complete than the HLP files, these data also include data on the characteristics and performance of individual loans. Over the 1997 to 2003 period, this segment comprised roughly 13 percent of originations. The remaining loans are those held on the balance sheets of banks, thrifts and credit unions. While aggregate data regarding the performance of these portfolios is available, comprehensive loan level data similar to the enterprise, FHA and private-label loans is not.[209] As a result, the actual characteristics of individual loans are not available.

Without the temporary provisions granting qualified mortgage status to certain loans that are eligible to be purchased by the GSEs or insured by FHA, VA and RHS, of the mortgages originated during the 1997 to 2003 period, the Bureau estimates that roughly 70 percent of would have been qualified mortgages. Most of these loans would qualify for the safe harbor, and perhaps one to four percent points of these loans would have been qualified mortgages subject to the rebuttable presumption. Another 22 percent of loans would have been non-qualified mortgages subject to the ability-to-repay requirements. The remaining 8 percent of loans made over that period were appear to have been made without sufficient documentation to be permitted under TILA section 129C documentation or were subprime hybrid adjustable rate mortgages underwritten to teaser rates in a way that is no longer allowed under the final rule. An important caveat is that these estimates are not adjusted to account for: (1) Loans with total points and fees above the thresholds and therefore not eligible to be qualified mortgages; (2) the exception of rural balloon loans to qualified mortgages; or the exception for streamlined refinancings of non-traditional loans.[210]

Based on data from 2011, the Bureau estimates that without the temporary provisions granting qualified mortgage status to certain loans purchasable by the GSEs or insurable by FHA, VA and RHS, 76 percent of mortgages would have been qualified mortgages inside

1022 because the considerations are self-evident and the analysis is simplified by assuming full compliance. In general, to the extent regulated entities under-comply with a consumer protection regulation, they will experience less compliance costs, consumers will experience less benefits, and the entities will be at a higher risk of litigation costs and liability, including from private suits to the extent the relevant statute, such as TILA, provides for private liability. In addition, even if there is full compliance, there will always be some residual risk of non-meritorious litigation. The Bureau, however, has chosen to discuss litigation costs and liability in this analysis because these considerations are particularly important in the context of this final rule. The meaning and effect of the presumption of compliance that attaches to qualified mortgages is a key issue in this rulemaking and has been a major focus for commenters and interested parties. As such, the Bureau is addressing these considerations in this analysis. In other rulemakings, the Bureau notes that consideration of litigation costs is not always necessary and remains at its discretion.

[207] As described in the comment letter, ''the data conform generally to the type and kind of FHA data featured in a recent Discussion Paper published by the Philadelphia Federal Reserve in December 2011, *FHA Lending: Recent Trends and Their Implication for the Future.''* The letter contains charts and data from that paper.

[208] In sizing the mortgage market and various components, the Bureau relied on aggregate market data from the Mortgage Market Annual, published by Inside Mortgage Finance and on data provided by the Market Data section of the FHA Web site which can be found at *http://www.fhfa.gov/Default.aspx?Page=70*.

[209] The proprietary industry data available for sale only contains loan level information for portfolio loans that are serviced by the largest servicers in the country.

[210] Estimates for the GSE loans and the FHA loans are derived from the datasets provided to the CFPB and described above. For loans in private label securities, estimates are made based upon reported average characteristics of loans in subprime and Alt-A securitizations. The aggregate value of loans originated and held on balance sheet are estimated using data from Inside Mortgage Finance and the distribution of DTI is assumed to mirror the distribution at the GSEs. Statistical projections described below support such an assumption.

the safe harbor, 2 percent of mortgages would have been qualified mortgages with a rebuttable presumption, and 22 percent of mortgages would have been subject to the ability-to-repay requirements. These estimates are subject to the same limitation stated above.[211]

ii. Liability Costs for Qualified Mortgages

For qualified mortgages claimed to be within the safe harbor, borrowers will have no claim against the lender for ability-to-repay violations unless the loan does not in fact meet the requirements for safe harbor treatment. Based on the experience of loans originated during the 1997–2003 period, the Bureau estimates that roughly four percent of qualified mortgages loans will ever be 60 days delinquent and less than one percent are expected to result in foreclosure.[212] The performance of the qualified mortgages that have a conclusive presumption of compliance is expected to be slightly better than these averages.

The Bureau believes that only a very small fraction of these delinquent or foreclosed-upon borrowers would seek to raise an ability-to-repay claim. The conclusive presumption precludes liability for loans which meet the eligbility criteria for a safe haror, i.e. loans whose product features make them eligible; for which the lender verified income, assets, and debts and properly calculated the DTI ratio to be 43 percent or less; and which are not higher priced. And even if a loan is erroneously categorized as a qualified mortgage with a safe harbor, a borrower still cannot recover unless the lender has violated the general ability-to-repay requirements, including the requirement that the lender make a ''reasonable and good faith'' determination that the consumer had the ability to repay. Generally, only a small percentage of borrowers contest foreclosure and even smaller percentage do so with the benefit of legal representation. This fact, and the limited chance of success for borrowers to raise successful claims, makes it very unlikely that many claims will arise from borrowers with these qualified mortgages.

For qualified mortgage loans above the higher-priced threshold, costs (as well as benefits) of the final rule derive from the differences, including differences with respect to the originator and assignee liability, between the existing liability rules and the final rule. Under existing rules, creditors that make a higher-priced mortgage loan (HPML) are not allowed to extend credit without regard to ''the consumer's repayment ability as of consummation, including the consumer's current and reasonably expected income, employment, assets other than the collateral, current obligations, and mortgage-related obligations.'' Further, a creditor is presumed to have complied if the creditor properly verifies and documents income and assets, made the determination using the largest payment of principal and interest scheduled in the first seven years following consummation, and took into account the ratio of total debt obligations to income, or the income the consumer had after paying debt obligations.

As noted, 1 to 4 percent of loans, based on data from the 1997- 2003 period, are estimated to be qualified mortgages with a rebuttable presumption. As just described, the delinquency rates and default rates are expected to be just around 4 percent and 1 percent respectively.

Nearly all of the mortgages that will be qualified mortgages above the higher-priced threshold are currently covered by the existing HPML presumption of compliance,[213] because the requirements in the final rule that qualified mortgage loans be fully documented, have verified income and be underwritten to the maximum payment in the first five years of the loan (with the exception for rural balloon loans) will in most cases also satisfy the requirements for obtaining the presumption under the 2008 HOEPA Final Rule. The final rule's requirements for obtaining the status of a qualified mortgage (and thus the rebuttable presumption) are slightly more prescriptive than the existing rules for gaining that presumption and this difference in the criteria for qualification may leave borrowers with slightly less opportunity to rebut the presumption of compliance.[214]

For the subset of these borrowers that are in default more than three years into the mortgage, that seek to and are able to successfully rebut the lender's presumption of compliance (when seeking an offset during foreclosure), and that are therefore entitled to compensation, the returns from this action are in fact reduced relative to the existing rules which do not limit the recovery period in a claim for offset in a foreclosure proceeding brought by the creditor. As such, the probability that lenders will have to defend such an action is reduced relative to current rules although the subset described above is likely to be so small that the impact will be immaterial. As discussed below, relative to the existing rules lenders may face increased putback risk from investors although that, too, is small.

For the set of borrowers that are in default within the first three years, potential damages are not reduced; however, the increased requirements at origination to qualify for qualified mortgage status, and the correspondingly more limited grounds on which to rebut the presumption reduce the probability of a successful challenge. So here too, the probability that lenders will have to defend such an action may be reduced or at least held constant relative to current rules. Overall, therefore the ex-post liabilities

[211] The estimates in this analysis are based upon data and statistical analyses performed by the Bureau. To estimate counts and properties of mortgages for entities that do not report under HMDA, the Bureau has matched HMDA data to Call Report data and MCR data and has statistically projected estimated loan counts for those depository institutions that do not report these data either under HMDA or on the NCUA call report. The Bureau has projected originations of higher-priced mortgage loans for depositories that do not report HMDA in a similar fashion. These projections use Poisson regressions that estimate loan volumes as a function of an institution's total assets, employment, mortgage holdings and geographic presence. Neither HMDA nor the Call Report data have loan level estimates of the DTI. To estimate these figures, the Bureau has matched the HMDA data to data on the HLP dataset provided by the FHFA. This allows estimation of coefficients in a probit model to predict DTI using loan amount, income and other variables. This model is then used to estimate DTI for loans in HMDA.

[212] In the HLP data, under four percent of loans originated from 1997 to 2003 that satisfy most of the requirements of the first definition of a qualified mortgage (*i.e.*,not no-doc or low-doc, not IO, not neg-am and with DTI ratio equal to or below 43%) were ever 60 days delinquent. Among all FHA insured loans over the same years, just under 6 percent of loans with a DTI ratio equal to or below 43 percent were ever 60 days delinquent. Some of these loans would have a conclusive presumption of compliance with the ability-to-pay requirements and others would have the rebuttable presumption. The four percent and one percent figures are likely to slightly overestimate the rates for loans in the safe harbor and may be underestimates for loans with the rebuttable presumption.

[213] There may be some loans that are currently made with a rebuttable presumption that will no longer have that presumption but instead will be covered the general ability to repay standards. For example, higher priced covered transactions with more than three points and fees will not qualify for the presumption under the final rule.

[214] Under the Board's rule, the presumption of compliance attaches if the creditor ''tak[es] into account'' either the ''ratio of total debt obligations to income or the income the consumer will have after paying debt obligations.'' The consumer may rebut the presumption ''with evidence that the creditor nonetheless disregarded repayment'' such as by offering ''evidence of a very high debt-to-income ratio and very limited residual income.'' Under the final rule, however, a creditor cannot claim the benefit of the presumption of compliance if the debt to income is very high, since the final rule contains specific debt-to-income criteria for qualified mortgages. Thus, under the final rule, to rebut the presumption the consumer must prove insufficient residual income.

for lenders are likely reduced for these loans.

Relative to current rules for HPMLs, the current rule extends liability to assignees.[215] The establishment of assignee liability does not increase the amount that a borrower can obtain from a successful legal action; however, it does increase the number of parties from whom the borrower can seek redress. Borrowers in a foreclosure action in a judicial state can now assert their claim against the assignee bringing the foreclosure action, rather than having to initiate an affirmative lawsuit against the originator that no longer holds the loan. The effect is to reduce the costs of bringing these defensive actions and therefore increasing their likely number. For loans that are not sold, or for borrowers wishing to bring affirmative actions, the establishment of assignee liability has little or no effect.

The extension of liability to assignees may also increase the cost of contracting between the two parties. Under the final rule, the borrower now has a contingent claim against two parties. As a result, the two parties will want to contract ex-ante about the extent of each party's liability under the various contingencies. This increase in contracting costs should be small for two reasons. First, even in the absence of assignee liability, the market has already included these contingencies in standard contracts. For example, following the Board's 2008 rule, the Fannie Mae seller servicer guide was amended to include provisions that HPMLs are ''eligible for delivery to Fannie Mae provided [that] * * * lenders represent and warrant when they sell an HPML to Fannie Mae that the mortgage complies in all respects with Regulation Z requirements for HPMLs, including the underwriting and consumer protection requirements.[216]'' The Freddie Mac seller servicer guide has similar provisions.[217] With contracts like these already in place, it appears that amending contracts for the particulars of the final rule should be small. Second, underwriting guidelines, pooling and servicing agreements and other contracts in the mortgage market are currently being reworked and refined.[218] Among the myriad of changes, addenda to manage the ability-to-repay liabilities of the current rule should be only a small cost.

iii. Non-Qualified Mortgages and Estimation of Costs

The remaining loans are not qualified mortgages. These include for example, mortgage loans with a back-end DTI ratio over 43 percent, loans with points and fees above three percent of the loan balance, mortgages with a term over 30 years, or balloon loans that do not qualify for qualified mortgage balloon definition.[219] For loans in this segment priced below the higher-priced threshold, the obligation to assess the consumer's ability to repay and the liability where the lender fails to do so is a new liability for both the originator and any assignees. For loans in this segment above the higher-priced threshold, lenders cannot invoke a rebuttable presumption of compliance and for those loans that are not high-cost loans, assignees are subject to expanded liability as compared to current rules.[220]

The Bureau has estimated litigation costs under the new ability to pay standards for non-qualified mortgages. Estimating costs for non-qualified mortgages should reasonably serve an upper bound for the costs for qualified mortgages. Costs for putbacks, or loans the buyers of which force the sellers to take back on their books because they do not satisfy the final rule are also estimated.

Estimating the increased liability costs involves a series of assumptions about the performance of these loans, the probability that borrowers will bring particular actions, and the subsequent behavior of lenders and courts. Some assumptions about costs are also necessary.

Under the ability-to-repay provisions, consumers can bring an action against the lender at any point during the first three years of the loan or as an offset to foreclosure at any time. In the latter cases, the recovery of interest and finance charges is capped at the amount paid during the first three years.

The Bureau has estimated these costs as follows. To begin, assume an average loan balance of $210,000 (just below the mean balance for first lien loans reported in HMDA in 2011), an average interest rate of 7 percent (the average mortgage rate for 30 yr. mortgages from 1997 to 2003) [221], and an average of $3,150 (1.5 points) paid up front in fees. Further, assume that, on average, affirmative cases and contested early foreclosures happen at the midpoint of the period, 18 months after consummation. This implies that for the affirmative cases, and the early foreclosures borrowers contest, successful borrowers are reimbursed for fees and interest an average of roughly $29,200.[222] (The Bureau assumes in this calculation that all prevailing borrowers receive $4,000 in statutory TILA damages.) For the later foreclosures, defined here as foreclosure that occur three or more years after loan consummation, borrowers who contest foreclosure are reimbursed for 36 months of interest or roughly $51,250.

Based on data from the FHFA for 1997–2003 for loans with DTI ratios above 43 percent, it is reasonable to assume, 3.5 percent of loans reach 60 day delinquency during the first three years of the loan but do not start a foreclosure process, an additional 1.5 percent of loans start the foreclosure process within the first three years, and an additional 1.5 percent of loans start the foreclosure process after three

[215] As amended by section 1413 of the Dodd-Frank Act, TILA provides that when a creditor, an assignee, other holder or their agent initiates a foreclosure action, a consumer may assert a violation of TILA section 129C(a) ''as a matter of defense by recoupment or setoff.'' TILA section 130(k). There is no time limit on the use of this defense and the amount of recoupment or setoff is limited, with respect to the special statutory damages, to no more than three years of finance charges and fees. In contrast, for high cost loans as under existing law, an assignee generally continues to be subject to all claims and defenses, not only in foreclosure, with respect to that mortgage that the consumer could assert against the creditor of the mortgage, unless the assignee demonstrates, by a preponderance of evidence, that a reasonable person exercising ordinary due diligence, could not determine that the mortgage was a high cost mortgage. TILA 131(d).

[216] *See* Fannie Mae, ''Delivery of Higher-Priced Mortgage Loans, Revised Qualifying Rate Requirements, Assessment of Late Charges, Clarifications to Points and Fees Limitation, and Updates to Reporting under the Home Mortgage Disclosure Act,'' Announcement 09–24 (July 10, 2009), available at *https://www.fanniemae.com/content/announcement/0924.pdf.*

[217] *See* Freddie Mac, ''Higher-Priced Mortgages Loans and Rate Spread Data,'' Bulletin 2009–17 (July 8, 2009), *available at http://www.freddiemac.com/sell/guide/bulletins/pdf/bll0917.pdf.*

[218] *See* Federal Housing Finance Agency, ''Strategic Plan for Enterprise Conservatorships,'' (Feb. 21, 2012), *available at http://www.fhfa.gov/webfiles/23344/StrategicPlanConservatorshipsFINAL.pdf. Also see* Federal Housing Finance Agency, ''Building a New Infrastucture for the Secondary Mortgage Market,'' *available at http://www.fhfa.gov/webfiles/24572/FHFASecuritizationWhitePaper100412FINAL.pdf.*

[219] The Bureau believes that the requirements for higher-priced balloon loans made by lenders who do not meet the rural or underserved test effectively ban these products.

[220] Note that several state laws have ability-to-repay requirements applicable to conforming loans and/or higher priced loans, and there are variations in their applicability, requirements, and liability provisions. The benefits and costs of the final rule will be attenuated to the extent that certain states already provide similar requirements.

[221] H.15 monthly series from Federal Reserve Board of Governors downloaded from St, Louis Fred at *http://research.stlouisfed.org/fred2/series/MORTG/downloaddata?cid=114.*

[222] Because some of the costs are independent of loan size, one has to make assumptions about the underlying loan value; otherwise, all calculations could simply be done as percentages of loan balances. The figures used here are consistent with those used by commenters that provided similar calculations.

years.[223] The Bureau believes that consumers who have fallen behind on their mortgage payments are unlikely to initiate an ability to repay claim in court prior to foreclosure. Rather, they will likely seek to work with their servicer and the owner of the loan to cure the delinquency through, e.g., forbearance or some form of loan modification, or where that is not possible, to reach an agreement to enable the consumer to walk away from the property and the loan (*i.e.,* deed in lieu or short sale). Once a foreclosure proceeding is commenced, however, it will then be in the interest of consumers to assert ability-to-repay claims where there is a plausible basis to do so; this is especially true in judicial foreclosure states because an ability-to-repay claim can be asserted as a defense by way of offset against whoever holds the loan at the time of the foreclosure (*i.e.,* the originator or assignee).

The ability of consumers to assert such claims either defensively or, in non-judicial foreclosure states, in affirmative actions will depend to some extent upon their ability to obtain legal representation. In its notice reopening the comment period for the rule, the Bureau specifically requested information and data regarding the frequency of such actions. In general, industry commenters asserted, that even under the rebuttable presumption standard, future legal actions under the rule would be very common. In contrast, consumer and community groups pointed to the available evidence and experience to suggest that only a very small minority of consumers in foreclosure are represented and that very few claims are brought. Consumer group commenters pointed out the practical limitations of consumers to bring an ability-to-repay claim, noting that few distressed homeowners would be able to afford and obtain legal representation often necessary to mount a successful rebuttal in litigation. Consumer groups also provided percentages of borrowers in foreclosure who are represented by lawyers, noting the difficulty of bringing a TILA violation claim, and addressed estimates of litigation costs, such as attorney's fees. The data provided however are quite limited: two commenters (both representing industry) suggest that during the recent years there were roughly 900 mortgage-related TILA cases filed each year in Federal court while data regarding the number of TILA claims brought in state courts were not provided.[224]

More specifically the Bureau has considered the available evidence with respect to the extent of litigation under laws potentially analogous to this one, such as the 2008 HOEPA Final Rule (which does not provide assignee liability, except as applicable to high cost mortgages) and under HOEPA and state anti-predatory lending laws (which generally do provide for assignee liability). So far as the Bureau is aware, claims under these rules have been very infrequent. Industry participants likely have access to the most complete information about litigation activity, much of which activity is not reported in legal databases such as Lexis and Westlaw. Industry commenters, however, did not bring forth any evidence to suggest that claims have been anything but rare. Thus, relative to the one to two million annual foreclosure starts from 2009 through 2011,[225] the record supports a conclusion that litigation under TILA generally and under the most directly analogous federal and state laws has been very limited.

Industry commenters maintained that past experience is not a guide because new liability under the Dodd-Frank Act will increase incentives for litigation. The Bureau recognizes that the availability of new ability-to-repay remedies may make it easier for consumers to obtain representation (by providing those consumers whose loans are not currently covered by the Board rule with new rights; and those consumers whose loans are covered, with more easily asserted, and to that extent more valuable claims). Thus, the analysis below of litigation costs relies on very conservative (likely unrealistic) assumptions about the extent to which the Dodd-Frank liability provisions will increase litigation levels above levels under current laws.

Among the three percent of borrowers that are in foreclosure, the Bureau assumes that 20 percent will bring an action against the lender for failing to meet the ability-to-repay requirements; that implies that 0.6 percent of borrowers will bring claims. As noted, this value is many times higher than recent experience with the 2008 HOEPA Final Rule or analogous state laws would suggest and is a very conservative upper bound. One half of these borrowers, should they prevail, are assumed to be entitled to 18 months of interest and the other half to 36 months of interest. Based on our assumed loan size ($210,000), interest rate (7%), and origination fees ($3,150) as discussed above, on average a successful borrower will have a claim of $40,225 (including the statutory TILA damages, before legal costs).

To estimate legal costs, assume that in each case, the lender will move for summary judgment based upon what they are likely to claim to be undisputed evidence documenting their consideration of borrowers' ability to pay. The consumer would likely claim that he or she was unable to pay the mortgage from its inception, and would have to present evidence from which it could be inferred that the creditor did not make a ''reasonable and good faith determination'' of the consumer's ability to repay. To estimate legal costs, assume that in each case, following any discovery permitted, the lender will move for summary judgment, which is a written request for a judgment in the moving party's favor (along with a written legal brief in support of the motion with supporting documents and affidavits) before a lawsuit goes to trial, claiming that all factual and legal issues can be decided in the moving party's favor, as a means to avoid trial altogether. The opposing party (*i.e.,* the consumer) would need to show that there are triable issues of fact. The analysis assumes that, in these motions, the lender will succeed four-fifths of the time. In the remaining one fifth of cases, the lender settles prior to summary judgment and pays the full value of the claim. This assumption is also conservative. In evidence provided by industry commenters which the commenters suggested were analogous, lenders prevailed in nearly all of the cases cited.

To litigate these cases, the borrower is assumed to spend 60 hours of attorney time up to and including responding to the motion for summary judgment while the lender, given its resources, is assumed to spend 170 hours up to and including filing the relevant motions.[226] In 2011, the average wage for lawyers in the legal services industry was $68.75/hr; adjusting that figure to reflect benefits and other forms of

[223] These values are derived from GSE loans with at DTI ratio above 43% originated during the 1997–2003 period. For these loans, roughly 7 percent ever reached 60 days late, one-half of those in the first three years. Roughly 3 percent ever reached 180 days delinquent which is a rough proxy for foreclosure. One could also assume that some additional borrowers simply stop paying their loans strategically in order to extract funds from the originator or assignee, however that possibility seems unreasonable.

[224] *See* Mortgage Bankers Association comment letter, docket CFPB–2012–0029, submitted Sep. 7, 2012. *See also* National Consumer Law Center comment letter, docket CFPB–2012–0029, submitted Sep. 7, 2012.

[225] MBA National Delinquency Survey.

[226] Comment letters submitted to the Board suggest roughly this number of hours when assessing the cost of a rebuttable presumption. *See* MBA Comment Letter dated July 22, 2011.

compensation, and a 50 percent mark-up for firm yields an hourly rate for legal services of $150/hr. With these assumptions, borrowers are willing to bring cases, and lenders will defend them, since on average both sides are ahead relative to simply dropping the claim or paying it in full.[227] To reflect the expected value of these costs, the costs of non-qualified mortgages would increase by 10 basis points (0.1 percent of the loan amount, or roughly $212 for the $210,000 loan).[228] Assuming loans with a weighted average life of four years, this could add roughly 2.5 basis points (0.025 percentage points) to the rate of each loan. Were the whole cost passed on to the consumer, increasing the rate from 7.0 percent to 7.025 percent, the monthly payment would rise by roughly $3.50. The resource cost to litigate this case is also roughly 10 basis points since it includes the lenders' and the borrowers' legal expenses of $25,500 and $9,000, respectively, and excludes the transfer of $40,225 that occurs in successful cases.

iv. Sensitivity Analysis

As part of a sensitivity analysis, the Bureau has estimated these costs under different assumptions. Notably, industry commenters provided estimates of the costs for various types of cases related to mortgage actions. These comments suggest a much higher cost for legal expenses of $300 per hour and closer to 300 hours to litigate cases that involve motions for summary judgment. Using these figures (and the assumption that borrowers' legal expenses include a proportionally higher 150 hours at $300/hr), the increased cost of each loan is approximately 31 basis points or an increase in the interest rate of just under 8 basis points (0.08 percentage points). Importantly, in this scenario, using the assumptions set forth previously about loan size and other factors, lenders would spend $107,000 to defend claims worth substantially less than the legal costs ($40,225).[229] It is possible, however, that lenders would be willing to litigate such cases in order to discourage future litigation but, if so, one would expect a corresponding diminution of litigation over time.

As a second sensitivity test, going back to the original legal cost estimates, one can assume that of the 3.5 percent of borrowers who find themselves behind on their payments during the first three years, 84 percent (or 3 percent of total borrowers) chose to bring affirmative claims. This would quintuple the original estimates on a per loan basis to fifty basis points spread over a four-year average life. Similarly, one could assume that a larger percentage of borrowers in default bring claims. Raising that assumption from 20 percent to 40 percent results in estimated costs of 20 basis points per loan.

Originators and assignees share the liability for ability-to-repay violations. Depending on the contract in place, lenders will bear some repurchase risk for those loans that are sold into the secondary market. For example, sellers of loans to the GSEs already bear this risk for HPMLs since the enterprises have the right to put the loan back in case of ability-to-repay violations. In cases where the lender is defunct or there are other issues affecting the lender's capacity to reassume the risk, the purchaser of the loan may be unable to exercise that right and will bear the additional liability costs. The need of both the seller and the buyer to budget for expected capital and liquidity charges in these situations, and to negotiate the specific transactions, will also add some costs. However, in recent work, some economists have estimated that even for loans from the 2005 to 2008 vintage repurchase risk added conservatively about 19 basis points (or 0.19 percent of the loan amount) to the cost of a loan. Given the much lower default rates in the coming years (based on the default rates during the 1997–2003 period), and the increased underwriting requirements mandated by the final rule even for non-qualified mortgages, these costs are likely to be closer to 1–3 basis points at most.[230]

v. Summary of Litigation Costs

Combining liability costs and repurchase costs, estimated costs for non-qualified mortgage loans (loans made under the ability-to-repay standard without any presumption of compliance) are estimated to increase by approximately twelve basis points (or 3 basis points (0.03 percentage points) on the rate); under very conservative estimates, this figure could be as high as forty basis points (or ten basis points (0.01 percentage points) on the rate). Depending on the competitive conditions in the relevant product and geographic markets, some of this increase will be passed on to borrowers and the rest will be absorbed by lenders. Certain borrowers may be priced out of the market as a result of the price increase. However, the number of such borrowers is likely to be very small given the values above since an increase of even ten basis points on the rate on an average mortgage would increase the monthly payment by less than $10.

vi. Temporary Provisions for Qualified Mortgages

As described in the preamble, the final rule recognizes the fragility of the current mortgage market and therefore includes temporary measures extending qualified mortgage status to loans that in the long run may not be qualified mortgages. These include loans with a DTI above 43 percent and that nonetheless can be purchased or guaranteed by the GSEs, insured by the FHA, VA or RHS. Based on the data as of year-end 2011, such loans are approximately 18 percent of the market. Without fuller data on the points and fees and product features associated with most loans, it is hard to estimate precisely the size of this segment or predict how large it would be several years from now with, or without, the statute taking effect. Ignoring those features, based on information about the rates and fees on these loans we believe roughly 97 percent of these loans should qualify for the legal safe harbor with the conclusive presumption of compliance (*i.e.,* they are not higher-priced covered transactions) and 3 percent are estimated to qualify for the rebuttable presumption (*i.e.,* they are higher-priced covered transactions). The temporary expansion of the definition of a qualified mortgage results in over 95 percent of the market being granted qualified mortgage status.

Extending qualified mortgage status to these loans reduces costs to lenders as described above and limits some of the consumer protections that an increased possibility of liability would create if a creditor were able to satisfy the GSE or federal agency underwriting standards without having a reasonable and good faith believe in the consumer's ability to repay. However, the added certainty

[227] For illustration purposes, the Bureau assumes that 20 percent of the potential litigants have private costs of litigation of less than $1,000. Under the assumptions above, the creditor prefers to incur the legal costs to file for summary judgment as opposed to settling outright (the creditor's expected payoff is roughly $5,000 dollars more in this case).

[228] This is calculated as 0.6 percent of borrowers bringing cases multiplied by $35,345 in expected lender costs per case divided by the $210,000 loan amount.

[229] At the same time, higher litigation costs may deter certain consumers from bringing suit.

[230] Securitized loans performed very poorly just following the bubble, with delinquency rates many times that of loans in more typical times. Adjusting the figures to reflect this better performance and the increased origination standards in the final rule, yields the 1–3 basis points. See Andreas Fuster, Laurie Goodman, David Lucca and Laurel Madar, Linsey Molloy, Paul Willen, The Rising Gap Between Primary and Secondary Mortgage Rates, November 2012 available at: *http://www.newyorkfed.org/research/conference/2012/mortgage/primsecsprd_frbny.pdf.*

from this reduced liability should benefit both consumers and covered persons. The mortgage market is still fragile, even four plus years past the most turbulent portions of the financial crisis. With lenders and the markets in general adjusting to new regulations designed to counter the forces behind the crisis, extending qualified mortgage status to these segments of loans should limit any disruption to the supply of mortgage credit with only limited effects on consumers. The extension of qualified mortgage status to these loans should allow the market time to digest the rules and for any increase in premia associated with uncertainty about litigation and putback costs to diminish.

c. Access to Credit

Overall, the Bureau believes that the final rule will not lead to a significant reduction in consumers' access to consumer financial products and services, namely mortgage credit. The Bureau notes the potential for the ability to repay requirements, including increased documentation and amortization requirements, to prevent some consumers from qualifying for a loan. First, the final rule generally bans no-doc and low-doc loans to the extent the level of documentation is lower than that required by the rule. The final rule would by definition prevent borrowers who would only qualify for these types of loans from receiving a mortgage; as discussed, that is one of the benefits of the rule. Second, the final rule generally increases documentation requirements for mortgage loans and requires underwriting to be done based on an assumed fully amortizing loan at the fully indexed rate.

As noted above, when measured against the current marketplace, the Bureau anticipates the effect of these requirements on access to credit to be very small. The Bureau anticipates that, as the economy recovers, the currently restrictive credit environment will loosen. Indeed, if anything, the Bureau anticipates that the immediate effect of the rule may be to contribute to the recovery of the mortgage market by reducing legal uncertainty which may be affecting lending. This is especially true if the impact of the rule were compared to a post-statutory baseline (i.e. to the implementation of the Dodd-Frank ability to pay and qualified mortage provisions without implementing regulations.)

Measured against the years leading up to the financial crisis, when lending standards were quite loose, the effects of the final rule on access to credit would of course have been significantly larger. The final rule will set a floor to the loosening of credit in order to prevent the deterioration of lending standards to dangerous levels. A primary goal of the statute was to prevent a repeat of the deterioration of lending standards that contributed to the financial crisis, which harmed consumers in various ways and significantly curtailed their access to credit. Such a goal will, by definition, entail some potential diminution of access to credit as market standards change over time. The Bureau believes that, to the extent the final rule reduces credit access, it will primarily reduce inefficient lending that ignores or inappropriately discounts a consumer's ability to repay the loan, thereby preventing consumer harm, rather than impeding access to credit for borrowers that do have an ability to repay. The Bureau notes that the rule may have a disproportionate impact on access to credit for consumers with atypical financial characteristics, such as income streams that are inconsistent over time or particularly difficult to document.

There also exists the potential for both increased documentation requirements and increased liability to increase the price of mortgage loans for some consumers. As discussed above, price increases from both increased documentation requirements and increased liability should be small. The documentation requirements, such as providing a pay stub or tax return, will impose relatively little additional cost to most consumers. Similarly, the increased documentation costs for creditors should not be significant, or result in more than relatively small increases in the cost of mortgage loans.

With respect to liability costs, the Bureau notes that over 95 percent of the current market is estimated to satisfy one of the definitions of a qualified mortgage, greatly reducing the expected cost of litigation. The Bureau also notes that the clear standards established for determining whether a loan is a qualified mortgage should reduce uncertainty regarding litigation costs, which will mitigate any resulting impact on access to credit. In light of the foregoing considerations, the Bureau believes that the ability to repay requirements and the accompanying potential litigation costs will create, at most, relatively small price increases for mortgage loans. These small price increases, in turn, are not likely to result in the denial of credit to more than a relatively small number of borrowers, some of whom commenters pointed out could be low income, at the margin.

The Bureau notes that concerns have been raised concerning the application of increased documentation and amortization requirements to such entities as certain nonprofits and state housing finance agencies, as well as certain refinancing programs. As applied to such entities and programs, the final rule may restrict access to mortgage credit, including for consumers who may otherwise have limited credit options, while doing little to further the consumer protection purposes of the statute. To address these concerns, the Bureau has proposed separately to exempt some such entities and programs from these documentation and amortization requirements.

The Bureau also notes that concerns have been raised regarding the application of the qualified mortgage criteria and the general ability to repay requirements to certain small creditors. These concerns arise from the observation that for many community banks and credit unions, for example, compliance resources are scarce and compliance costs as a percentage of revenue can be high. At the same time, these institutions employ a traditional model of relationship lending that did not succumb to the general deterioration in lending standards that contributed to the financial crisis. Moreover, because this business model may be based on particularized knowledge of customers and the development of durable customer relationships, the resulting loans may be beneficial to customers even when they do not conform to the general standards set forth in the final rule. Further, these institutions have particularly strong incentives not only to maintain positive reputations in their communities, but also, because they often keep the loans they make in their own portfolios, to pay appropriate attention to the borrower's ability to repay the loan. Accordingly, the Bureau has proposed separately to provide additional criteria by which certain small portfolio lenders may make qualified mortgages.

Greater access to credit can be associated with higher home prices and higher homeownership rates, and as discussed in the section on costs, there is some evidence of positive social effects from home ownership. As such, were the rule to overly restrict credit, it is important to note that these positive spillovers would also be limited. However, the Bureau does not believe that the rule will result in an inappropriate reduction in access to credit; rather, over time, the final rule should ensure that lending standards do not deteriorate to dangerous levels, while at the same time ensuring that lending not be too restrictive.

4. Potential impacts of other provisions

Below, the Bureau discusses the impacts of several other provisions of the final rule and notes their interaction with other rulemakings. These include the points and fees provisions (which interact with the HOEPA rulemaking), the provisions of the statute regarding prepayment penalties, and the definition of rural or underserved areas (which interacts with the current rulemaking regarding escrow account requirements for certain higher-priced mortgage loans and with the 2013 HOEPA final rule). The interagency rule on appraisal requirements for high-risk mortgage loans also interacts with the QM definition.

a. Points and Fees Provisions

To be a ''qualified mortgage,'' the statute requires (among the other requirements already discussed) that the total points and fees payable in connection with the loan do not exceed 3 percent of the total loan amount and requires the Bureau to prescribe rules adjusting this limit to ''permit lenders that extend smaller loans to meet the requirements of the presumption of compliance.'' As noted earlier, such a restriction may have the effect of limiting cases where creditors, having received more funds up front, are less concerned about the long-term performance of the loan.

In the final rule, that limit is amended to a tiered approach with the following limits: for a loan amount greater than or equal to $100,000, three percent of the total loan amount; for a loan amount greater than or equal to $60,000 but less than $100,000, $3,000; for a loan amount greater than or equal to $20,000 but less than $60,000, five percent of the total loan amount; for a loan amount greater than or equal to $12,500 but less than $20,000, $1,000 of the total loan amount; and, for a loan amount of less than $12,500, eight percent of the total loan amount.

The higher limits for smaller dollar loans should allow more loans to be made as qualified mortgages. Data on the points and fees associated with a representative set of loans is not currently available. As a result, the Bureau cannot estimate precisely how many loans are impacted by this change. Under TILA as amended, a high-cost mortgage has points and fees equal to five percent of the total transaction amount if the transaction is $20,000 or more, and points and fees equal to the lesser of eight percent of the total transaction amount or $1,000, if the transaction is less than $20,000. Setting the maximum points and fees caps based on the HOEPA triggers will help ensure that a qualified mortgage is not a high-cost mortgage because of the points and fees.

The Dodd-Frank Act substantially expanded the scope of compensation included in points and fees for both the qualified mortgage and high-cost mortgage points and fees limits. In addition to compensation paid to mortgage brokerage firms and individual brokers, points and fees also includes compensation paid to other mortgage originators, including employees of a creditor (*i.e.,* loan officers). Under the existing rule, only consumer payments to mortgage brokers are included in points and fees for the high-cost mortgage threshold. Also under the Act, any fees paid to and retained by affiliates of the creditor must be included in points and fees (except for any bona fide third-party charge not retained by the creditor, loan originator, or an affiliate of either, unless otherwise required under the rule). The final rule restates these provisions.

In a concurrent proposal published elsewhere in today's **Federal Register**, the Bureau proposed one alternative which would permit loan originator compensation to be netted against other upfront charges paid by the consumer and one that would not. Still, the inclusion of loan originator compensation in points and fees under the Final Rule (together with the statutory provisions implementing in the Final Rule regarding the treatment of charges due to third parties affiliated with the creditor) could have the effect of limiting the number of loans eligible to be qualified mortgages. For most prime loans, the Bureau believes that this change will not have a major impact: current industry pricing practices and the exemption for bona fide discount points suggest that few of these loans will be constrained by the points and fees limits.

For loans near the border of higher-priced loans (i.e. loans one percentage point above APOR), the exemption for bona-fide discount points is reduced and for loans priced at two percentage points or more above APOR the exemption is eliminated. For these loans, the inclusion of loan originator compensation and affiliate fees could limit qualified mortgage status for certain loans. Loans that will qualify for the safe harbor, but where the borrower pays for these charges through a higher interest rate, may lose the conclusive presumption of compliance and instead have only the rebuttable presumption. This impact is most likely greater for lenders with affiliated companies whose charges must be included in the points and fees calculations.

b. Prepayment Penalties

The Final Rule implements the provisions of Dodd-Frank with respect to prepayment penalties. Specifically, in accordance with the statute, the rule prohibits prepayment penalties for any mortgage other than a fixed-rate mortgage that is a qualified mortgage and not a higher-priced mortgage.[231] Where the Final Rule permits prepayment penalties, it limits these penalties to 2 percent of the outstanding balance on the loan during the first year after consummation and 1 percent of the outstanding balance during the second year after consummation.

Available information from the sources described above suggests that loans originated today do not contain prepayment penalties, and this is likely to be true for the foreseeable future. Neither loans originated for sale to Fannie Mae and Freddie Mac, nor loans insured by FHA generally contain prepayment penalties.[232] Moreover, the Bureau understands that prime loans, which make up the vast majority of originations today, have in recent years rarely had prepayment penalties.[233] Some originators may make subprime loans they hold on portfolio for which they charge prepayment penalties, but data on terms of loans on portfolio are not available and at least in the current market, this is likely to be a very small number of loans. With the low interest rates that prevail today, lenders see little reason to limit prepayment risk by charging prepayment penalties.

Prepayment penalties by design impose costs on consumers to switch from their current loans to loans with lower interest rates. This cost can be particularly high for consumers with potentially increasing payments and who seek to refinance to avoid the increases. Moreover, these penalties are complex and often not transparent to consumers. Consumers may not focus on prepayment penalty terms because they are more focused on the terms they

[231] For purposes of this provision of the rule, a higher priced mortgage is defined in the Act as a first lien, non-jumbo mortgage with an APR that is more than 150 basis points above APOR; a first lien, jumbo mortgage with an APR that is more than 250 basis points above APOR; and a second lien mortgage with an APR that is 350 basis points above APOR.

[232] As explained in the final rule, FHA loans used a method of interest calculaton which results in consumers who pay off loans during the course of a month being obligated to pay interest until the end of the month. The Final Rule treats that as a prepayment penalty and provides an extended compliance period to allow time for FHA to change this feature of its loans.

[233] *See* 73 FR 44522 (July 30, 2008).

find more salient, such as interest rate and payment amount. Leading up to the mortgage crisis, some loan originators sometimes took advantage of consumers' lack of awareness or understanding of prepayment penalties.[234] Originators could sell unsuspecting consumers loans with substantial expected payment increases as well as substantial prepayment penalties that would prevent the consumer from refinancing.

By limiting prepayment penalties to prime, fixed-rate qualified mortgages, the Final Rule benefits consumers by limiting these cases and lowering the cost of exiting a mortgage. Consumers will be able to refinance at lower cost, either when market rates drop or when the consumer's risk profile improves. In other cases, consumers who are sold mortgages with rates higher than their risk profile warrants will be able to refinance their mortgages to a market rate at lower cost. In still other cases, consumers will be able to sell their homes and move at lower cost. This cost reduction from restriction of prepayment penalties is particularly important to consumers who incur drops in income or increases in expenses that cause them to struggle to make their mortgage payments.

However, to the extent prepayment penalties compensate investors for legitimate prepayment risk, restricting penalties will reduce the value of certain mortgages and limit the returns to creditors and investors (which includes entities that are covered persons as well as entities that are not covered persons). In these cases, the cost of credit for some consumers will rise as creditors raise prices to compensate for increased prepayment risk. Currently, the number of loans that would have prepayment penalties but for the Final Rule appears to be very small, however, so costs to consumers and covered persons are expected to be de minimis.

c. Definition of Small Lenders, Rural and Underserved

The final rule allows certain small creditors operating predominantly in rural or underserved areas to originate balloon-payment qualified mortgages. Specifically, this option exists for lenders originating 500 or fewer covered transactions (including their affiliates), secured by a first lien, in the preceding calendar year, with assets under $2 billion (to be adjusted annually), and who made more than 50 percent of their total covered transactions secured by first liens on properties in counties that are ''rural'' or ''underserved.'' For the purposes of the final rule, and the 2013 Escrow rule published elsewhere in today's **Federal Register**, the Bureau has defined rural to include noncore counties and those micropolitan counties that are not adjacent to metropolitan statistical areas using the Department of Agriculture's urban influence codes. Relative to the proposed rule that only included a subset of rural counties, the final rule expands the exemption. The Bureau has not altered the definition of underserved from that contained in the proposed rule.

Although there is no comprehensive evidence with respect to the prevalence of balloon loans, the Bureau understands anecdotally from outreach that in these rural areas, creditors sometimes have difficulty selling certain loans on the secondary market either because of unique features of the rural property or of the rural borrower. In these instances, the creditors will make a portfolio loan. Because of their small size, some of these creditors eschew ARMs and manage interest rate risk by making balloon payment loans which the creditors then roll-over based on then-current interest rate when the balloon payment comes due.

Relative to a pre-statutory baseline, the rural balloon provisions of the rule have minimal effect. Relative to a post-statutory baseline in which the statute was implemented without the exception for rural lenders, the provisions of the rule have the following impacts on consumers and covered persons. Creditors covered by the rule's definition are permitted to make balloon loans which are qualified mortgages, potentially mitigating consumer access to credit issues that might arise if balloon payment mortgages were restricted. The rule creates certain minimum, consumer-protective requirements with respect to such balloon loans, such as a minimum term of five years and a requirement that the interest rate be fixed for that period of time. The rule also requires that creditors verify and consider income and debts before making such loans (albeit without a fixed debt-to-income requirement). However, to the extent these creditors rely on this permission to make balloon loans rather than other types of qualified mortgages, the rule also denies these consumers the consumer protections associated with not giving balloon loans qualified mortgage status.

According to the definition used in the final rule, approximately 10 percent of the U.S. population lives in areas that the Bureau defines as rural or underserved: the Bureau estimates that 2,707 small creditors, currently issuing first-lien mortgages and operating predominantly in rural or underserved areas, will be able to originate balloon qualified mortgages as a result of the provision. Given the low population density of the areas currently defined as rural, the corresponding limits on the number of creditors, and the challenges of making loans that could be sold in the secondary market, keeping this source of credit in the community with the safeguards added by the rule is likely more important to consumers than the consumer protections associated with not allowing balloon loans to be qualified mortgages. In somewhat less rural areas, for example the micropolitan counties not covered by the definition in the final rule, there are more creditors that can provide alternative forms of credit, such as ARM loans, and more creditors in general.

d. Qualified Mortgages and Appraisals

One impact of the current definition of qualified mortgage is related to higher-risk mortgages as defined in the Act. The Act contains special appraisal requirements with respect to higher-risk mortgages; those requirements are the subject of an interagency rulemaking process which resulted in a proposed rule in August which the agencies expect to finalize shortly. The Act generally defines a higher-risk mortgage as a closed-end consumer credit transaction secured by a principal dwelling with an APR exceeding rate thresholds substantially similar to rate triggers currently in Regulation Z for higher-priced mortgage loans, but excluding qualified mortgages. In general, as the number of loans defined as qualified mortgages increases, the number of loans that would be covered by the proposed appraisal requirements decreases. Based on the general definition of qualified mortgage in the final rule, those higher priced mortgage loans with a debt-to-income ratio of 43 or less would be exempt from the new requirements for interior appraisals. The temporary provision allowing additional loans (*e.g.* loans with a higher debt to income ratio and that are purchasable by the GSEs or insurable by FHA), to be qualified mortgages could further remove mortgages from that requirement. The impact of this reduction in the scope of appraisal requirements is relatively muted for first lien mortgages because of the small number of high-risk mortgages to begin

[234] Over 70 percent of subprime loans from 2001 through 2007 had prepayment penalties. *See Demyank and Hemert, Review of Financial Studies, 24,6, 2011.*

with and the fact that most lenders already do a full interior appraisal and share the results with the consumer.

E. Potential Specific Impacts of the Final Rule

1. Depository Institutions and Credit Unions With $10 Billion or Less in Total Assets, as Described in Section 1026

Some depository institutions and credit unions with $10 billion or less in total assets as described in Section 1026 may see different impacts from the final rule than larger institutions. These differences are driven by the lending practices and portfolios at smaller depository institutions and credit unions, notably those below roughly $2 billion in assets, and by the nature of these institutions' relationship to the secondary market.

The Bureau understands that lending practices at many smaller institutions (according to comment letters and outreach) are based on a more personal relationship-based model, and less on automated systems, at least when the lender plans to keep the loan on portfolio rather than sell it. To the extent that the documentation and verification requirements in the final rule differ from current practice at these institutions, the final rule may impose some new compliance costs. However, unless these institutions keep all of the loans they originate on portfolio, which seems unlikely, they are already subject to documentation requirements from the secondary market so that any incremental costs are likely to be small. In addition, data from HMDA indicate that, on average, a larger proportion of loan originations at smaller institutions are higher-priced mortgage loans and will therefore have the rebuttable presumption of compliance rather than the safe harbor. These loans already are subject to an obligation to assess repayment ability and a rebuttable presumption under the Board's 2009 rule, so any new effects on these loans from the final rule, at least the loans these institutions keep on portfolio, are expected to be limited. Historically, delinquency rates on mortgages at smaller institutions are lower than the average in the industry and as such, the expected litigation costs for these loans are also probably quite low. Nevertheless, the proposal posted elsewhere in today's **Federal Register** asks for comment on whether the safe harbor should be extended to additional loans at particular smaller institutions.

The establishment of assignee liability for violation of the ability-to-repay provisions may also differentially impact smaller institutions by increasing counterparty risk for entities purchasing mortgages from these institutions. As described above, creditors and secondary market purchasers are expected to contract around the new ability-to-repay liability. For example, both Fannie Mae and Freddie Mac require lenders to represent and warrant that loans sold to the enterprises meet the current ability-to-repay requirements and to repurchase loans in cases where violations are found. Under such an arrangement,[235] should a consumer bring a claim, the purchaser will look to the originator to repurchase the loan; if the originator is no longer in business or does not have the financial means to do so, the purchaser will have to bear the risk. This places greater incentive on purchasers to vet potential counterparties and may impact some smaller institutions' ability to sell loans. The impact is likely greatest for loans made under the general ability-to-repay standard rather than for qualified mortgages. In the near term, the temporary provisions expanding the number of qualified mortgages, will greatly mitigate costs for these institutions.

2. Impact of the Provisions on Consumers in Rural Areas

The final rule should have minimal differential impacts on consumers in rural areas. In these areas, a greater fraction of loans are made by smaller institutions and carried on portfolio. The availability or pricing for fixed rate or adjustable-rate loans that are qualified mortgages is likely to be unaffected. Notably, the liability for these loans is nearly unchanged; those below the threshold will be subject to the safe harbor while those above the threshold have a rebuttable presumption similar to the one in place under existing regulation. Only the very small number of loans made by these institutions and then sold may be impacted by the changes in counterparty risk. Consumers constrained to borrow from these lenders may see a small increase in the price of credit, either from the lenders now having to fund the loan on the balance sheet or facing reduced prices in the secondary market. The possible increases in compliance costs just described may also lead to very small increases in rates.

An important difference between the rural and the non-rural consumers is the availability of balloon loans following the rule. While the balloon loans in the non-rural areas that are not underserved cannot be qualified mortgages, small lenders operating predominantly in the rural or underserved areas can, under certain conditions, originate balloons loans that are qualified mortgages. Thus, rural consumers will preserve access to credit, while potentially experiencing the lack of protection associated with prohibiting balloon transactions from being qualified mortgages. Despite the fact that excluding a small creditor from the balloon loan market generally does not significantly disrupt the price-setting process, this might not be true for rural markets. In particular, there are 567 counties that have three creditors or fewer (that originate five or more covered transactions per year), according to HMDA 2011. Going from three creditors to two could significantly increase prices for consumers.

Data regarding the specific mortgages originated and held on bank and credit union portfolios is very limited; the exception is the data on the credit union call report showing the total number and amount of balloon loans together with hybrid adjustable-rate mortgages. According to these data, there appear to be few institutions, and therefore very few consumers affected in this way. In counties where the problem should be worst, namely micropolitan counties not covered by the rural or underserved definition, there are just under 50 credit unions that extend balloon loans and not ARMs; in total they originate 1,200 balloon loans. Consumers seeking credit at these institutions, or similarly situated banks or thrifts, may face some costs in taking a different product or in switching institutions depending on the product offerings and prices in the market. The Bureau believes any price increase is likely not significant as these areas are served by multiple lenders. On average, according to the 2011 HMDA data, 16 lenders on average made higher-priced mortgage loans in these counties, a proxy for what could be balloon loans.

F. Alternatives Considered

Two factors are most relevant when comparing the benefits, costs and impacts of the final rule to alternative regulatory implementations: the requirements for underwriting each loan and the eventual legal liability attached to that loan. The current rule differs from the Board's proposal along both dimensions, particularly in regard to qualified mortgages, as it uses a slightly different structure overall, such as incorporating a specific debt-to-income

[235] It is also possible that other contracting arrangements will develop. The industry is currently working on various changes to the traditional pooling and servicing agreements, for example.

ratio requirement. It also varies in structure from some other proposals offered by commenters. However, even within the structure developed in the final rule, the parameters within the rule (*e.g.* the DTI ratio threshold) could have been different. In order to more fully illuminate the impacts of the final rule, this section first considers the final rule in comparison to the proposals and then to other reasonable alternatives.

In the 2011 ATR Proposal, the Board proposed two alternative definitions for a qualified mortgage. The Board's Alternative 1 proposed to define a qualified mortgage using only the statutory provisions (except for the discretionary requirement to consider the consumer's debt-to-income ratio or residual income). That is, the definition of a qualified mortgage would be based on product features, cost limitations (points and fees limit) and income verification but would not require the creditor to follow any other specific underwriting procedures. Alternative 1 would have operated as a legal safe harbor with the conclusive presumption of compliance.

The final rule maintains a minimum standard for documenting and verifying loans and varies the legal liability with the perceived consumer risk. Alternative 1, on the other hand, placed more emphasis on the restrictions on product features to protect consumers. Loans without interest-only, negative amortization or balloon features, or where total points and fees do not exceed three points were assumed safe and therefore had limited requirements for documenting income and debt (relative to other loans) and were afforded the conclusive presumption of compliance.

Compared to this alternative, the final rule with the temporary provisions likely offers qualified mortgage status to a similar number of loans: without the effects of the temporary provisions, fewer loans would qualify as qualified mortgages. The final rule also mandates stricter documentation and verification of qualified mortgages and limits the presumption of compliance in the case of higher-priced covered transactions. Compared to Alternative 1, only those loans that meet the product, features and point-and-fee limitations and that have a DTI ratio less than or equal to 43 percent are qualified mortgages. This approach limits the reliance on compensating factors when underwriting high DTI ratio loans and recognizes that while such loans may be in the creditor's interest, there is a greater possibility that the consumer may not have the ability to repay the loan. This change likely increases costs slightly in order to provide this consumer protection. Requiring the additional verification of debts for qualified mortgages also provides additional consumer protection. Since this is current practice in the market today, this likely adds very little cost for the time being; however, it does impose costs as credit expands to the point that the market would otherwise relax verification requirements—as well as benefits to consumers and society at large from preventing loans based on unverified (or no) data. Compared to Alternative 1, the only difference in the strength of the liability protection for qualified mortgages is for those loans above the higher-priced threshold. In the final rule, these loans have a rebuttable presumption of compliance rather than a conclusive presumption. However, given that the legal standard today is a rebuttable presumption, the final rule nearly maintains the status quo for borrowers with HPMLs; adopting Alternative 1 would have been a slight diminution of these borrower's legal rights.

The Board's Alternative 2 would have provided the lender with a rebuttable presumption of compliance and would have defined a ''qualified mortgage'' as including the statutory criteria as well the additional underwriting requirements from the general ability-to-repay standard. The Board proposed to permit, but not require, creditors to comply with the underwriting requirements by looking to ''widely accepted governmental and non-governmental underwriting standards'' (such as the FHA's standards). The important difference between this aspect of Alternative 2 and Alternative 1 is that, under Alternative 2, the relative weights for such tradeoffs had to be derived from widely accepted standards.

Compared to Alternative 2, the final rule with the temporary provisions likely offers qualified mortgage status to a similar number of loans; without the effects of the temporary provisions, fewer loans would be eligible to be qualified mortgages. Under the final rule, there is little difference in the documentation and verification requirements; however, the presumption of compliance is strengthened for the majority of qualified mortgages. Compared to Alternative 2 (and to Alternative 1), only those loans that meet the product, features and cost limitations and that have a DTI ratio less than or equal to 43 percent are qualified mortgages. This limits the use of compensating factors for high DTI loans and recognizes that while such loans may be in the creditor's interest, there is a greater possibility that the consumer may not have the ability to repay the loan. This change likely increases costs slightly in order to provide this consumer protection. Both Alternative 2 and the final rule have very similar documentation and verification standards so there is little difference in the benefits and costs along that dimension. Relative to Alternative 2, the difference in the liability standard is for those qualified mortgages below the higher-priced threshold. In the final rule, these loans have a conclusive presumption of compliance rather than just a rebuttable presumption.

As noted in the preamble, a coalition of industry and consumer advocates presented another alternative proposal to the Bureau that would have provided a tiered approach to defining a qualified mortgage. Under the first tier, if the consumer's total debt-to-income ratio is 43 percent or less, the loan would be a qualified mortgage, and no other tests would be required. Under the second tier, if the consumer's total debt-to-income ratio is more than 43 percent, the creditor would apply a series of tests related to the consumer's front-end debt-to-income ratio (housing debt to income), stability of income and past payment history, availability of reserves, and residual income to determine if a loan is a qualified mortgage. This would have allowed some loans with up to 50 percent DTI ratios to meet the qualified mortgage definition. To the extent that it relies on additional factors beyond the DTI ratio, this alternative is similar to the Board's approach. However, the coalition's proposal generally restricted the factors considered to be factors related to ability to repay, rather than other factors related to credit or collateral in its determination. These commenters also supported a rebuttable presumption standard for qualified mortgages.

Relative to this alternative, the final rule will likely include fewer loans as qualified mortgages. The loans that will not be qualified mortgages are those that would qualify only under one or more of the additional factors besides DTI ratio that the alternative included: housing expenses, stability of income, reserves etc. As a result, these loans will have to meet the ability-to-repay standard of the final rule, providing additional consumer protections with the minor added costs described above. Relative to a rule including these factors, the final rule is simpler and easier to implement for industry, lowering costs overall. In addition, creditors are free to include such factors in their own credit decisions and to develop the best models for their inclusion. The Bureau views this more dynamic outcome as a benefit relative to a more prescriptive rule detailing how such factors should be traded off against each other. This alternative did include a rebuttable presumption of compliance for all qualified mortgages; as such, the final rule's safe harbor limits liability costs and consumer benefits, as already discussed, for those qualified mortgages that are not higher priced covered transactions.

As noted, the Bureau also considered certain alternatives to its own version of the final rule. One such alternative would have used a threshold of a 36 percent DTI ratio to define qualified mortgages. This would have left roughly an additional 15 percent of loans, both during the 1997–2003 period and during 2011, without a presumption of compliance. As noted however, the Bureau believes that 43 percent is a more efficient threshold: it is an accepted market standard, rates of delinquency and default for borrowers between 36 and 43 percent are still modest, and many borrowers—particularly in higher cost housing markets—borrow at these levels.

The Bureau also considered whether all qualified mortgages should have the same degree of presumption with the qualified mortgage standard—either all being afforded a conclusive presumption of compliance or all being afforded a rebuttable presumption. As discussed in the section-by-section analysis, the Bureau determined that the bifurcated approach in which only higher-priced covered transactions provide the consumer with the opportunity to rebut the presumption of compliance best balances the concerns of costs, certainty, and consumer protection.

VIII. Final Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct an initial regulatory flexibility analysis (IRFA) and a final regulatory flexibility analysis (FRFA) of any rule subject to notice-and-comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.[236] The Bureau also is subject to certain additional procedures under the RFA involving the convening of a panel to consult with small business representatives prior to proposing a rule for which an IRFA is required.[237]

In the 2011 ATR Proposal, the Board did not certify that the rule would not have a significant economic impact on a substantial number of small entities and therefore prepared an IRFA.[238] In this IRFA the Board solicited comment on any costs, compliance requirements, or changes in operating procedures arising from the application of the proposed rule to small businesses, comment regarding any state or local statutes or regulations that would duplicate, overlap, or conflict with the proposed rule, and comment on alternative means of compliance for small entities with the ability-to-repay requirements and restrictions on prepayment penalties. Comments addressing the ability-to-repay requirements and restrictions on prepayment penalties are addressed in the section-by-section analysis above. Comments addressing the impact on the cost of credit are discussed below.

1. A Statement of the Need for, and Objectives of, the Rule

The Bureau is publishing a final rule to establish new ability-to-repay requirements related to mortgage origination. As discussed in the preamble, the final rule's amendments to Regulation Z implement certain amendments to TILA that were added by sections 1411, 1412, 1413, and 1414 of the Dodd-Frank Act in response to the recent foreclosure crisis to address certain lending practices (such as low- or no-documentation loans or underwriting mortgages without including any principal repayments in the underwriting determination) that led to consumers having mortgages they could not afford, thereby contributing to high default and foreclosure rates.

A full discussion of the market failures motivating these provisions of the Dodd-Frank Act and the final rule is included in the preamble and in the Bureau's section 1022 analysis above. Those discussions also describe the specific ways the final rule addresses these issues. However, in general, the purpose of the Dodd-Frank Act ability-to-repay requirements is to assure that consumers are offered and receive residential mortgage loans on terms that reasonably reflect their ability to repay the loans and that are understandable and not unfair, deceptive or abusive. Prior to the Dodd-Frank Act, existing Regulation Z provided ability-to-repay requirements for high-cost and higher-priced mortgages. Accordingly, new TILA section 129C generally prohibits a creditor from making a residential mortgage loan unless the creditor makes a reasonable and good faith determination, based on verified and documented information, that the consumer has a reasonable ability to repay the loan according to its terms, including any mortgage-related obligations (such as property taxes and mortgage insurance). Consistent with the statute, the final rule applies the ability-to-repay requirements of TILA section 129C to any consumer credit transaction secured by a dwelling, except an open-end credit plan, timeshare plan, reverse mortgage, or temporary loan.

Congress also recognized the importance of maintaining access to responsible, affordable mortgage credit. To provide creditors more certainty about their potential liability under the ability-to-repay standards while protecting consumers from unaffordable loans, the Dodd-Frank Act creates a presumption of compliance with the ability-to-repay requirement when creditors make ''qualified mortgages.'' Qualified mortgages do not contain certain features that Congress deemed to create a risk to consumers' ability to repay, and must be underwritten using standards set forth in the statute that are designed to assure that consumers will have the ability to repay these loans. The final rule establishes standards for complying with the ability-to-repay requirements, including defining ''qualified mortgage.'' The final rule provides three options for originating a qualified mortgage: under the general definition in § 1026.43(e)(2), for loans where the consumer's monthly debt-to-income ratio would not exceed 43 percent; under the definition § 1026.43(e)(4), for a maximum of seven years, for loans that are eligible for purchase by the GSEs while in conservatorship or certain other Federal agencies, and under § 1026.43(f), for loans that have balloon-payment features if the creditor operates predominantly in rural or underserved areas and meets certain asset-size and transaction volume limits.

Congress did not explicitly define the nature of the presumption of compliance that attaches to a qualified mortgage. Congress also left some contours of a qualified mortgage

[236] For purposes of assessing the impacts of the final rule on small entities, ''small entities'' is defined in the RFA to include small businesses, small not-for-profit organizations, and small government jurisdictions. 5 U.S.C. 601(6). A ''small business'' is determined by application of Small Business Administration regulations and reference to the North American Industry Classification System (NAICS) classifications and size standards. 5 U.S.C. 601(3). A ''small organization'' is any ''not-for-profit enterprise which is independently owned and operated and is not dominant in its field.'' 5 U.S.C. 601(4). A ''small governmental jurisdiction'' is the government of a city, county, town, township, village, school district, or special district with a population of less than 50,000. 5 U.S.C. 601(5).

[237] 5 U.S.C. 609.

[238] 76 FR 27479–27480.

undefined, such as whether there should be a minimum debt-to-income ratio. Congress left these decisions to the Bureau and granted broad authority to revise, add to, or subtract from the qualified mortgage criteria upon a finding that doing so is ''necessary or proper'' or ''necessary and appropriate'' to achieve certain specified standards, such as ensuring that responsible, affordable mortgage credit remains available to consumers.

As discussed above, the final rule recognizes both the need to assure that consumers are offered and receive loans based on a reasonable and good faith determination of their repayment ability and the need to ensure that responsible, affordable mortgage credit remains available to consumers. The Bureau believes, based upon its analysis of the data available to it, that, under the final rule, the vast majority of loans originated today can meet the standards for a qualified mortgage so long as creditors follow the required procedures, such as verifying income or assets, and current debt obligations, alimony and child support. The Bureau also believes, based upon its analysis of the historical performance of loans meeting the rule's definition of ''qualified mortgages,'' that consumers will be able to repay these loans. The Bureau believes that the final rule will not restrict creditors' ability to make responsible loans, both within and outside the qualified mortgage space.

The final rule provides special rules for complying with the ability-to-repay requirements for a creditor refinancing a ''non-standard mortgage'' into a ''standard mortgage.'' The purpose of this provision is to provide flexibility for creditors to refinance a consumer out of a risky mortgage into a more stable one without undertaking a full underwriting process.

In addition to the ability-to-repay and qualified mortgage provisions, the final rule implements the Dodd-Frank Act limits on prepayment penalties and lengthens the time creditors must retain records that evidence compliance with the ability-to-repay and prepayment penalty provisions.

2. Summary of Significant Issues Raised by Comments in Response to the Initial Regulatory Flexibility Analysis, Statement of the Assessment of the Bureau of Such Issues, and a Statement of Any Changes Made as a Result of Such Comments

The Board's IRFA estimated the possible compliance costs for small entities from each major component of the rule against a pre-statute baseline. The Board requested comments on the IRFA.

The Board did not receive any comments in its IRFA. Industry commenters generally expressed concern with respect to the costs they anticipated from the 2011 ATR Proposal. The Bureau received numerous comments describing in general terms the impact of the proposed rule on small creditors and the need for the qualified mortgage definition to be structured as a safe harbor with clear, well-defined standards to ensure that the largest number of consumers possible can access credit. Small creditors are particularly concerned about the litigation risk associated with the requirement to make a reasonable and good faith determination of consumers' ability to repay based on verified and documented information. Because of their size, small creditors note that they are particularly unsuited to bear the burden and cost of litigation and would find it particularly difficult to absorb the cost of an adverse judgment. Indeed, small creditors insist that they will not continue to make mortgage loans unless they are protected from liability for violations of the ability-to-repay rules by a conclusive presumption of compliance or ''safe harbor.'' These small creditors' concerns about compliance with the ability-to-repay rule and associated litigation risk have been repeatedly expressed to the Bureau by their trade associations and prudential regulators.

Several commenters on the proposal urged the Bureau to adopt less stringent regulatory requirements for small creditors or for loans held in portfolio by small creditors. For example, at least two commenters on the proposal, a credit union and a state trade group for small banks, urged the Bureau to exempt small portfolio creditors from the ability-to-repay and qualified mortgage rule. Two other trade group commenters urged the Bureau to adopt less stringent regulatory requirements for small creditors than for larger creditors at least in part because mortgage loans made by small creditors often are held in portfolio and therefore historically have been conservatively underwritten.

Some industry commenters supported not including quantitative standards for such variables as debt-to-income ratios and residual income because they argued that underwriting a loan involves weighing a variety of factors, and creditors and investors should be allowed to exercise discretion and weigh risks for each individual loan. To that point, one industry trade group commenter argued that community banks, for example, generally have conservative requirements for a consumer's debt-to-income ratio, especially for loans that are held in portfolio by the bank, and consider many factors when underwriting for mortgage loans, such as payment history, liquid reserves, and other assets. Because several factors are considered and evaluated in the underwriting process, this commenter asserted that community banks can be flexible when underwriting for mortgage loans and provide arrangements for certain consumers that fall outside of the normal debt-to-income ratio for a certain loan. This commenter contended that strict quantitative standards would inhibit community banks' relationship lending and ability to use their sound judgment in the lending process. Some commenters contended that requiring specific quantitative standards could restrict credit access and availability for consumers.

A number of other commenters expressed concerns that the availability of portfolio mortgage loans from small creditors would be severely limited because the proposed exception for rural balloon loans was too restrictive. Some industry commenters urged the Bureau to allow balloon mortgage loans held in portfolio by the originating banks for the life of the loan to be included under this safe harbor so that small creditors could continue to meet the specific needs of their customers.

These comments, and the responses, are discussed in the section-by-section analysis and element 6–1 of this FRFA.

3. Response to the Small Business Administration Chief Counsel for Advocacy

The SBA Office of Advocacy (Advocacy) provided a formal comment letter to the Bureau in response to the Bureau's reopening of the comment period for certain issues relating to the ability-to-repay/qualified mortgage rulemaking. Among other things, this letter expressed concern about the following issues: the qualified mortgage definition and the use of data as a means for measuring a consumer's ability to repay.

First, Advocacy expressed concern that the qualified mortgage definition will have major implications on the viability of community banks. Advocacy pointed to the assertion made by small banks that they will no longer originate mortgage loans if they are only provided with a rebuttable presumption of compliance. In addition, according to Advocacy, small banks contend that establishing the qualified mortgage as a rebuttable presumption of compliance will reduce the availability and affordability of mortgages to consumers due to increased litigation and compliance costs, and the exit by certain small lenders unable to manage the risk. According to Advocacy, small banks assert that one way to enable them to compete effectively (and to ensure consumers can obtain affordable loans) is to establish the qualified mortgage as a safe harbor and allow for non-traditional loans such as mortgages with balloon payments to continue to be made.

The Bureau carefully considered the arguments for establishing the qualified mortgage as a safe harbor or rebuttable presumption of compliance in light of the proposed rule, and a complete discussion of the consideration of the Bureau's final rule can be found in the respective section of the section-by-section analysis, the Bureau's section 1022(b)(2) discussion, and in element 6–1 of this FRFA.

As discussed in more detail elsewhere, the final rule provides a safe harbor under the ability-to-repay requirements for mortgage loans that satisfy the definition of a qualified mortgage and are not higher-priced covered transactions (*i.e.,* APR does not exceed Average Prime Offer Rate (APOR)[239] + 1.5 percentage points for first liens or 3.5 percentage points for subordinate liens). The final rule provides a rebuttable presumption for all other qualified mortgage loans, meaning qualified mortgage loans that are higher-priced covered transactions (*i.e.,* APR exceeds APOR + 1.5 percentage points for first lien or 3.5 percentage points for subordinate lien). The Bureau believes that a bifurcated approach to the presumption of compliance provides the best way of balancing consumer protection and access to credit considerations and is consistent with the purposes of the statute, while calibrating consumer protections and risk levels to match the historical record of loan performance. To reduce uncertainty in potential litigation, the final rule defines the standard by which a consumer may rebut the presumption of compliance afforded to higher-priced qualified mortgages.

The Bureau notes that the Board's proposed § 1026.43 did not include special provisions for portfolio loans made by small creditors and the Board's proposal did not address such an accommodation. However, this final rule is related to a proposed rule published elsewhere in today's **Federal Register**. As discussed in more detail below, in that proposal, the Bureau is proposing certain amendments to this final rule, including a proposal to define as a qualified mortgage a larger category of loans made and held in portfolio by small creditors than this final rule defines as a qualified mortgage.

Second, Advocacy expressed concern about using loan performance, as measured by the delinquency rate, as an appropriate metric to evaluate whether consumers had the ability to repay at the time their loans were consummated. Advocacy noted that a consumer's circumstances might change after the loan was made due to unemployment or illness. The Bureau agrees that consumers' circumstances can change and lead to delinquency or default. However, the Bureau also believes that DTI is an indicator of the consumer's ability to repay. All things being equal, consumers carrying loans with higher DTI ratios will be less able to absorb any such shocks and are more likely to default.

4. A Description of and an Estimate of the Number of Small Entities to Which the Rule Will Apply

The final rule will apply to creditors that engage in originating or extending certain dwelling-secured credit. The credit provisions of TILA and Regulation Z have broad applicability to individuals and businesses that originate and extend even small numbers of home-secured credit. *See* 1026.1(c)(1).[240] Small entities that originate or extend closed-end loans secured by a dwelling are potentially subject to at least some aspects of the final rule.

For purposes of assessing the impacts of the final rule on small entities, ''small entities'' is defined in the RFA to include small businesses, small nonprofit organizations, and small government jurisdictions. 5 U.S.C. 601(6). A ''small business'' is determined by application of SBA regulations and reference to the North American Industry Classification System (NAICS) classifications and size standards.[241] 5 U.S.C. 601(3). Under such standards, banks and other depository institutions are considered ''small'' if they have $175 million or less in assets, and for other financial businesses, the threshold is average annual receipts (*i.e.,* annual revenues) that do not exceed $7 million.[242]

The Bureau can identify through data under the Home Mortgage Disclosure Act, Reports of Condition and Income (Call Reports), and data from the National Mortgage Licensing System (NMLS) the approximate numbers of small depository institutions that will be subject to the final rule. Origination data is available for entities that report in HMDA, NMLS or the credit union call reports; for other entities, the Bureau has estimated their origination activities using statistical projection methods.

The following table provides the Bureau's estimate of the number and types of entities to which the rule will apply:

[239] The Average Prime Offer Rate means ''the average prime offer rate for a comparable transaction as of the date on which the interest rate for the transaction is set, as published by the Bureau.'' TILA section 129C(b)(2)B).

[240] Regulation Z generally applies to ''each individual or business that offers or extends credit when four conditions are met: (i) The credit is offered or extended to consumers; (ii) the offering or extension of credit is done regularly; (iii) the credit is subject to a finance charge or is payable by a written agreement in more than four installments, and (iv) the credit is primarily for personal, family, or household purposes.'' Section 1026.1(c)(1). Regulation Z provides, in general, that a person regularly extends consumer credit only if the person extended credit more than 5 times for transactions secured by a dwelling in the preceding year.

[241] The current SBA size standards are found on SBA's Web site at *http://www.sba.gov/content/table-small-business-size-standards.*

[242] *See id.*

Category	NAICS Code	Total Entities	Small Entities	Entities That Originate Any Mortgage Loans[b]	Small Entities that Originate Any Mortgage Loans
Commercial Banking	522110	6,505	3,601	6,307[a]	3,466[a]
Savings Institutions	522120	930	377	922[a]	373[a]
Credit Unions[c]	522130	7,240	6,296	4,178[a]	3,240[a]
Real Estate Credit[d e]	522292	2,787	2,294	2,787	2,294[a]
Total		17,462	12,568	14,194	9,373

Source: 2011 HMDA, Dec 31, 2011 Bank and Thrift Call Reports, Dec 31, 2011 NCUA Call Reports, Dec 31, 2011 NMLSR Mortgage Call Reports.

[a] For HMDA reporters, loan counts from HMDA 2011. For institutions that are not HMDA reporters, loan counts projected based on Call Report data fields and counts for HMDA reporters.

[b] Entities are characterized as originating loans if they make one or more loans.

[c] Does not include cooperativas operating in Puerto Rico. The Bureau has limited data about these institutions or their mortgage activity.

[d] NMLSR Mortgage Call Report (MCR) for 2011. All MCR reporters that originate at least one loan or that have positive loan amounts are considered to be engaged in real estate credit (instead of purely mortgage brokers). For institutions with missing revenue values, the probability that institution was a small entity is estimated based on the count and amount of originations and the count and amount of brokered loans.

[e] Data do not distinguish nonprofit from for-profit organizations, but Real Estate Credit presumptively includes nonprofit organizations.

5. Projected Reporting, Recordkeeping, and Other Compliance Requirements

The final rule does not impose new reporting requirements. The final rule does, however, impose new recordkeeping and other compliance requirements on certain small entities. The requirements on small entities from each major component of the rule are presented below.

The Bureau discusses impacts against a pre-statute baseline. This baseline assumes compliance with the Federal rules that overlap with the final rule. The impact of the rule relative to the pre-statute baseline will be smaller than the impact would be if not for compliance with the existing Federal rules. In particular, creditors have already incurred some of the one-time costs necessary to comply with the final rule when they came into compliance with the 2008 HOEPA Final Rule on higher-priced mortgage loans. And creditors already have budgeted for some of the ongoing costs of the final rule to the extent those are costs necessary to remaining in compliance with the 2008 HOEPA Final Rule. These expenses attributable to the 2008 HOEPA Final Rule will facilitate and thereby reduce the cost of compliance with this final rule.

Recordkeeping Requirements

The final rule imposes new record retention requirements on covered persons. As discussed above, the final rule requires creditors to retain evidence of compliance with § 1026.43 (containing the ability-to-repay/qualified mortgage provisions and prepayment penalty restrictions) for three years after consummation. The final rule clarifies that creditors need not maintain actual paper copies of the documentation used to underwrite a transaction. For most covered persons, the required records will be kept in electronic form and creditors need retain only enough information to reconstruct the required records. This should limit any burden associated with the record retention requirement for creditors.

Other Compliance Requirements

As discussed in detail in the section-by-section analysis and the Bureau's section 1022(b)(2) discussion above, the final rule imposes new compliance requirements on creditors. In general, creditors will have to update their policies and procedures; additionally, creditors may have to update their systems, for example, to store flags identifying qualified mortgages, and to ensure compliance. The Bureau believes that small creditors' major one-time costs will be to learn about the final rule, consider whether they need to modify their underwriting practices and procedures to comply with the rule and, if necessary, modify their practices and procedures. The precise costs to small entities of modifying their underwriting practices, should they need to do so, are difficult to predict. These costs will depend on a number of factors, including, among other things, the current practices and systems used by such entities to collect and analyze consumer income, asset, and liability information, the complexity of the terms of credit products that they offer, and the range of such product offerings. To the extent that most small creditors' processes already align with the rule, any additional compliance costs should be minimal.

When originating mortgages, the creditor must calculate the monthly mortgage payment based on the greater of the fully indexed rate or any introductory rate, assuming monthly, fully amortizing payments that are substantially equal. The final rule provides special payment calculation rules for loans with balloon payments, interest-only loans, and negative amortization loans. The final rule may therefore increase compliance costs for small entities, particularly for creditors that offer products that contain balloon payments, interest-only loans, and negative amortization loans. The precise costs to small entities of updating their processes and systems to account for these additional calculations are difficult to predict, but these costs are mitigated, in some circumstances, by the presumption of compliance or safe harbor for qualified mortgages.

The Final Rule also includes requirements for documentation and verification of certain information that the creditor must consider in assessing a consumer's repayment ability. The final rule provides special rules for verification of a consumer's income or assets, and provides examples of records that can be used. Different verification requirements apply to qualified mortgages. Creditors that originate qualified mortgages under the general definition must verify a consumer's income or assets, current debt obligations, alimony, and child support, and must also verify a consumer's monthly debt-to-income ratio. The final rule does not contain specific verification requirements for creditors originating qualified mortgages under the temporary provisions; however, such loans must comply with eligibility requirements (including underwriting requirements) of the GSEs or the Federal agency program applicable to the loan.

The final rule also provides special rules for complying with the ability-to-repay requirements for a creditor refinancing a ''non-standard mortgage'' into a ''standard mortgage.'' This provision is based on TILA section 129C(a)(6)(E), which contains special rules for the refinance of a ''hybrid loan'' into a ''standard loan.'' The purpose of this provision is to provide flexibility for creditors to refinance a consumer out of a risky mortgage into a more stable one without undertaking a full underwriting process. Under the final rule, a non-standard mortgage is defined as an adjustable-rate mortgage with an introductory fixed interest rate for a period of one year or longer, an interest-only loan, or a negative amortization loan. Under this option, a creditor refinancing a non-standard mortgage into a standard mortgage does not have to consider the eight specific underwriting criteria under the general ability-to-repay option, if certain conditions are met, thus reducing compliance costs for small entities.

Prepayment limitations, as discussed in detail in the section-by-section analysis and the Bureau's section 1022 analysis, are also included in the final rule.

Estimate of the Classes of Small Entities Which Will Be Subject to the Requirement

Section 603(b)(4) of the RFA requires an estimate of the classes of small entities which will be subject to the requirement. The classes of small entities which will be subject to the reporting, recordkeeping, and compliance requirements of the final rule are the same classes of small entities that are identified above in part VIII.B.4.

Section 604(a)(5) of the RFA also requires an estimate of the type of professional skills necessary for the preparation of the reports or records. The Bureau anticipates that the professional skills required for compliance with the final rule are the same or similar to those required in the ordinary course of business of the small entities affected by the final rule. Compliance by the small entities that will be affected by the final rule will require continued performance of the basic functions that they perform today: Managing information about consumers and conducting sound underwriting practices for mortgage originations.

6–1. Description of the Steps the Agency has Taken To Minimize the Significant Economic Impact on Small Entities

The Bureau understands the new provisions will impose a cost on small entities, and has attempted to mitigate the burden consistent with statutory objectives. The Bureau has also taken numerous additional steps that are likely to reduce the overall cost of the rule. Nevertheless, the rule will certainly create new one-time and ongoing costs for creditors. The section-by-section analysis of each provision and the Bureau's section 1022 analysis contain a complete discussion of the following steps taken to mitigate the burden.

The final rule provides small creditors with the option of offering only qualified mortgages, which will enjoy either a presumption of compliance with respect to the repayment ability requirement (for higher-priced covered transactions) or a safe harbor from the repayment ability requirement, thus reducing litigation risks and costs for small creditors.

The Bureau believes that a variety of underwriting standards can yield reasonable, good faith ability-to-repay determinations. The Bureau is permitting creditors to develop and apply their own underwriting standards (and to make changes to those standards over time in response to empirical information and changing economic and other conditions) as long as those standards lead to ability-to-repay determinations that are reasonable and in good faith. In addition, the Bureau will permit creditors to use their own definitions and other technical underwriting criteria and notes that underwriting guidelines issued by governmental entities such as the FHA are a source to which creditors may refer for guidance on definitions and technical underwriting criteria. The Bureau believes this flexibility is necessary given the wide range of creditors, consumers, and mortgage products to which this rule applies. The Bureau believes this increased flexibility will reduce the burden on small creditors by allowing them to determine the practices that fit best with their business model.

Qualified Mortgage Provisions

The general definition of the qualified mortgage includes a very clear standard of 43 percent for the debt-to-income threshold and clear methods to compute that figure. The clarity of this provision, and others, should make implementation of and compliance with these provisions of the rule. The Bureau carefully considered the arguments for establishing the qualified mortgage as a safe harbor or rebuttable presumption of compliance in light of the proposed rule, and a complete discussion of the consideration of the Bureau's final rule can be found in the respective section of the section-by-section analysis. The final rule establishes standards for complying with the ability-to-repay requirements, including defining ''qualified mortgage.'' The final rule provides three options for originating a qualified mortgage: under the general definition in § 1026.43(e)(2), for loans where the consumer's monthly debt-to-income ratio would not exceed 43 percent; under the definition § 1026.43(e)(4), for a maximum of seven years, for loans that are eligible for purchase by the GSEs while in conservatorship or certain other Federal agencies, and under § 1026.43(f), for loans that have balloon-payment features if the creditor operates predominantly in rural or underserved areas and meets certain asset-size and transaction volume limits. The final rule provides a safe harbor under the ability-to-repay requirements for mortgage loans that satisfy the definition of a qualified mortgage and are not higher-priced covered transactions (*i.e.,* APR does not exceed Average Prime Offer Rate (APOR) [243] + 1.5 percentage points for first liens or 3.5 percentage points for subordinate liens). The final rule provides a rebuttable presumption for all other qualified mortgage loans, meaning qualified mortgage loans that are higher-priced covered transactions (*i.e.,* APR exceeds APOR + 1.5 percentage points for first lien or 3.5 percentage points for subordinate lien).

The Bureau believes that a bifurcated approach to the presumption of compliance provides the best way of balancing consumer protection and access to credit considerations and is consistent with the purposes of the statute, while calibrating consumer protections and risk levels to match the historical record of loan performance. To reduce uncertainty in potential

[243] The Average Prime Offer Rate means ''the average prime offer rate for a comparable transaction as of the date on which the interest rate for the transaction is set, as published by the Bureau.'' TILA section 129C(b)(2)B).

litigation, the final rule defines the standard by which a consumer may rebut the presumption of compliance afforded to higher-priced qualified mortgages. The Bureau's approach to the standards with which a consumer can rebut the presumption that applies to higher-priced transactions is further designed to ensure careful calibration.

The Bureau considered several alternatives, including only the safe harbor standard and only the rebuttable presumption standard. In its rulemaking, the Bureau tried to balance consumers' access to credit concerns with the consumer protection associated with reducing consumers' cost of litigation. Compared to the final rule, only the safe harbor standard marginally increased consumers' access to credit, but significantly reduced consumer protection. Conversely, only the rebuttable presumption standard marginally increased consumer protection, but significantly decreased consumers' access to credit.

Balloon-Payment Qualified Mortgage Provisions

The Bureau has also provided an exception to the general provision that a qualified mortgage may not provide for a balloon payment for loans that are originated by certain small creditors and that meet specified criteria. The Bureau understands that community banks originate balloon-payment loans to hedge against interest rate risk, rather than making adjustable-rate mortgages, and that community banks hold these balloon-payment loans in portfolio virtually without exception because they are not eligible for sale in the secondary market. Under the final rule, the Bureau is permitting small creditors operating predominantly in rural or underserved areas to originate a balloon-payment qualified mortgage.

Unlike loans that are qualified mortgages under the general definition, there is no specific debt-to-income ratio requirement for balloon-payment qualified mortgages. However, creditors must consider and verify a consumer's monthly debt-to-income ratio. Like the other qualified mortgage definitions, a loan that satisfies the criteria for a balloon-payment qualified mortgage and is not a higher-priced covered transaction receives a legal safe harbor under the ability-to-repay requirements. A loan that satisfies those criteria and is a higher-priced covered transaction receives a rebuttable presumption of compliance with the ability-to-repay requirements. The Bureau believes that this exception will decrease the economic impact of the final rule on small entities. In response to concerns regarding the proposed provisions for holding balloon-payment loans in portfolio, the final rule provides more flexible portfolio requirements which permit certain transfers.

Concurrent Proposal for Portfolio Loans Made by Small Creditors

The Bureau notes that the Board's proposal did not include special provisions for portfolio loans made by small creditors and the Board's proposal did not address such an accommodation.

The Bureau understands that creditors generally have in place underwriting policies, procedures, and internal controls that require verification of the consumer's reasonably expected income or assets, employment status, debt obligations and simultaneous loans, and debt-to-income or residual income. Notably, in response to the proposal, commenters stated that most creditors today are already complying with the full ability-to-repay underwriting standards. For these institutions, there would be no additional burden as a result of the verification requirements in the final rule, since those institutions collect the required information in the normal course of business. To the extent small creditors do not verify and document some or all of the information required by the proposed rule in the normal course of business, they will need to engage in certain one-time implementation efforts and system adjustments. These one-time costs might include expenses related to creditors needing to reanalyze their product lines, retrain staff, and reorganize the processing and administrative elements of their mortgage operations.

In a related proposed rule published elsewhere in today's **Federal Register**, the Bureau is proposing certain amendments to this final rule, including an additional definition of a qualified mortgage for certain loans made and held in portfolio by small creditors. The proposed new category would include certain loans originated by small creditors that: (1) Have total assets less than $2 billion at the end of the previous calendar year; and (2) together with all affiliates, originated 500 or fewer covered transactions, secured by first-liens during the previous calendar year. These loans generally conform the requirements under the general definition of a qualified mortgage except the 43 percent limit on monthly debt-to-income ratio. Under the proposed additional definition, a creditor would not have to use the instructions in the appendix to the final rule to calculate debt-to-income ratio, and a loan with a consumer debt-to-income ratio higher than 43 percent could be a qualified mortgage if all other criteria are met.

The Bureau also is proposing to allow small creditors to charge a higher annual percentage rate for first-lien qualified mortgages in the proposed new category and still benefit from a conclusive presumption of compliance or ''safe harbor.'' In addition, the Bureau also is proposing to allow small creditors operating predominantly in rural or underserved areas to offer first-lien balloon loans with a higher annual percentage rate and still benefit from a conclusive presumption of compliance with the ability to repay rules or ''safe harbor.'' The Bureau is proposing these changes because it believes they may be necessary to preserve access to credit for some consumers. The regulatory requirement to make a reasonable and good faith determination based on verified and documented evidence that a consumer has a reasonable ability to repay may entail significant litigation risk for small creditors. The Bureau believes that small creditors have historically engaged in responsible mortgage underwriting that includes thorough and thoughtful determinations of consumers' ability to repay, at least in part because they bear the risk of default associated with loans held in their portfolios. The Bureau also believes that because small creditors' lending model is based on maintaining ongoing, mutually beneficial relationships with their customers, they therefore have a more comprehensive understanding of their customers' financial circumstances and are better able to assess ability to repay than larger creditors.

Further, the Bureau understands that the only sources of mortgage credit available to consumers in rural and underserved areas may be small creditors because larger creditors may be unable or unwilling to lend in these areas. For these reasons, the Bureau is proposing a new category of qualified mortgages that would include small creditor portfolio loans and is also proposing to raise the annual percentage rate threshold for the safe harbor to accommodate small creditors' higher costs. The Bureau believes these steps may be necessary to preserve some rural and underserved consumers' access to non-conforming credit.

6–2. Description of the Steps the Agency Has Taken To Minimize Any Additional Cost of Credit for Small Entities

Section 603(d) of the RFA requires the Bureau to consult with small entities regarding the potential impact of the proposed rule on the cost of credit for small entities and related matters. 5

U.S.C. 603(d). The Bureau notes that the Board was not subject to this requirement when it issued its IRFA.

The Bureau does not believe that the final rule will result in an increase in the cost of business credit for small entities. Instead, the final rule will apply only to mortgage loans obtained by consumers primarily for personal, family, or household purposes and the final rule will not apply to loans obtained primarily for business purposes. Given that the final rule does not increase the cost of credit for small entities, the Bureau has not taken additional steps to minimize the cost of credit for small entities.

IX. Paperwork Reduction Act Analysis

Certain provisions of this final rule contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (Paperwork Reduction Act or PRA).

This final rule amends 12 CFR part 1026 (Regulation Z). Regulation Z currently contains collections of information approved by the Office of Management and Budget (OMB). The Bureau's OMB control number for Regulation Z is 3170–0015. The PRA (44 U.S.C 3507(a), (a)(2) and (a)(3)) requires that a Federal agency may not conduct or sponsor a collection of information unless OMB approved the collection under the PRA and the OMB control number obtained is displayed. Further, notwithstanding any other provision of law, no person is required to comply with, or is subject to any penalty for failure to comply with, a collection of information that does not display a currently valid OMB control number (44 U.S.C. 3512).

This final rule contains information collection requirements that have not been approved by the OMB and, therefore, are not effective until OMB approval is obtained. The unapproved information collection requirements are contained in sections 1026.25(c)(3) and 1026.43(c)–(f) of these regulations. The Bureau will publish a separate notice in the **Federal Register** announcing the submission of these information collection requirements to OMB as well as OMB's action on these submissions; including, the OMB control number and expiration date.

On May 11, 2011, the Board of Governors of the Federal Reserve System (Board) published notice of the proposed rule in the **Federal Register** (76 FR 27390). The information collection requirements in §§ 1026.25(c)(3) and 1026.43(c)–(f) were contained in the Board's proposal; however, these requirements were not separately discussed in the proposal's PRA section. For full public transparency, the Bureau now claims these requirements as information collections. The Bureau received no PRA-related comments to the Board's proposal on the information collections in §§ 1026.25(c)(3) and 1026.43(c).

A. Overview

As described below, the final rule amends the collections of information currently in Regulation Z to implement amendments to TILA made by the Dodd-Frank Act. The Dodd-Frank Act prohibits a creditor from making a mortgage loan unless the creditor makes a reasonable and good faith determination, based on verified and documented information, that the consumer will have a reasonable ability to repay the loan, including any mortgage-related obligations (such as property taxes). TILA section 129C(a); 15 U.S.C. 1639c(a). The Dodd-Frank Act provides special protection from liability for creditors who make ''qualified mortgages.'' TILA section 129C(b); 15 U.S.C. 1639c(b). The purpose of the Dodd-Frank Act ability-to-repay requirement is to assure that consumers are offered and receive residential mortgage loans on terms that reasonably reflect their ability to repay the loans and that are understandable and not unfair, deceptive or abusive. TILA section 129B(a)(2); 15 U.S.C. 1639b(a)(2). Prior to the Dodd-Frank Act, existing Regulation Z provided ability-to-repay requirements for high-cost and higher-priced mortgage loans. The Dodd-Frank Act expanded the scope of the ability-to-repay requirement to cover all residential mortgage loans.

The final rule establishes standards for complying with the ability-to-repay requirement, including defining ''qualified mortgage.'' The final rule provides three options for originating a qualified mortgage: under the general definition in § 1026.43(e)(2), for loans where the consumer's monthly debt-to-income ratio do not exceed 43 percent; under the definition § 1026.43(e)(4), for a maximum of seven years, for loans that are eligible for purchase by the GSEs while in conservatorship or certain other Federal agencies, and under § 1026.43(f), for loans that have a balloon-payment if the creditor operates predominantly in rural or underserved areas and meets certain underwriting requirements, and asset-size and transaction volume limits.

In addition to the ability-to-repay and qualified mortgage provisions, the final rule implements the Dodd-Frank Act limits on prepayment penalties and lengthens the time creditors must retain records that evidence compliance with the ability-to-repay and prepayment penalty provisions. Currently, Regulation Z requires creditors to retain evidence of compliance for two years after disclosures must be made or action must be taken. The final rule amends Regulation Z to require creditors to retain evidence of compliance with the ability-to-repay/qualified mortgage provisions and prepayment penalty restrictions in § 1026.43 for three years after consummation for consistency with statute of limitations on claims under TILA section 129C. *See generally* the section-by-section analysis of §§ 1026.25 and 1026.43, above.

The information collection in the final rule is required to provide benefits for consumers and would be mandatory. *See* 15 U.S.C. 1601 *et seq.;* 12 U.S.C. 2601 *et seq.* Because the Bureau does not collect any information under the final rule, no issue of confidentiality arises. The likely respondents would be depository institutions (*i.e.,* commercial banks/savings institutions and credit unions) and non-depository institutions (*i.e.,* mortgage companies or other non-bank lenders) subject to Regulation Z.[244]

Under the final rule, the Bureau generally accounts for the paperwork burden associated with Regulation Z for the following respondents pursuant to its administrative enforcement authority: insured depository institutions with more than $10 billion in total assets, their depository institution affiliates, and certain nondepository lenders. The Bureau and the FTC generally both have enforcement authority over non-depository institutions for Regulation Z. Accordingly, the Bureau has allocated to itself half of the estimated burden to non-depository institutions. Other Federal agencies are responsible for estimating and reporting to OMB the total paperwork burden for the institutions for which they have administrative enforcement authority. They may, but are not required to, use the Bureau's burden estimation methodology.

Using the Bureau's burden estimation methodology, the total estimated burden under the changes to Regulation Z for all of the nearly 14,300 institutions subject to the final rule, including

[244] For purposes of this PRA analysis, references to ''creditors'' or ''lenders'' shall be deemed to refer collectively to commercial banks, savings institutions, credit unions, and mortgage companies (*i.e.,* non-depository lenders), unless otherwise stated. Moreover, reference to ''respondents'' shall generally mean all categories of entities identified in the sentence to which this footnote is appended, except as otherwise stated or if the context indicates otherwise.

Bureau respondents,[245] would be approximately 14,300 hours for one-time changes. The aggregate estimates of total burdens presented in this part VIII are based on estimated costs that are weighted averages across respondents. The Bureau expects that the amount of time required to implement each of the changes for a given institution may vary based on the size, complexity, and practices of the respondent.

B. Information Collection Requirements

The Bureau believes the following aspects of the final rule would be information collection requirements under the PRA.

1. Ability-To-Repay Verification and Documentation Requirements

Section 1026.43(c)(2) of the final rule contains eight specific criteria that a creditor must consider in assessing a consumer's repayment ability. Section 1026.43(c)(3) of the final rule requires creditors originating residential mortgage loans to verify the information that the creditor relies on in determining a consumer's repayment ability under § 1026.43(c)(2) using reasonably reliable third-party records. Section 1026.43(c)(4) of the final rule provides special rules for verification of a consumer's income or assets, and provides examples of records that can be used to verify the consumer's income or assets (for example, tax-return and payroll transcripts).

If a creditor chooses to make a qualified mortgage, different verification requirements apply to qualified mortgages. Creditors that originate qualified mortgages under § 1026.43(e)(2) or (f) must verify a consumer's income or assets, and current debt obligations, alimony and child support and must also verify a consumer's monthly debt-to-income ratio (or, in the case of qualified mortgages under § 1026.43(f), residual income). The final rule does not contain specific verification requirements for creditors originating qualified mortgages under § 1026.43(e)(4); however, such loans must comply with eligibility requirements (including underwriting requirements) of the GSEs or the Federal agency program applicable to the loan.

The Bureau estimates one-time and ongoing costs to respondents of complying with the requirements in § 1026.43 as follows.

One-time costs. The Bureau estimates that covered persons will incur one-time costs associated with reviewing the final rule. Specifically, the Bureau estimates that, for each covered person, one attorney and one compliance officer will each take 21 minutes (42 minutes in total) to read and review the sections of the **Federal Register** that describe the verification and documentation requirements, based on the length of the sections.

The Bureau estimates the one-time costs to the 135 depository institutions (including their depository affiliates) that are mortgage originator respondents of the Bureau under Regulation Z would be $7,700, or 94 hours. For the estimated 2,787 nondepository institutions and 77 privately insured credit unions that are subject to the Bureau's administrative enforcement authority, the Bureau is taking the half the burden for purposes of this PRA analysis. Accordingly, the Bureau estimates the total one-time costs across all relevant providers of reviewing the relevant sections of the **Federal Register** to be about 1000 hours or roughly $81,000.

Ongoing costs. The Bureau does not believe that the verification and documentation requirements of the final rule will result in additional ongoing costs for most covered persons. The Bureau understands that creditors generally have in place underwriting policies, procedures, and internal controls that require verification of the consumer's reasonably expected income or assets, employment status, debt obligations and simultaneous loans, credit history, and debt-to-income or residual income. Notably, in response to the 2011 ATR Proposal, commenters stated that most creditors today are already complying with the full ability-to-repay underwriting standards. For these institutions, there would be no additional burden as a result of the verification requirements in the final rule, since those institutions collect the required information in the normal course of business.

2. Record Retention Requirement

The final rule imposes new record retention requirements on covered persons. As discussed above in part V, the final rule requires creditors to retain evidence of compliance with § 1026.43 (containing the ability-to-repay/qualified mortgage provisions and prepayment penalty restrictions) for three years after consummation. *See* part V above, section-by-section analysis of § 1026.25.

The Bureau estimates one-time and ongoing costs to respondents of complying with the record retention requirement in § 1026.25 as follows.

One-time costs. The Bureau estimates that covered persons will incur one-time costs associated with reviewing the final rule. Specifically, the Bureau estimates that, for each covered person, one attorney and one compliance officer will each take 9 minutes (18 minutes in total) to read and review the sections of the final rule that describe the record retention requirements, based on the length of the sections.

The Bureau estimates the one-time costs to the 135 depository institutions (including their depository affiliates) that are mortgage originator respondents of the Bureau under Regulation Z would be $3,300, or 40 hours. For the estimated 2,787 nondepository institutions and 77 privately insured credit unions that are subject to the Bureau's administrative enforcement authority, the Bureau is taking the half the burden for purposes of this PRA analysis. Accordingly, the Bureau estimates the total one-time costs across all relevant providers of reviewing the relevant sections of the **Federal Register** to be about 430 hours or roughly $35,000.

Ongoing costs. The Bureau believes that any burden associated with the final rule's record keeping requirement will be minimal or *de minimis.* Under current rules, creditors must retain evidence of compliance with Regulation Z for two years after consummation; the final rule extends that period to three years after consummation for evidence of compliance with the ability-to-repay/qualified mortgage provisions and the prepayment penalty limitations in this final rule. The final rule clarifies that creditors need retain only enough information to reconstruct the required records.

The final rule clarifies that creditors need not maintain actual paper copies of the documentation used to underwrite a transaction. *See* comments 25(a)(2) and 25(c)(3)–1. For most covered persons, the required records will be kept in electronic form. This further reduces any burden associated with the final rule's record retention requirement for creditors that keep the required records in electronic form, as the only additional requirement will be to store data for an additional year, to

[245] There are 153 depository institutions (and their depository affiliates) that are subject to the Bureau's administrative enforcement authority. In addition there are 146 privately insured credit unions that are subject to the Bureau's administrative enforcement authority. For purposes of this PRA analysis, the Bureau's respondents under Regulation Z are 135 depository institutions that originate either open or closed-end mortgages; 77 privately insured credit unions that originate either open or closed-end mortgages; and an estimated 2,787 non-depository institutions that are subject to the Bureau's administrative enforcement authority. Unless otherwise specified, all references to burden hours and costs for the Bureau respondents for the collection under Regulation Z are based on a calculation that includes one half of burden for the estimated 2,787 nondepository institutions and 77 privately insured credit unions.

the extent such creditors are currently storing such data for the minimum period required by Regulation Z.

Furthermore, the Bureau believes that many creditors will retain such records for at least three years in the ordinary course of business, even in the absence of a change to record retention requirements, due to the Dodd-Frank Act's extension of the statute of limitations for civil liability for violations of the prepayment penalty provisions or ability-to-repay provisions (including the qualified mortgage provisions) to three years after the date of a violation. Even absent the rule, the Bureau believes that most creditors will retain records of compliance with § 1026.43 for the life of the loan, given that the statute allows borrowers to bring a defensive claim for recoupment or setoff in the event that a creditor or assignee initiates foreclosure proceedings.

C. Summary of Burden Hours

The below table summarizes the one time and annual burdens under Regulation Z associated with information collections affected by the final rule for Bureau respondents under the PRA. For the two collections, the one-time burden for Bureau respondents is approximately 1,570 hours.

The Consumer Financial Protection Bureau has a continuing interest in the public's opinions of our collections of information. At any time, comments regarding the burden estimate, or any other aspect of this collection of information, including suggestions for reducing the burden, may be sent to:

The Consumer Financial Protection Bureau (Attention: PRA Office), 1700 G Street NW., Washington, DC, 20552, or by the internet to *CFPB_Public_PRA@cfpb.gov.*

List of Subjects in 12 CFR Part 1026

Advertising, Consumer protection, Mortgages, Reporting and recordkeeping requirements, Truth in Lending.

Authority and Issuance

For the reasons set forth in the preamble, the Bureau amends Regulation Z, 12 CFR part 1026, as set forth below:

PART 1026—TRUTH IN LENDING (REGULATION Z)

■ 1. The authority citation for part 1026 continues to read as follows:

Authority: 12 U.S.C. 2601; 2603–2605, 2607, 2609, 2617, 5511, 5512, 5532, 5581; 15 U.S.C. 1601 *et seq.*

Subpart D—Miscellaneous

■ 2. Section 1026.25 is amended by:
■ A. Revising paragraph (a); and
■ B. Adding and reserving paragraphs (c)(1) and (c)(2).
■ C. Adding paragraph (c)(3).

The additions and revisions read as follows:

§ 1026.25 Record retention.

(a) *General rule.* A creditor shall retain evidence of compliance with this regulation, other than advertising requirements under §§ 1026.16 and 1026.24 and certain requirements for mortgage loans under paragraph (c) of this section, for two years after the date disclosures are required to be made or action is required to be taken. The administrative agencies responsible for enforcing the regulation may require a creditor under their jurisdictions to retain records for a longer period if necessary to carry out their enforcement responsibilities under section 108 of the Act.

* * * * *

(c) *Records related to certain requirements for mortgage loans.* (1) [Reserved]

(2) [Reserved]

(3) *Records related to minimum standards for transactions secured by a dwelling.* Notwithstanding paragraph (a) of this section, a creditor shall retain evidence of compliance with § 1026.43 of this regulation for three years after consummation of a transaction covered by that section.

Subpart E—Special Rules for Certain Home Mortgage Transactions

■ 3. Section 1026.32 is amended by:
■ A. Revising the section heading;
■ B. Revising paragraph (b)(1);
■ C. Removing and reserving paragraph (b)(2);
■ D. Adding paragraph (b)(3) through (6)

The additions and revisions read as follows:

§ 1026.32 Requirements for high-cost mortgages.

* * * * *

(b) *Definitions.* For purposes of this subpart, the following definitions apply:

(1) In connection with a closed-end credit transaction, *points and fees* means the following fees or charges that are known at or before consummation:

(i) All items included in the finance charge under § 1026.4(a) and (b), except that the following items are excluded:

(A) Interest or the time-price differential;

(B) Any premium or other charge imposed in connection with any Federal or State agency program for any guaranty or insurance that protects the creditor against the consumer's default or other credit loss;

(C) For any guaranty or insurance that protects the creditor against the consumer's default or other credit loss and that is not in connection with any Federal or State agency program:

(*1*) If the premium or other charge is payable after consummation, the entire amount of such premium or other charge; or

(*2*) If the premium or other charge is payable at or before consummation, the portion of any such premium or other charge that is not in excess of the amount payable under policies in effect at the time of origination under section 203(c)(2)(A) of the National Housing Act (12 U.S.C. 1709(c)(2)(A)), provided that the premium or charge is required to be refundable on a pro rata basis and the refund is automatically issued upon notification of the satisfaction of the underlying mortgage loan;

(D) Any bona fide third-party charge not retained by the creditor, loan originator, or an affiliate of either, unless the charge is required to be included in points and fees under paragraph (b)(1)(i)(C), (iii), or (iv) of this section;

(E) Up to two bona fide discount points paid by the consumer in connection with the transaction, if the interest rate without any discount does not exceed:

(*1*) The average prime offer rate, as defined in § 1026.35(a)(2), by more than one percentage point; or

(*2*) For purposes of paragraph (a)(1)(ii) of this section, for transactions that are secured by personal property, the average rate for a loan insured under Title I of the National Housing Act (12 U.S.C. 1702 *et seq.*) by more than one percentage point; and

(F) If no discount points have been excluded under paragraph (b)(1)(i)(E) of this section, then up to one bona fide discount point paid by the consumer in connection with the transaction, if the interest rate without any discount does not exceed:

(*1*) The average prime offer rate, as defined in § 1026.35(a)(2), by more than two percentage points; or

(*2*) For purposes of paragraph (a)(1)(ii) of this section, for transactions that are secured by personal property, the average rate for a loan insured under Title I of the National Housing Act (12 U.S.C. 1702 *et seq.*) by more than two percentage points;

(ii) All compensation paid directly or indirectly by a consumer or creditor to a loan originator, as defined in § 1026.36(a)(1), that can be attributed to that transaction at the time the interest rate is set;

(iii) All items listed in § 1026.4(c)(7) (other than amounts held for future payment of taxes), unless:

(A) The charge is reasonable;

(B) The creditor receives no direct or indirect compensation in connection with the charge; and

(C) The charge is not paid to an affiliate of the creditor;

(iv) Premiums or other charges payable at or before consummation for any credit life, credit disability, credit unemployment, or credit property insurance, or any other life, accident, health, or loss-of-income insurance for which the creditor is a beneficiary, or any payments directly or indirectly for any debt cancellation or suspension agreement or contract;

(v) The maximum prepayment penalty, as defined in paragraph (b)(6)(i) of this section, that may be charged or collected under the terms of the mortgage loan; and

(vi) The total prepayment penalty, as defined in paragraph (b)(6)(i) of this section, incurred by the consumer if the consumer refinances the existing mortgage loan with the current holder of the existing loan, a servicer acting on behalf of the current holder, or an affiliate of either.

(2) [Reserved]

(3) *Bona fide discount point*—(i) *Closed-end credit.* The term *bona fide discount point* means an amount equal to 1 percent of the loan amount paid by the consumer that reduces the interest rate or time-price differential applicable to the transaction based on a calculation that is consistent with established industry practices for determining the amount of reduction in the interest rate or time-price differential appropriate for the amount of discount points paid by the consumer.

(ii) [Reserved]

(4) *Total loan amount*—(i) *Closed-end credit.* The total loan amount for a closed-end credit transaction is calculated by taking the amount financed, as determined according to § 1026.18(b), and deducting any cost listed in § 1026.32(b)(1)(iii), (iv), or (vi) that is both included as points and fees under § 1026.32(b)(1) and financed by the creditor.

(ii) [Reserved]

(5) *Affiliate* means any company that controls, is controlled by, or is under common control with another company, as set forth in the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*).

(6) *Prepayment penalty*—(i) *Closed-end credit transactions.* For a closed-end credit transaction, *prepayment penalty* means a charge imposed for paying all or part of the transaction's principal before the date on which the principal is due, other than a waived, bona fide third-party charge that the creditor imposes if the consumer prepays all of the transaction's principal sooner than 36 months after consummation, provided, however, that interest charged consistent with the monthly interest accrual amortization method is not a prepayment penalty for extensions of credit insured by the Federal Housing Administration that are consummated before January 21, 2015.

(ii) [Reserved]

* * * * *

■ 4. Add § 1026.43 to read as follows:

§ 1026.43 Minimum standards for transactions secured by a dwelling.

(a) *Scope.* This section applies to any consumer credit transaction that is secured by a dwelling, as defined in § 1026.2(a)(19), including any real property attached to a dwelling, other than:

(1) A home equity line of credit subject to § 1026.40;

(2) A mortgage transaction secured by a consumer's interest in a timeshare plan, as defined in 11 U.S.C. 101(53(D)); or

(3) For purposes of paragraphs (c) through (f) of this section:

(i) A reverse mortgage subject to § 1026.33;

(ii) A temporary or ''bridge'' loan with a term of 12 months or less, such as a loan to finance the purchase of a new dwelling where the consumer plans to sell a current dwelling within 12 months or a loan to finance the initial construction of a dwelling; or

(iii) A construction phase of 12 months or less of a construction-to-permanent loan.

(b) *Definitions.* For purposes of this section:

(1) *Covered transaction* means a consumer credit transaction that is secured by a dwelling, as defined in § 1026.2(a)(19), including any real property attached to a dwelling, other than a transaction exempt from coverage under paragraph (a) of this section.

(2) *Fully amortizing payment* means a periodic payment of principal and interest that will fully repay the loan amount over the loan term.

(3) *Fully indexed rate* means the interest rate calculated using the index or formula that will apply after recast, as determined at the time of consummation, and the maximum margin that can apply at any time during the loan term.

(4) *Higher-priced covered transaction* means a covered transaction with an annual percentage rate that exceeds the average prime offer rate for a comparable transaction as of the date the interest rate is set by 1.5 or more percentage points for a first-lien covered transaction, or by 3.5 or more percentage points for a subordinate-lien covered transaction.

(5) *Loan amount* means the principal amount the consumer will borrow as reflected in the promissory note or loan contract.

(6) *Loan term* means the period of time to repay the obligation in full.

(7) *Maximum loan amount* means the loan amount plus any increase in principal balance that results from negative amortization, as defined in § 1026.18(s)(7)(v), based on the terms of the legal obligation assuming:

(i) The consumer makes only the minimum periodic payments for the maximum possible time, until the consumer must begin making fully amortizing payments; and

(ii) The maximum interest rate is reached at the earliest possible time.

(8) *Mortgage-related obligations* mean property taxes; premiums and similar charges identified in § 1026.4(b)(5), (7), (8), and (10) that are required by the creditor; fees and special assessments imposed by a condominium, cooperative, or homeowners association; ground rent; and leasehold payments.

(9) *Points and fees* has the same meaning as in § 1026.32(b)(1).

(10) *Prepayment penalty* has the same meaning as in § 1026.32(b)(6).

(11) *Recast* means:

(i) For an adjustable-rate mortgage, as defined in § 1026.18(s)(7)(i), the expiration of the period during which payments based on the introductory fixed interest rate are permitted under the terms of the legal obligation;

(ii) For an interest-only loan, as defined in § 1026.18(s)(7)(iv), the expiration of the period during which interest-only payments are permitted under the terms of the legal obligation; and

(iii) For a negative amortization loan, as defined in § 1026.18(s)(7)(v), the expiration of the period during which negatively amortizing payments are permitted under the terms of the legal obligation.

(12) *Simultaneous loan* means another covered transaction or home equity line of credit subject to § 1026.40 that will be secured by the same dwelling and made to the same consumer at or before consummation of the covered transaction or, if to be made after consummation, will cover closing costs of the first covered transaction.

(13) *Third-party record* means:

(i) A document or other record prepared or reviewed by an appropriate person other than the consumer, the creditor, or the mortgage broker, as defined in § 1026.36(a)(2), or an agent of the creditor or mortgage broker;

(ii) A copy of a tax return filed with the Internal Revenue Service or a State taxing authority;

(iii) A record the creditor maintains for an account of the consumer held by the creditor; or

(iv) If the consumer is an employee of the creditor or the mortgage broker, a document or other record maintained by the creditor or mortgage broker regarding the consumer's employment status or employment income.

(c) *Repayment ability*—(1) *General requirement.* A creditor shall not make a loan that is a covered transaction unless the creditor makes a reasonable and good faith determination at or before consummation that the consumer will have a reasonable ability to repay the loan according to its terms.

(2) *Basis for determination.* Except as provided otherwise in paragraphs (d), (e), and (f) of this section, in making the repayment ability determination required under paragraph (c)(1) of this section, a creditor must consider the following:

(i) The consumer's current or reasonably expected income or assets, other than the value of the dwelling, including any real property attached to the dwelling, that secures the loan;

(ii) If the creditor relies on income from the consumer's employment in determining repayment ability, the consumer's current employment status;

(iii) The consumer's monthly payment on the covered transaction, calculated in accordance with paragraph (c)(5) of this section;

(iv) The consumer's monthly payment on any simultaneous loan that the creditor knows or has reason to know will be made, calculated in accordance with paragraph (c)(6) of this section;

(v) The consumer's monthly payment for mortgage-related obligations;

(vi) The consumer's current debt obligations, alimony, and child support;

(vii) The consumer's monthly debt-to-income ratio or residual income in accordance with paragraph (c)(7) of this section; and

(viii) The consumer's credit history.

(3) *Verification using third-party records.* A creditor must verify the information that the creditor relies on in determining a consumer's repayment ability under § 1026.43(c)(2) using reasonably reliable third-party records, except that:

(i) For purposes of paragraph (c)(2)(i) of this section, a creditor must verify a consumer's income or assets that the creditor relies on in accordance with § 1026.43(c)(4);

(ii) For purposes of paragraph (c)(2)(ii) of this section, a creditor may verify a consumer's employment status orally if the creditor prepares a record of the information obtained orally; and

(iii) For purposes of paragraph (c)(2)(vi) of this section, if a creditor relies on a consumer's credit report to verify a consumer's current debt obligations and a consumer's application states a current debt obligation not shown in the consumer's credit report, the creditor need not independently verify such an obligation.

(4) *Verification of income or assets.* A creditor must verify the amounts of income or assets that the creditor relies on under § 1026.43(c)(2)(i) to determine a consumer's ability to repay a covered transaction using third-party records that provide reasonably reliable evidence of the consumer's income or assets. A creditor may verify the consumer's income using a tax-return transcript issued by the Internal Revenue Service (IRS). Examples of other records the creditor may use to verify the consumer's income or assets include:

(i) Copies of tax returns the consumer filed with the IRS or a State taxing authority;

(ii) IRS Form W–2s or similar IRS forms used for reporting wages or tax withholding;

(iii) Payroll statements, including military Leave and Earnings Statements;

(iv) Financial institution records;

(v) Records from the consumer's employer or a third party that obtained information from the employer;

(vi) Records from a Federal, State, or local government agency stating the consumer's income from benefits or entitlements;

(vii) Receipts from the consumer's use of check cashing services; and

(viii) Receipts from the consumer's use of a funds transfer service.

(5) *Payment calculation*—(i) *General rule.* Except as provided in paragraph (c)(5)(ii) of this section, a creditor must make the consideration required under paragraph (c)(2)(iii) of this section using:

(A) The fully indexed rate or any introductory interest rate, whichever is greater; and

(B) Monthly, fully amortizing payments that are substantially equal.

(ii) *Special rules for loans with a balloon payment, interest-only loans, and negative amortization loans.* A creditor must make the consideration required under paragraph (c)(2)(iii) of this section for:

(A) A loan with a balloon payment, as defined in § 1026.18(s)(5)(i), using:

(*1*) The maximum payment scheduled during the first five years after the date on which the first regular periodic payment will be due for a loan that is not a higher-priced covered transaction; or

(*2*) The maximum payment in the payment schedule, including any balloon payment, for a higher-priced covered transaction;

(B) An interest-only loan, as defined in § 1026.18(s)(7)(iv), using:

(*1*) The fully indexed rate or any introductory interest rate, whichever is greater; and

(*2*) Substantially equal, monthly payments of principal and interest that will repay the loan amount over the term of the loan remaining as of the date the loan is recast.

(C) A negative amortization loan, as defined in § 1026.18(s)(7)(v), using:

(*1*) The fully indexed rate or any introductory interest rate, whichever is greater; and

(*2*) Substantially equal, monthly payments of principal and interest that will repay the maximum loan amount over the term of the loan remaining as of the date the loan is recast.

(6) *Payment calculation for simultaneous loans.* For purposes of making the evaluation required under paragraph (c)(2)(iv) of this section, a creditor must consider, taking into account any mortgage-related obligations, a consumer's payment on a simultaneous loan that is:

(i) A covered transaction, by following paragraph (c)(5)of this section; or

(ii) A home equity line of credit subject to § 1026.40, by using the periodic payment required under the terms of the plan and the amount of credit to be drawn at or before consummation of the covered transaction.

(7) *Monthly debt-to-income ratio or residual income*—(i) *Definitions.* For purposes of this paragraph (c)(7), the following definitions apply:

(A) *Total monthly debt obligations.* The term *total monthly debt obligations* means the sum of: the payment on the covered transaction, as required to be calculated by paragraphs (c)(2)(iii) and (c)(5) of this section; simultaneous loans, as required by paragraphs (c)(2)(iv) and (c)(6) of this section; mortgage-related obligations, as required by paragraph (c)(2)(v) of this section; and current debt obligations, alimony, and child support, as required by paragraph (c)(2)(vi) of this section.

(B) *Total monthly income.* The term *total monthly income* means the sum of the consumer's current or reasonably expected income, including any income from assets, as required by paragraphs (c)(2)(i) and (c)(4) of this section.

(ii) *Calculations*— (A) *Monthly debt-to-income ratio.* If a creditor considers the consumer's monthly debt-to-income ratio under paragraph (c)(2)(vii) of this section, the creditor must consider the ratio of the consumer's total monthly debt obligations to the consumer's total monthly income.

(B) *Monthly residual income.* If a creditor considers the consumer's monthly residual income under paragraph (c)(2)(vii) of this section, the creditor must consider the consumer's remaining income after subtracting the consumer's total monthly debt obligations from the consumer's total monthly income.

(d) *Refinancing of non-standard mortgages*—(1) *Definitions.* For purposes of this paragraph (d), the following definitions apply:

(i) *Non-standard mortgage.* The term *non-standard mortgage* means a covered transaction that is:

(A) An adjustable-rate mortgage, as defined in § 1026.18(s)(7)(i), with an introductory fixed interest rate for a period of one year or longer;

(B) An interest-only loan, as defined in § 1026.18(s)(7)(iv); or

(C) A negative amortization loan, as defined in § 1026.18(s)(7)(v).

(ii) *Standard mortgage.* The term *standard mortgage* means a covered transaction:

(A) That provides for regular periodic payments that do not:

(*1*) Cause the principal balance to increase;

(*2*) Allow the consumer to defer repayment of principal; or

(*3*) Result in a balloon payment, as defined in § 1026.18(s)(5)(i);

(B) For which the total points and fees payable in connection with the transaction do not exceed the amounts specified in paragraph (e)(3) of this section;

(C) For which the term does not exceed 40 years;

(D) For which the interest rate is fixed for at least the first five years after consummation; and

(E) For which the proceeds from the loan are used solely for the following purposes:

(*1*) To pay off the outstanding principal balance on the non-standard mortgage; and

(*2*) To pay closing or settlement charges required to be disclosed under the Real Estate Settlement Procedures Act, 12 U.S.C. 2601 *et seq.*

(iii) *Refinancing.* The term *refinancing* has the same meaning as in § 1026.20(a).

(2) *Scope.* The provisions of this paragraph (d) apply to the refinancing of a non-standard mortgage into a standard mortgage when the following conditions are met:

(i) The creditor for the standard mortgage is the current holder of the existing non-standard mortgage or the servicer acting on behalf of the current holder;

(ii) The monthly payment for the standard mortgage is materially lower than the monthly payment for the non-standard mortgage, as calculated under paragraph (d)(5) of this section.

(iii) The creditor receives the consumer's written application for the standard mortgage no later than two months after the non-standard mortgage has recast.

(iv) The consumer has made no more than one payment more than 30 days late on the non-standard mortgage during the 12 months immediately preceding the creditor's receipt of the consumer's written application for the standard mortgage.

(v) The consumer has made no payments more than 30 days late during the six months immediately preceding the creditor's receipt of the consumer's written application for the standard mortgage; and

(vi) If the non-standard mortgage was consummated on or after January 10, 2014, the non-standard mortgage was made in accordance with paragraph (c) or (e) of this section, as applicable.

(3) *Exemption from repayment ability requirements.* A creditor is not required to comply with the requirements of paragraph (c) of this section if:

(i) The conditions in paragraph (d)(2) of this section are met; and

(ii) The creditor has considered whether the standard mortgage likely will prevent a default by the consumer on the non-standard mortgage once the loan is recast.

(4) *Offer of rate discounts and other favorable terms.* A creditor making a covered transaction under this paragraph (d) may offer to the consumer rate discounts and terms that are the same as, or better than, the rate discounts and terms that the creditor offers to new consumers, consistent with the creditor's documented underwriting practices and to the extent not prohibited by applicable State or Federal law.

(5) *Payment calculations.* For purposes of determining whether the consumer's monthly payment for a standard mortgage will be materially lower than the monthly payment for the non-standard mortgage, the following provisions shall be used:

(i) *Non-standard mortgage.* For purposes of the comparison conducted pursuant to paragraph (d)(2)(ii) of this section, the creditor must calculate the monthly payment for a non-standard mortgage based on substantially equal, monthly, fully amortizing payments of principal and interest using:

(A) The fully indexed rate as of a reasonable period of time before or after the date on which the creditor receives the consumer's written application for the standard mortgage;

(B) The term of the loan remaining as of the date on which the recast occurs, assuming all scheduled payments have been made up to the recast date and the payment due on the recast date is made and credited as of that date; and

(C) A remaining loan amount that is:

(*1*) For an adjustable-rate mortgage under paragraph (d)(1)(i)(A) of this section, the outstanding principal balance as of the date of the recast, assuming all scheduled payments have been made up to the recast date and the payment due on the recast date is made and credited as of that date;

(*2*) For an interest-only loan under paragraph (d)(1)(i)(B) of this section, the outstanding principal balance as of the date of the recast, assuming all scheduled payments have been made up to the recast date and the payment due on the recast date is made and credited as of that date; or

(*3*) For a negative amortization loan under paragraph (d)(1)(i)(C) of this section, the maximum loan amount, determined after adjusting for the outstanding principal balance.

(ii) *Standard mortgage.* For purposes of the comparison conducted pursuant to paragraph (d)(2)(ii) of this section, the monthly payment for a standard mortgage must be based on substantially equal, monthly, fully amortizing payments based on the maximum interest rate that may apply during the first five years after consummation.

(e) *Qualified mortgages*—(1) *Safe harbor and presumption of compliance*—(i) *Safe harbor for transactions that are not higher-priced covered transactions.* A creditor or assignee of a qualified mortgage, as defined in paragraphs (e)(2), (e)(4), or (f) of this section, that is not a higher-priced covered transaction, as defined in paragraph (b)(4) of this section, complies with the repayment ability requirements of paragraph (c) of this section.

(ii) *Presumption of compliance for higher-priced covered transactions.* (A) A creditor or assignee of a qualified mortgage, as defined in paragraphs (e)(2), (e)(4), or (f) of this section, that is a higher-priced covered transaction, as defined in paragraph (b)(4) of this section, is presumed to comply with the repayment ability requirements of paragraph (c) of this section.

(B) To rebut the presumption of compliance described in paragraph (e)(1)(ii)(A) of this section, it must be proven that, despite meeting the requirements of paragraphs (e)(2), (e)(4), or (f) of this section, the creditor did not make a reasonable and good faith determination of the consumer's repayment ability at the time of consummation, by showing that the consumer's income, debt obligations, alimony, child support, and the consumer's monthly payment (including mortgage-related obligations) on the covered transaction and on any simultaneous loans of which the creditor was aware at consummation would leave the consumer with insufficient residual income or assets other than the value of the dwelling (including any real property attached to the dwelling) that secures the loan with which to meet living expenses, including any recurring and material non-debt obligations of which the creditor was aware at the time of consummation.

(2) *Qualified mortgage defined—general.* Except as provided in paragraphs (e)(4) or (f) of this section, a qualified mortgage is a covered transaction:

(i) That provides for regular periodic payments that are substantially equal, except for the effect that any interest rate change after consummation has on the payment in the case of an adjustable-rate or step-rate mortgage, that do not:

(A) Result in an increase of the principal balance;

(B) Allow the consumer to defer repayment of principal, except as provided in paragraph (f) of this section; or

(C) Result in a balloon payment, as defined in § 1026.18(s)(5)(i), except as provided in paragraph (f) of this section;

(ii) For which the loan term does not exceed 30 years;

(iii) For which the total points and fees payable in connection with the loan do not exceed the amounts specified in paragraph (e)(3) of this section;

(iv) For which the creditor underwrites the loan, taking into account the monthly payment for mortgage-related obligations, using:

(A) The maximum interest rate that may apply during the first five years after the date on which the first regular periodic payment will be due; and

(B) Periodic payments of principal and interest that will repay either:

(*1*) The outstanding principal balance over the remaining term of the loan as of the date the interest rate adjusts to the maximum interest rate set forth in paragraph (e)(2)(iv)(A) of this section, assuming the consumer will have made all required payments as due prior to that date; or

(*2*) The loan amount over the loan term;

(v) For which the creditor considers and verifies at or before consummation the following:

(A) The consumer's current or reasonably expected income or assets other than the value of the dwelling (including any real property attached to the dwelling) that secures the loan, in accordance with appendix Q and paragraphs (c)(2)(i) and (c)(4) of this section; and

(B) The consumer's current debt obligations, alimony, and child support in accordance with appendix Q and paragraphs (c)(2)(vi) and (c)(3) of this section; and

(vi) For which the ratio of the consumer's total monthly debt to total monthly income at the time of consummation does not exceed 43 percent. For purposes of this paragraph (e)(2)(vi), the ratio of the consumer's total monthly debt to total monthly income is determined:

(A) Except as provided in paragraph (e)(2)(vi)(B) of this section, in accordance with the standards in appendix Q;

(B) Using the consumer's monthly payment on:

(*1*) The covered transaction, including the monthly payment for mortgage-related obligations, in accordance with paragraph (e)(2)(iv) of this section; and

(*2*) Any simultaneous loan that the creditor knows or has reason to know will be made, in accordance with paragraphs (c)(2)(iv) and (c)(6) of this section.

(3) *Limits on points and fees for qualified mortgages.* (i) A covered transaction is not a qualified mortgage unless the transaction's total points and fees, as defined in § 1026.32(b)(1), do not exceed:

(A) For a loan amount greater than or equal to $100,000 (indexed for inflation): 3 percent of the total loan amount;

(B) For a loan amount greater than or equal to $60,000 (indexed for inflation) but less than $100,000 (indexed for inflation): $3,000 (indexed for inflation);

(C) For a loan amount greater than or equal to $20,000 (indexed for inflation) but less than $60,000 (indexed for inflation): 5 percent of the total loan amount;

(D) For a loan amount greater than or equal to $12,500 (indexed for inflation) but less than $20,000 (indexed for inflation): $1,000 (indexed for inflation);

(E) For a loan amount less than $12,500 (indexed for inflation): 8 percent of the total loan amount.

(ii) The dollar amounts, including the loan amounts, in paragraph (e)(3)(i) of this section shall be adjusted annually on January 1 by the annual percentage change in the Consumer Price Index for All Urban Consumers (CPI–U) that was reported on the preceding June 1. See the official commentary to this paragraph (e)(3)(ii) for the current dollar amounts.

(4) *Qualified mortgage defined—special rules*—(i) *General.* Notwithstanding paragraph (e)(2) of this section, a qualified mortgage is a covered transaction that satisfies:

(A) The requirements of paragraphs (e)(2)(i) through (iii) of this section; and

(B) One or more of the criteria in paragraph (e)(4)(ii) of this section.

(ii) *Eligible loans.* A qualified mortgage under this paragraph (e)(4) must be one of the following at consummation:

(A) A loan that is eligible:

(*1*) To be purchased or guaranteed by the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation operating under the conservatorship or receivership of the Federal Housing Finance Agency pursuant to section 1367(a) of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (12 U.S.C. 4617(a)); or

(*2*) To be purchased or guaranteed by any limited-life regulatory entity succeeding the charter of either the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation pursuant to section 1367(i) of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (12 U.S.C. 4617(i));

(B) A loan that is eligible to be insured by the U.S. Department of Housing and Urban Development under the National Housing Act (12 U.S.C. 1707 *et seq.*);

(C) A loan that is eligible to be guaranteed the U.S. Department of Veterans Affairs;

(D) A loan that is eligible to be guaranteed by the U.S. Department of Agriculture pursuant to 42 U.S.C. 1472(h); or

(E) A loan that is eligible to be insured by the Rural Housing Service.

(iii) *Sunset of special rules.* (A) Each respective special rule described in paragraph (e)(4)(ii)(B), (C), (D), or (E) of this section shall expire on the effective date of a rule issued by each respective agency pursuant to its authority under TILA section 129C(b)(3)(ii) to define a qualified mortgage.

(B) Unless otherwise expired under paragraph (e)(4)(iii)(A) of this section, the special rules in this paragraph (e)(4) are available only for covered transactions consummated on or before January 10, 2021.

(f) *Balloon-payment qualified mortgages made by certain creditors*—(1) *Exemption.* Notwithstanding paragraph (e)(2) of this section, a qualified mortgage may provide for a balloon payment, provided:

(i) The loan satisfies the requirements for a qualified mortgage in paragraphs (e)(2)(i)(A), (e)(2)(ii), (e)(2)(iii), and (e)(2)(v) of this section, but without regard to the standards in appendix Q;

(ii) The creditor determines at or before consummation that the consumer can make all of the scheduled payments under the terms of the legal obligation, as described in paragraph (f)(1)(iv) of this section, together with the consumer's monthly payments for all mortgage-related obligations and excluding the balloon payment, from the consumer's current or reasonably expected income or assets other than the dwelling that secures the loan;

(iii) The creditor considers at or before consummation the consumer's monthly debt-to-income ratio or residual income and verifies the debt obligations and income used to determine that ratio in accordance with paragraph (c)(7) of this section, except that the calculation of the payment on the covered transaction for purposes of determining the consumer's total monthly debt obligations in (c)(7)(i)(A) shall be determined in accordance with paragraph (f)(iv)(A) of this section, together with the consumer's monthly payments for all mortgage-related obligations and excluding the balloon payment;

(iv) The legal obligation provides for:

(A) Scheduled payments that are substantially equal, calculated using an amortization period that does not exceed 30 years;

(B) An interest rate that does not increase over the term of the loan; and

(C) A loan term of five years or longer.

(v) The loan is not subject, at consummation, to a commitment to be acquired by another person, other than a person that satisfies the requirements of paragraph (f)(1)(vi) of this section; and

(vi) The creditor satisfies the requirements stated in § 1026.35(b)(2)(iii)(A), (B), and (C).

(2) *Post-consummation transfer of balloon-payment qualified mortgage.* A balloon-payment qualified mortgage, extended pursuant to paragraph (f)(1), immediately loses its status as a qualified mortgage under paragraph (f)(1) if legal title to the balloon-payment qualified mortgage is sold, assigned, or otherwise transferred to another person except when:

(i) The balloon-payment qualified mortgage is sold, assigned, or otherwise transferred to another person three years or more after consummation of the balloon-payment qualified mortgage;

(ii) The balloon-payment qualified mortgage is sold, assigned, or otherwise transferred to a creditor that satisfies the requirements of paragraph (f)(1)(vi) of this section;

(iii) The balloon-payment qualified mortgage is sold, assigned, or otherwise transferred to another person pursuant to a capital restoration plan or other action under 12 U.S.C. 1831o, actions or instructions of any person acting as conservator, receiver or bankruptcy trustee, an order of a State or Federal governmental agency with jurisdiction to examine the creditor pursuant to State or Federal law, or an agreement between the creditor and such an agency; or

(iv) The balloon-payment qualified mortgage is sold, assigned, or otherwise transferred pursuant to a merger of the creditor with another person or acquisition of the creditor by another person or of another person by the creditor.

(g) *Prepayment penalties*—(1) *When permitted.* A covered transaction must not include a prepayment penalty unless:

(i) The prepayment penalty is otherwise permitted by law; and

(ii) The transaction:

(A) Has an annual percentage rate that cannot increase after consummation;

(B) Is a qualified mortgage under paragraph (e)(2), (e)(4), or (f) of this section; and

(C) Is not a higher-priced mortgage loan, as defined in § 1026.35(a).

(2) *Limits on prepayment penalties.* A prepayment penalty:

(i) Must not apply after the three-year period following consummation; and

(ii) Must not exceed the following percentages of the amount of the outstanding loan balance prepaid:

(A) 2 percent, if incurred during the first two years following consummation; and

(B) 1 percent, if incurred during the third year following consummation.

(3) *Alternative offer required.* A creditor must not offer a consumer a covered transaction with a prepayment penalty unless the creditor also offers the consumer an alternative covered transaction without a prepayment penalty and the alternative covered transaction:

(i) Has an annual percentage rate that cannot increase after consummation and has the same type of interest rate as the covered transaction with a prepayment penalty; for purposes of this paragraph (g), the term ''type of interest rate'' refers to whether a transaction:

(A) Is a fixed-rate mortgage, as defined in § 1026.18(s)(7)(iii); or

(B) Is a step-rate mortgage, as defined in § 1026.18(s)(7)(ii);

(ii) Has the same loan term as the loan term for the covered transaction with a prepayment penalty;

(iii) Satisfies the periodic payment conditions under paragraph (e)(2)(i) of this section;

(iv) Satisfies the points and fees conditions under paragraph (e)(2)(iii) of this section, based on the information known to the creditor at the time the transaction is offered; and

(v) Is a transaction for which the creditor has a good faith belief that the consumer likely qualifies, based on the information known to the creditor at the time the creditor offers the covered transaction without a prepayment penalty.

(4) *Offer through a mortgage broker.* If the creditor offers a covered transaction with a prepayment penalty to the consumer through a mortgage broker, as defined in § 1026.36(a)(2), the creditor must:

(i) Present the mortgage broker an alternative covered transaction without a prepayment penalty that satisfies the requirements of paragraph (g)(3) of this section; and

(ii) Establish by agreement that the mortgage broker must present the consumer an alternative covered transaction without a prepayment penalty that satisfies the requirements of paragraph (g)(3) of this section, offered by:

(A) The creditor; or

(B) Another creditor, if the transaction offered by the other creditor has a lower interest rate or a lower total dollar amount of discount points and origination points or fees.

(5) *Creditor that is a loan originator.* If the creditor is a loan originator, as defined in § 1026.36(a)(1), and the creditor presents the consumer a covered transaction offered by a person to which the creditor would assign the covered transaction after consummation, the creditor must present the consumer an alternative covered transaction without a prepayment penalty that satisfies the requirements of paragraph (g)(3) of this section, offered by:

(i) The assignee; or

(ii) Another person, if the transaction offered by the other person has a lower interest rate or a lower total dollar amount of origination discount points and points or fees.

(6) *Applicability.* This paragraph (g) applies only if a covered transaction is consummated with a prepayment penalty and is not violated if:

(i) A covered transaction is consummated without a prepayment penalty; or

(ii) The creditor and consumer do not consummate a covered transaction.

(h) *Evasion; open-end credit.* In connection with credit secured by a consumer's dwelling that does not meet the definition of open-end credit in § 1026.2(a)(20), a creditor shall not structure the loan as an open-end plan to evade the requirements of this section.

5. Reserved appendices N, O, and P are added, and appendix Q is added to read as follows:

Appendix N to Part 1026—[Reserved]

Appendix O to Part 1026—[Reserved]

Appendix P to Part 1026—[Reserved]

Appendix Q to Part 1026—Standards for Determining Monthly Debt and Income

Section 1026.43(e)(2)(vi) provides that, to satisfy the requirements for a qualified mortgage under § 1026.43(e)(2), the ratio of the consumer's total monthly debt to total monthly income at the time of consummation cannot exceed 43 percent. Section 1026.43(e)(2)(vi)(A) requires the creditor to calculate the ratio of the consumer's total monthly debt to total monthly income using the following standards, with additional requirements for calculating debt and income appearing in § 1026.43(e)(2)(vi)(B).

I. Consumer Eligibility

A. Stability of Income.

1. *Effective Income.* Income may not be used in calculating the consumer's income ratios if it comes from any source that cannot be verified, is not stable, or will not continue.

2. *Verifying Employment History.*

a. The creditor must verify the consumer's employment for the most recent two full years, and the consumer must:

i. Explain any gaps in employment that span one or more months, and

ii. Indicate if he/she was in school or the military for the recent two full years, providing evidence supporting this claim, such as college transcripts, or discharge papers.

b. Allowances can be made for seasonal employment, typical for the building trades and agriculture, if documented by the creditor.

Note: A consumer with a 25 percent or greater ownership interest in a business is considered self-employed and will be evaluated as a self-employed consumer for underwriting purposes.

3. *Analyzing a Consumer's Employment Record.*

a. When analyzing the probability of continued employment, creditors must examine:

i. The consumer's past employment record;

ii. Qualifications for the position;

iii. Previous training and education; and

iv. The employer's confirmation of continued employment.

b. Favorably consider a consumer for a mortgage if he/she changes jobs frequently within the same line of work, but continues to advance in income or benefits. In this analysis, income stability takes precedence over job stability.

4. *Consumers Returning to Work After an Extended Absence.* A consumer's income may be considered effective and stable when recently returning to work after an extended absence if he/she:

a. Is employed in the current job for six months or longer; and

b. Can document a two-year work history prior to an absence from employment using:

i. Traditional employment verifications; and/or

ii. Copies of IRS Form W–2s or pay stubs.

Note: An acceptable employment situation includes individuals who took several years off from employment to raise children, then returned to the workforce.

c. Important: Situations not meeting the criteria listed above may not be used in qualifying. Extended absence is defined as six months.

B. Salary, Wage and Other Forms of Income.

1. *General Policy on Consumer Income Analysis.*

a. The income of each consumer who will be obligated for the mortgage debt must be analyzed to determine whether his/her income level can be reasonably expected to continue through at least the first three years of the mortgage loan.

b. In most cases, a consumer's income is limited to salaries or wages. Income from other sources can be considered as effective, when properly verified and documented by the creditor.

Notes:

i. Effective income for consumers planning to retire during the first three-year period must include the amount of:

a. Documented retirement benefits;

b. Social Security payments; or

c. Other payments expected to be received in retirement.

ii. Creditors must not ask the consumer about possible, future maternity leave.

2. *Overtime and Bonus Income.*

a. Overtime and bonus income can be used to qualify the consumer if he/she has received this income for the past two years, and it will likely continue. If the employment verification states that the overtime and bonus income is unlikely to continue, it may not be used in qualifying.

b. The creditor must develop an average of bonus or overtime income for the past two years. Periods of overtime and bonus income less than two years may be acceptable, provided the creditor can justify and document in writing the reason for using the income for qualifying purposes.

3. *Establishing an Overtime and Bonus Income Earning Trend.*

a. The creditor must establish and document an earnings trend for overtime and bonus income. If either type of income shows a continual decline, the creditor must document in writing a sound rationalization for including the income when qualifying the consumer.

b. A period of more than two years must be used in calculating the average overtime and bonus income if the income varies significantly from year to year.

4. *Qualifying Part-Time Income.*

a. Part-time and seasonal income can be used to qualify the consumer if the creditor documents that the consumer has worked the part-time job uninterrupted for the past two years, and plans to continue. Many low and moderate income families rely on part-time and seasonal income for day to day needs, and creditors should not restrict consideration of such income when qualifying these consumers.

b. Part-time income received for less than two years may be included as effective income, provided that the creditor justifies and documents that the income is likely to continue.

c. Part-time income not meeting the qualifying requirements may not be used in qualifying.

Note: For qualifying purposes, ''part-time'' income refers to employment taken to supplement the consumer's income from regular employment; part-time employment is not a primary job and it is worked less than 40 hours.

5. *Income from Seasonal Employment.*

a. Seasonal income is considered uninterrupted, and may be used to qualify the consumer, if the creditor documents that the consumer:

i. Has worked the same job for the past two years, and

ii. Expects to be rehired the next season.

b. Seasonal employment includes:

i. Umpiring baseball games in the summer; or

ii. Working at a department store during the holiday shopping season.

6. *Primary Employment Less Than 40 Hour Work Week.*

a. When a consumer's primary employment is less than a typical 40-hour work week, the creditor should evaluate the stability of that income as regular, on-going primary employment.

b. Example: A registered nurse may have worked 24 hours per week for the last year. Although this job is less than the 40-hour work week, it is the consumer's primary employment, and should be considered effective income.

7. *Commission Income.*

a. Commission income must be averaged over the previous two years. To qualify commission income, the consumer must provide:

i. Copies of signed tax returns for the last two years; and

ii. The most recent pay stub.

b. Consumers whose commission income was received for more than one year, but less than two years may be considered favorably if the underwriter can:

i. Document the likelihood that the income will continue, and

ii. Soundly rationalize accepting the commission income.

Notes:

i. Unreimbursed business expenses must be subtracted from gross income.

ii. A commissioned consumer is one who receives more than 25 percent of his/her annual income from commissions.

iii. A tax transcript obtained directly from the IRS may be used in lieu of signed tax returns, and the cost of the transcript may be charged to the consumer.

8. *Qualifying Commission Income Earned for Less Than One Year.*

a. Commission income earned for less than one year is not considered effective income. Exceptions may be made for situations in which the consumer's compensation was changed from salary to commission within a similar position with the same employer.

b. A consumer may also qualify when the portion of earnings not attributed to commissions would be sufficient to qualify the consumer for the mortgage.

9. *Employer Differential Payments.* If the employer subsidizes a consumer's mortgage payment through direct payments, the amount of the payments:

a. Is considered gross income, and

b. Cannot be used to offset the mortgage payment directly, even if the employer pays the servicing creditor directly.

10. *Retirement Income.* Retirement income must be verified from the former employer, or from Federal tax returns. If any retirement income, such as employer pensions or 401(k)'s, will cease within the first full three years of the mortgage loan, such income may not be used in qualifying.

11. *Social Security Income.* Social Security income must be verified by the Social Security Administration or on Federal tax returns. If any benefits expire within the first full three years of the loan, the income source may not be used in qualifying.

Notes:

i. The creditor must obtain a complete copy of the current awards letter.

ii. Not all Social Security income is for retirement-aged recipients; therefore, documented continuation is required.

iii. Some portion of Social Security income may be ''grossed up'' if deemed nontaxable by the IRS.

12. *Automobile Allowances and Expense Account Payments.*

a. Only the amount by which the consumer's automobile allowance or expense account payments exceed actual expenditures may be considered income.

b. To establish the amount to add to gross income, the consumer must provide the following:

i. IRS Form 2106, Employee Business Expenses, for the previous two years; and

ii. Employer verification that the payments will continue.

c. If the consumer uses the standard per-mile rate in calculating automobile expenses, as opposed to the actual cost method, the portion that the IRS considers depreciation may be added back to income.

d. Expenses that must be treated as recurring debt include:

i. The consumer's monthly car payment; and

ii. Any loss resulting from the calculation of the difference between the actual expenditures and the expense account allowance.

C. Consumers Employed by a Family Owned Business.

1. *Income Documentation Requirement.*

In addition to normal employment verification, a consumer employed by a family owned business is required to provide evidence that he/she is not an owner of the business, which may include:

a. Copies of signed personal tax returns, or

b. A signed copy of the corporate tax return showing ownership percentage.

Note: A tax transcript obtained directly from the IRS may be used in lieu of signed tax returns, and the cost of the transcript may be charged to the consumer.

D. General Information on Self-Employed Consumers and Income Analysis.

1. *Definition: Self Employed Consumer.* A consumer with a 25 percent or greater ownership interest in a business is considered self-employed.

2. *Types of Business Structures.* There are four basic types of business structures. They include:

a. Sole proprietorships;

b. Corporations;

c. Limited liability or ''S'' corporations; and

d. Partnerships.

3. *Minimum Length of Self Employment.*

a. Income from self-employment is considered stable, and effective, if the consumer has been self-employed for two or more years.

b. Due to the high probability of failure during the first few years of a business, the requirements described in the table below are necessary for consumers who have been self-employed for less than two years.

If the period of self-employment is:	Then:
Between one and two years	To be eligible for a mortgage loan, the individual must have at least two years of documented previous successful employment in the line of work in which the individual is self-employed, or in a related occupation. Note: A combination of one year of employment and formal education or training in the line of work in which the individual is self-employed or in a related occupation is also acceptable.
Less than one year	The income from the consumer may not be considered effective income.

4. *General Documentation Requirements for Self Employed Consumers.* Self-employed consumers must provide the following documentation:

a. Signed, dated individual tax returns, with all applicable tax schedules for the most recent two years;

b. For a corporation, ''S'' corporation, or partnership, signed copies of Federal business income tax returns for the last two years, with all applicable tax schedules;

c. Year to date profit and loss (P&L) statement and balance sheet; and

d. Business credit report for corporations and ''S'' corporations.

5. *Establishing a Consumer's Earnings Trend.*

a. When qualifying a consumer for a mortgage loan, the creditor must establish the consumer's earnings trend from the previous two years using the consumer's tax returns.

b. If a consumer:

i. Provides quarterly tax returns, the income analysis may include income through the period covered by the tax filings, or

ii. Is not subject to quarterly tax returns, or does not file them, then the income shown on the P&L statement may be included in the analysis, provided the income stream based on the P&L is consistent with the previous years' earnings.

c. If the P&L statements submitted for the current year show an income stream considerably greater than what is supported by the previous year's tax returns, the creditor must base the income analysis solely on the income verified through the tax returns.

d. If the consumer's earnings trend for the previous two years is downward and the most recent tax return or P&L is less than the prior year's tax return, the consumer's most recent year's tax return or P&L must be used to calculate his/her income.

6. *Analyzing the Business's Financial Strength:*

a. To determine if the business is expected to generate sufficient income for the consumer's needs, the creditor must carefully analyze the business's financial strength, including the:

i. Source of the business's income;

ii. General economic outlook for similar businesses in the area.

b. Annual earnings that are stable or increasing are acceptable, while businesses that show a significant decline in income over the analysis period are not acceptable.

E. Income Analysis: Individual Tax Returns (IRS Form 1040).

1. *General Policy on Adjusting Income Based on a Review of IRS Form 1040.* The amount shown on a consumer's IRS Form 1040 as adjusted gross income must either be increased or decreased based on the creditor's analysis of the individual tax return and any related tax schedules.

2. *Guidelines for Analyzing IRS Form 1040.* The table below contains guidelines for analyzing IRS Form 1040:

IRS Form 1040 heading	Description
Wages, Salaries and Tips	An amount shown under this heading may indicate that the individual: • Is a salaried employee of a corporation, or • Has other sources of income. This section may also indicate that the spouse is employed, in which case the spouse's income must be subtracted from the consumer's adjusted gross income.
Business Income and Loss (from Schedule C)	Sole proprietorship income calculated on Schedule C is business income. Depreciation or depletion may be added back to the adjusted gross income.
Rents, Royalties, Partnerships (from Schedule E)	Any income received from rental properties or royalties may be used as income, after adding back any depreciation shown on Schedule E.
Capital Gain and Losses (from Schedule D)	Capital gains or losses generally occur only one time, and should not be considered when determining effective income. However, if the individual has a constant turnover of assets resulting in gains or losses, the capital gain or loss must be considered when determining the income. Three years' tax returns are required to evaluate an earning trend. If the trend: • Results in a gain, it may be added as effective income, or • Consistently shows a loss, it must be deducted from the total income. Creditor must document anticipated continuation of income through verified assets. *Example:* A creditor can consider the capital gains for an individual who purchases old houses, remodels them, and sells them for profit.
Interest and Dividend Income (from Schedule B)	This taxable/tax-exempt income may be added back to the adjusted gross income only if it: • Has been received for the past two years; and • Is expected to continue. If the interest-bearing asset will be liquidated as a source of the cash investment, the creditor must appropriately adjust the amount.
Farm Income or Loss (from Schedule F)	Any depreciation shown on Schedule F may be added back to the adjusted gross income.
IRA Distributions, Pensions, Annuities, and Social Security Benefits	The non-taxable portion of these items may be added back to the adjusted gross income, if the income is expected to continue for the first three years of the mortgage.
Adjustments to Income	Adjustments to income may be added back to the adjusted gross income if they are: • IRA and Keogh retirement deductions; • Penalties on early withdrawal of savings; • Health insurance deductions; and • Alimony payments.
Employee Business Expenses	Employee business expenses are actual cash expenses that must be deducted from the adjusted gross income.

F. Income Analysis: Corporate Tax Returns (IRS Form 1120).

1. *Description: Corporation.* A corporation is a State-chartered business owned by its stockholders.

2. *Need To Obtain Consumer Percentage of Ownership Information.*

a. Corporate compensation to the officers, generally in proportion to the percentage of ownership, is shown on the:

i. Corporate tax return IRS Form 1120; and

ii. Individual tax returns.

b. When a consumer's percentage of ownership does not appear on the tax returns, the creditor must obtain the information from the corporation's accountant, along with evidence that the consumer has the right to any compensation.

3. *Analyzing Corporate Tax Returns.*

a. In order to determine a consumer's self-employed income from a corporation the adjusted business income must:

i. Be determined; and

ii. Multiplied by the consumer's percentage of ownership in the business.

b. The table below describes the items found on IRS Form 1120 for which an adjustment must be made in order to determine adjusted business income.

Adjustment item	Description of adjustment
Depreciation and Depletion	Add the corporation's depreciation and depletion back to the after-tax income.
Taxable Income	Taxable income is the corporation's net income before Federal taxes. Reduce taxable income by the tax liability.
Fiscal Year vs. Calendar Year	If the corporation operates on a fiscal year that is different from the calendar year, an adjustment must be made to relate corporate income to the individual tax return.
Cash Withdrawals	The consumer's withdrawal of cash from the corporation may have a severe negative impact on the corporation's ability to continue operating.

G. Income Analysis: ''S'' Corporation Tax Returns (IRS Form 1120S).

1. *Description: ''S'' Corporation.*

a. An ''S'' corporation is generally a small, start-up business, with gains and losses passed to stockholders in proportion to each stockholder's percentage of business ownership.

b. Income for owners of ''S'' corporations comes from IRS Form W–2 wages, and is taxed at the individual rate. The IRS Form 1120S, Compensation of Officers line item is transferred to the consumer's individual IRS Form 1040.

2. *Analyzing ''S'' Corporation Tax Returns.*

a. ''S'' corporation depreciation and depletion may be added back to income in proportion to the consumer's share of the corporation's income.

b. In addition, the income must also be reduced proportionately by the total obligations payable by the corporation in less than one year.

c. Important: The consumer's withdrawal of cash from the corporation may have a severe negative impact on the corporation's ability to continue operating, and must be considered in the income analysis.

H. Income Analysis: Partnership Tax Returns (IRS Form 1065).

1. *Description: Partnership.*

a. A partnership is formed when two or more individuals form a business, and share in profits, losses, and responsibility for running the company.

b. Each partner pays taxes on his/her proportionate share of the partnership's net income.

2. *Analyzing Partnership Tax Returns.*

a. Both general and limited partnerships report income on IRS Form 1065, and the partners' share of income is carried over to Schedule E of IRS Form 1040.

b. The creditor must review IRS Form 1065 to assess the viability of the business. Both depreciation and depletion may be added back to the income in proportion to the consumer's share of income.

c. Income must also be reduced proportionately by the total obligations payable by the partnership in less than one year.

d. Important: Cash withdrawals from the partnership may have a severe negative impact on the partnership's ability to continue operating, and must be considered in the income analysis.

II. Non-Employment Related Consumer Income

A. Alimony, Child Support, and Maintenance Income Criteria. Alimony, child support, or maintenance income may be considered effective, if:

1. Payments are likely to be received consistently for the first three years of the mortgage;

2. The consumer provides the required documentation, which includes a copy of the:

i. Final divorce decree;

ii. Legal separation agreement;

iii. Court order; or

iv. Voluntary payment agreement; and

3. The consumer can provide acceptable evidence that payments have been received during the last 12 months, such as:

i. Cancelled checks;

ii. Deposit slips;

iii. Tax returns; or

iv. Court records.

Notes:

i. Periods less than 12 months may be acceptable, provided the creditor can adequately document the payer's ability and willingness to make timely payments.

ii. Child support may be ''grossed up'' under the same provisions as non-taxable income sources.

B. Investment and Trust Income.

1. *Analyzing Interest and Dividends.*

a. Interest and dividend income may be used as long as tax returns or account statements support a two-year receipt history. This income must be averaged over the two years.

b. Subtract any funds that are derived from these sources, and are required for the cash investment, before calculating the projected interest or dividend income.

2. *Trust Income.*

a. Income from trusts may be used if guaranteed, constant payments will continue for at least the first three years of the mortgage term.

b. Required trust income documentation includes a copy of the Trust Agreement or other trustee statement, confirming the:

i. Amount of the trust;

ii. Frequency of distribution; and

iii. Duration of payments.

c. Trust account funds may be used for the required cash investment if the consumer provides adequate documentation that the withdrawal of funds will not negatively affect income. The consumer may use funds from the trust account for the required cash investment, but the trust income used to determine repayment ability cannot be affected negatively by its use.

3. *Notes Receivable Income.*

a. In order to include notes receivable income to qualify a consumer, he/she must provide:

i. A copy of the note to establish the amount and length of payment, and

ii. Evidence that these payments have been consistently received for the last 12 months through deposit slips, cancelled checks, or tax returns.

b. If the consumer is not the original payee on the note, the creditor must establish that the consumer is now a holder in due course, and able to enforce the note.

4. *Eligible Investment Properties.*

Follow the steps in the table below to calculate an investment property's income or loss if the property to be subject to a mortgage is an eligible investment property.

1	Subtract the monthly payment (PITI) from the monthly net rental income of the subject property. Note: Calculate the monthly net rental by taking the gross rents, and subtracting the 25 percent reduction for vacancies and repairs.
2	Does the calculation in Step 1 yield a positive number? • If *yes,* add the number to the consumer's monthly gross income. • If *no,* and the calculation yields a negative number, consider it a recurring monthly obligation.

C. Military, Government Agency, and Assistance Program Income.

1. *Military Income.*

a. Military personnel not only receive base pay, but oftentimes are entitled to additional forms of pay, such as:

i. Income from variable housing allowances;

ii. Clothing allowances;

iii. Flight or hazard pay;

iv. Rations; and

v. Proficiency pay.

b. These types of additional pay are acceptable when analyzing a consumer's income as long as the probability of such pay to continue is verified in writing.

Note: The tax-exempt nature of some of the above payments should also be considered.

2. *VA Benefits.*

a. Direct compensation for service-related disabilities from the Department of Veterans Affairs (VA) is acceptable, provided the creditor receives documentation from the VA.

b. Education benefits used to offset education expenses are not acceptable.

3. *Government Assistance Programs.*

a. Income received from government assistance programs is acceptable as long as the paying agency provides documentation indicating that the income is expected to continue for at least three years.

b. If the income from government assistance programs will not be received for at least three years, it may not be used in qualifying.

c. Unemployment income must be documented for two years, and there must be reasonable assurance that this income will continue. This requirement may apply to seasonal employment.

4. *Mortgage Credit Certificates.*

a. If a government entity subsidizes the mortgage payments either through direct payments or tax rebates, these payments may be considered as acceptable income.

b. Either type of subsidy may be added to gross income, or used directly to offset the mortgage payment, before calculating the qualifying ratios.

5. *Homeownership Subsidies.*

a. A monthly subsidy may be treated as income, if a consumer is receiving subsidies under the housing choice voucher home ownership option from a public housing agency (PHA). Although continuation of the homeownership voucher subsidy beyond the first year is subject to Congressional appropriation, for the purposes of underwriting, the subsidy will be assumed to continue for at least three years.

b. If the consumer is receiving the subsidy directly, the amount received is treated as income. The amount received may also be treated as nontaxable income and be ''grossed up'' by 25 percent, which means that the amount of the subsidy, plus 25 percent of that subsidy may be added to the consumer's income from employment and/or other sources.

c. Creditors may treat this subsidy as an ''offset'' to the monthly mortgage payment (that is, reduce the monthly mortgage payment by the amount of the home ownership assistance payment before dividing by the monthly income to determine the payment-to-income and debt-to-income ratios). The subsidy payment must not pass through the consumer's hands.

d. The assistance payment must be:

i. Paid directly to the servicing creditor; or

ii. Placed in an account that only the servicing creditor may access.

Note: Assistance payments made directly to the consumer must be treated as income.

D. Rental Income.

1. *Analyzing the Stability of Rental Income.*

a. Rent received for properties owned by the consumer is acceptable as long as the creditor can document the stability of the rental income through:

i. A current lease;

ii. An agreement to lease, or

iii. A rental history over the previous 24 months that is free of unexplained gaps greater than three months (such gaps could be explained by student, seasonal, or military renters, or property rehabilitation).

b. A separate schedule of real estate is not required for rental properties as long as all properties are documented on the Uniform Residential Loan Application.

Note: The underwriting analysis may not consider rental income from any property being vacated by the consumer, except under the circumstances described below.

2. *Rental Income From Consumer Occupied Property.*

a. The rent for multiple unit property where the consumer resides in one or more units and charges rent to tenants of other units may be used for qualifying purposes.

b. Projected rent for the tenant-occupied units only may:

i. Be considered gross income, only after deducting vacancy and maintenance factors, and

ii. Not be used as a direct offset to the mortgage payment.

3. *Income from Roommates in a Single Family Property.*

a. Income from roommates in a single family property occupied as the consumer's primary residence is not acceptable. Rental income from boarders however, is acceptable, if the boarders are related by blood, marriage, or law.

b. The rental income may be considered effective, if shown on the consumer's tax return. If not on the tax return, rental income paid by the boarder may not be used in qualifying.

4. *Documentation Required To Verify Rental Income.* Analysis of the following required documentation is necessary to verify all consumer rental income:

a. IRS Form 1040 Schedule E; and

b. Current leases/rental agreements.

5. *Analyzing IRS Form 1040 Schedule E.*

a. The IRS Form 1040 Schedule E is required to verify all rental income. Depreciation shown on Schedule E may be added back to the net income or loss.

b. Positive rental income is considered gross income for qualifying purposes, while negative income must be treated as a recurring liability.

c. The creditor must confirm that the consumer still owns each property listed, by comparing Schedule E with the real estate owned section of the URLA.

6. *Using Current Leases To Analyze Rental Income.*

a. The consumer can provide a current signed lease or other rental agreement for a property that was acquired since the last income tax filing, and is not shown on Schedule E.

b. In order to calculate the rental income:

i. Reduce the gross rental amount by 25 percent for vacancies and maintenance;

ii. Subtract PITI and any homeowners association dues; and

iii. Apply the resulting amount to income, if positive, or recurring debts, if negative.

7. *Exclusion of Rental Income From Property Being Vacated by the Consumer.* Underwriters may not consider any rental income from a consumer's principal residence that is being vacated in favor of another principal residence, except under the conditions described below:

Notes:

i. This policy assures that a consumer either has sufficient income to make both mortgage payments without any rental income, or has an equity position not likely to result in defaulting on the mortgage on the property being vacated.

ii. This applies solely to a principal residence being vacated in favor of another principal residence. It does not apply to existing rental properties disclosed on the loan application and confirmed by tax returns (Schedule E of form IRS 1040).

8. *Policy Exceptions Regarding the Exclusion of Rental Income From a Principal Residence Being Vacated by a Consumer.*

When a consumer vacates a principal residence in favor of another principal residence, the rental income, reduced by the appropriate vacancy factor, may be considered in the underwriting analysis under the circumstances listed in the table below.

Exception	Description
Relocations	The consumer is relocating with a new employer, or being transferred by the current employer to an area not within reasonable and locally-recognized commuting distance. A properly executed lease agreement (that is, a lease signed by the consumer and the lessee) of at least one year's duration after the loan is closed is required. Note: Underwriters should also obtain evidence of the security deposit and/or evidence the first month's rent was paid to the homeowner.
Sufficient Equity in Vacated Property	The consumer has a loan-to-value ratio of 75 percent or less, as determined either by: • A current (no more than six months old) residential appraisal, or • Comparing the unpaid principal balance to the original sales price of the property. Note: The appraisal, in addition to using forms Fannie Mae1004/Freddie Mac 70, may be an exterior-only appraisal using form Fannie Mae/Freddie Mac 2055, and for condominium units, form Fannie Mae 1075/Freddie Mac 466.

E. Non Taxable and Projected Income.

1. *Types of Non Taxable Income.*

Certain types of regular income may not be subject to Federal tax. Such types of nontaxable income include:

a. Some portion of Social Security, some Federal government employee retirement income, Railroad Retirement Benefits, and some State government retirement income:

b. Certain types of disability and public assistance payments;

c. Child support;

d. Military allowances; and

e. Other income that is documented as being exempt from Federal income taxes.

2. *Adding Non Taxable Income to a Consumer's Gross Income.*

a. The amount of continuing tax savings attributed to regular income not subject to Federal taxes may be added to the consumer's gross income.

b. The percentage of non-taxable income that may be added cannot exceed the appropriate tax rate for the income amount. Additional allowances for dependents are not acceptable.

c. The creditor:

i. Must document and support the amount of income grossed up for any non-taxable income source, and

ii. Should use the tax rate used to calculate the consumer's last year's income tax.

Note: If the consumer is not required to file a Federal tax return, the tax rate to use is 25 percent.

3. *Analyzing Projected Income.*

a. Projected or hypothetical income is not acceptable for qualifying purposes. However, exceptions are permitted for income from the following sources:

i. Cost-of-living adjustments;

ii. Performance raises; and

iii. Bonuses.

b. For the above exceptions to apply, the income must be:

i. Verified in writing by the employer; and

ii. Scheduled to begin within 60 days of loan closing.

4. *Project Income for New Job.*

a. Projected income is acceptable for qualifying purposes for a consumer scheduled to start a new job within 60 days of loan closing if there is a guaranteed, non-revocable contract for employment.

b. The creditor must verify that the consumer will have sufficient income or cash reserves to support the mortgage payment and any other obligations between loan closing and the start of employment. Examples of this type of scenario are teachers whose contracts begin with the new school year, or physicians beginning a residency after the loan closes fall under this category.

c. The loan is not eligible for endorsement if the loan closes more than 60 days before the consumer starts the new job. To be eligible for endorsement, the creditor must obtain from the consumer a pay stub or other acceptable evidence indicating that he/she has started the new job.

III. Consumer Liabilities: Recurring Obligations

1. *Types of Recurring Obligation.* Recurring obligations include:

a. All installment loans;

b. Revolving charge accounts;

c. Real estate loans;

d. Alimony;

e. Child support; and

f. Other continuing obligations.

2. *Debt to Income Ratio Computation for Recurring Obligations.*

a. The creditor must include the following when computing the debt to income ratios for recurring obligations:

i. Monthly housing expense; and

ii. Additional recurring charges extending ten months or more, such as

a. Payments on installment accounts;

b. Child support or separate maintenance payments;

c. Revolving accounts; and

d. Alimony.

b. Debts lasting less than ten months must be included if the amount of the debt affects the consumer's ability to pay the mortgage during the months immediately after loan closing, especially if the consumer will have limited or no cash assets after loan closing.

Note: Monthly payments on revolving or open-ended accounts, regardless of the balance, are counted as a liability for qualifying purposes even if the account appears likely to be paid off within 10 months or less.

3. *Revolving Account Monthly Payment Calculation.* If the credit report shows any revolving accounts with an outstanding balance but no specific minimum monthly payment, the payment must be calculated as the greater of:

a. 5 percent of the balance; or

b. $10.

Note: If the actual monthly payment is documented from the creditor or the creditor obtains a copy of the current statement reflecting the monthly payment, that amount may be used for qualifying purposes.

4. *Reduction of Alimony Payment for Qualifying Ratio Calculation.* Since there are tax consequences of alimony payments, the creditor may choose to treat the monthly alimony obligation as a reduction from the consumer's gross income when calculating qualifying ratios, rather than treating it as a monthly obligation.

IV. Consumer Liabilities: Contingent Liability

1. *Definition: Contingent Liability.* A contingent liability exists when an individual is held responsible for payment of a debt if another party, jointly or severally obligated, defaults on the payment.

2. *Application of Contingent Liability Policies.* The contingent liability policies described in this topic apply unless the consumer can provide conclusive evidence from the debt holder that there is no possibility that the debt holder will pursue debt collection against him/her should the other party default.

3. *Contingent Liability on Mortgage Assumptions.* Contingent liability must be considered when the consumer remains obligated on an outstanding FHA-insured, VA-guaranteed, or conventional mortgage secured by property that:

a. Has been sold or traded within the last 12 months without a release of liability, or

b. Is to be sold on assumption without a release of liability being obtained.

4. *Exemption From Contingent Liability Policy on Mortgage Assumptions.* When a mortgage is assumed, contingent liabilities need not be considered if the:

a. Originating creditor of the mortgage being underwritten obtains, from the servicer of the assumed loan, a payment history showing that the mortgage has been current during the previous 12 months, or

b. Value of the property, as established by an appraisal or the sales price on the HUD–1 Settlement Statement from the sale of the property, results in a loan-to-value (LTV) ratio of 75 percent or less.

5. *Contingent Liability on Cosigned Obligations.*

a. Contingent liability applies, and the debt must be included in the underwriting analysis, if an individual applying for a mortgage is a cosigner/co-obligor on:

i. A car loan;

ii. A student loan;

iii. A mortgage; or

iv. Any other obligation.

b. If the creditor obtains documented proof that the primary obligor has been making regular payments during the previous 12 months, and does not have a history of delinquent payments on the loan during that time, the payment does not have to be included in the consumer's monthly obligations.

V. Consumer Liabilities: Projected Obligations and Obligations Not Considered Debt

1. *Projected Obligations.*

a. Debt payments, such as a student loan or balloon-payment note scheduled to begin or come due within 12 months of the mortgage loan closing, must be included by the creditor as anticipated monthly obligations during the underwriting analysis.

b. Debt payments do not have to be classified as projected obligations if the consumer provides written evidence that the debt will be deferred to a period outside the 12-month timeframe.

c. Balloon-payment notes that come due within one year of loan closing must be considered in the underwriting analysis.

2. *Obligations Not Considered Debt.* Obligations not considered debt, and therefore not subtracted from gross income, include:

a. Federal, State, and local taxes;

b. Federal Insurance Contributions Act (FICA) or other retirement contributions, such as 401(k) accounts (including repayment of debt secured by these funds):

c. Commuting costs;

d. Union dues;

e. Open accounts with zero balances;

f. Automatic deductions to savings accounts;

g. Child care; and

h. Voluntary deductions.

6. In Supplement I to Part 1026—Official Interpretations:

A. Under *Section 1026.25—Record Retention:*

i. Under *25(a) General rule,* paragraph 2 is revised.

ii. Section *25(c) Records related to certain requirements for mortgage loans, 25(c)(3) Records related to minimum standards for transactions secured by a dwelling,* and paragraphs 1 and 2 are added.

B. The heading for Section 1026.32 is revised.

C. Under revised *Section 1026.32:*

i. Under *32(b) Definitions:*

a. *Paragraph 32(b)(1)* and paragraph 1 are added.

b. Under *Paragraph 32(b)(1)(i),* paragraph 1 is revised.

c. *Paragraph 32(b)(1)(i)(B)* and paragraph 1 are added.

d. *Paragraph 32(b)(1)(i)(C)* and paragraphs 1 and 2 are added.

e. *Paragraph 32(b)(1)(i)(D)* and paragraphs 1, 2, 3, and 4 are added.

f. *Paragraph 32(b)(1)(i)(E)* and paragraphs 1, 2, and 3 are added.

g. *Paragraph 32(b)(1)(i)(F)* and paragraphs 1 and 2 are added.

h. Under *Paragraph 32(b)(1)(ii),* paragraphs 1 and 2 are revised and paragraphs 3 and 4 are added.

i. *Paragraph 32(b)(1)(iii)* and paragraph 1 are added.

j. Under *Paragraph 32(b)(1)(iv),* paragraph 1 is revised and paragraphs 2 and 3 are added.

k. *32(b)(3) Bona fide discount point, 32(b)(3)(i) Closed-end credit,* and paragraph 1 are added.

l. *32(b)(4) Total loan amount, 32(b)(4)(i) Closed-end credit,* and paragraph 1 are added.

m. *32(b)(6) Prepayment penalty* and paragraphs 1 and 2 are added.

D. *Section 1026.43—Minimum Standards for Transactions Secured by a Dwelling* is added.

The revisions and additions read as follows:

Supplement I to Part 1026—Official Interpretations

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Subpart D—Miscellaneous

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Section 1026.25—Record Retention

25(a) General rule.

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2. *Methods of retaining evidence.* Adequate evidence of compliance does not necessarily mean actual paper copies of disclosure statements or other business records. The evidence may be retained by any method that reproduces records accurately (including computer programs). Unless otherwise required, the creditor need retain only enough information to reconstruct the required disclosures or other records. Thus, for example, the creditor need not retain each open-end periodic statement, so long as the specific information on each statement can be retrieved.

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25(c) Records related to certain requirements for mortgage loans.

25(c)(3) Records related to minimum standards for transactions secured by a dwelling.

1. *Evidence of compliance with repayment ability provisions.* A creditor must retain evidence of compliance with § 1026.43 for three years after the date of consummation of a consumer credit transaction covered by that section. (See comment 25(c)-2 for guidance on the retention of evidence of compliance with the requirement to offer a consumer a loan without a prepayment penalty under § 1026.43(g)(3).) If a creditor must verify and document information used in underwriting a transaction subject to § 1026.43, the creditor shall retain evidence sufficient to demonstrate compliance with the documentation requirements of the rule. Although a creditor need not retain actual paper copies of the documentation used in underwriting a transaction subject to § 1026.43, to comply with § 1026.25(c)(3), the creditor must be able to reproduce such records accurately. For example, if the creditor uses a consumer's Internal Revenue Service (IRS) Form W–2 to verify the consumer's income, the creditor must be able to reproduce the IRS Form W–2 itself, and

not merely the income information that was contained in the form.

2. *Dwelling-secured transactions and prepayment penalties.* If a transaction covered by § 1026.43 has a prepayment penalty, the creditor must maintain records that document that the creditor complied with requirements for offering the consumer an alternative transaction that does not include a prepayment penalty under § 1026.43(g)(3), (4), or (5). However, the creditor need not maintain records that document compliance with those provisions if a transaction is consummated without a prepayment penalty or if the creditor and consumer do not consummate a covered transaction. If a creditor offers a transaction with a prepayment penalty to a consumer through a mortgage broker, to evidence compliance with § 1026.43(g)(4) the creditor should retain evidence of the alternative covered transaction presented to the mortgage broker, such as a rate sheet, and the agreement with the mortgage broker required by § 1026.43(g)(4)(ii).

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Subpart E—Special Rules for Certain Home Mortgage Transactions

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Section 1026.32—Requirements for High-Cost Mortgages

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32(b) Definitions.

Paragraph 32(b)(1).

1. *Known at or before consummation.* Section 1026.32(b)(1) includes in points and fees for closed-end credit transactions those items listed in § 1026.32(b)(1)(i) through (vi) that are known at or before consummation. The following examples clarify how to determine whether a charge or fee is known at or before consummation.

i. *General.* In general, a charge or fee is ''known at or before consummation'' if the creditor knows at or before consummation that the charge or fee will be imposed in connection with the transaction, even if the charge or fee is scheduled to be paid after consummation. Thus, for example, if the creditor charges the consumer $400 for an appraisal conducted by an affiliate of the creditor, the $400 is included in points and fees, even if the consumer finances it and repays it over the loan term, because the creditor knows at or before consummation that the charge or fee is imposed in connection with the transaction. By contrast, if a creditor does not know whether a charge or fee will be imposed, it is not included in points and fees. For example, charges or fees that the creditor may impose if the consumer seeks to modify a loan after consummation are not included in points and fees, because the creditor does not know at or before consummation whether the consumer will seek to modify the loan and therefore incur the fees or charges.

ii. *Prepayment penalties.* Notwithstanding the guidance in comment 32(b)(1)-1.i, under § 1026.32(b)(1)(v) the maximum prepayment penalty that may be charged or collected under the terms of the mortgage loan is included in points and fees because the amount of the maximum prepayment penalty that may be charged or collected is known at or before consummation.

iii. *Certain mortgage and credit insurance premiums.* Notwithstanding the guidance in comment 32(b)(1)-1.i, under § 1026.32(b)(1)(i)(C)(*1*) and (iii) premiums and charges for private mortgage insurance and credit insurance that are payable after consummation are not included in points and fees, even if the amounts of such premiums and charges are known at or before consummation.

Paragraph 32(b)(1)(i).

1. *General.* Section 1026.32(b)(1)(i) includes in the total ''points and fees'' items included in the finance charge under § 1026.4(a) and (b). However, certain items that may be included in the finance charge are excluded from points and fees under § 1026.32(b)(1)(i)(A) through (F). Items excluded from the finance charge under other provisions of § 1026.4 are not included in the total points and fees under § 1026.32(b)(1)(i), but may be included in points and fees under § 1026.32(b)(1)(ii) through (vi). To illustrate: A fee imposed by the creditor for an appraisal performed by an employee of the creditor meets the definition of ''finance charge'' under § 1026.4(a) as ''any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or a condition of the extension of credit.'' However, § 1026.4(c)(7) specifies that appraisal fees are not included in the finance charge. A fee imposed by the creditor for an appraisal performed by an employee of the creditor therefore would not be included in the finance charge and would not be counted in points and fees under § 1026.32(b)(1)(i). Section 1026.32(b)(1)(iii), however, expressly includes in points and fees items listed in § 1026.4(c)(7) (including appraisal fees) if the creditor receives compensation in connection with the charge. A creditor would receive compensation for an appraisal performed by its own employee. Thus, the appraisal fee in this example must be included in the calculation of points and fees.

Paragraph 32(b)(1)(i)(B).

1. *Federal and State mortgage insurance premiums and guaranty fees.* Under § 1026.32(b)(1)(i)(B), mortgage insurance premiums or guaranty fees in connection with a Federal or State agency program are excluded from points and fees, even though they are included in the finance charge under § 1026.4(a) and (b). For example, if a consumer is required to pay a $2,000 mortgage insurance premium for a loan insured by the Federal Housing Administration, the $2,000 must be included in the finance charge but is not counted in points and fees. Similarly, if a consumer pays a 2 percent funding fee for a loan guaranteed by the U.S. Department of Veterans Affairs or through the U.S Department of Agriculture's Rural Development Single Family Housing Guaranteed Loan Program, the fee is included in the finance charge but is not included in points and fees.

Paragraph 32(b)(1)(i)(C).

1. *Private mortgage insurance premiums.* i. *Payable after consummation.* Under § 1026.32(b)(1)(i)(C)(*1*), private mortgage insurance premiums payable after consummation are excluded from points and fees.

ii. *Payable at or before consummation.* A. *General.* Under § 1026.32(b)(1)(i)(C)(*2*), private mortgage insurance premiums payable at or before consummation (*i.e.,* single or up-front premiums) may be excluded from points and fees, even though they are included in the finance charge under § 1026.4(a) and (b). However, the portion of the premium that exceeds the amount payable under policies in effect at the time of origination under section 203(c)(2)(A) of the National Housing Act (12 U.S.C. 1709(c)(2)(A)) is included in points and fees. To determine whether any portion of the premium exceeds the amount payable under policies in effect at the time of origination under section 203(c)(2)(A) of the National Housing Act, a creditor references the premium amount that would be payable for the transaction under that Act, as implemented by applicable regulations and other written authorities issued by the Federal Housing Administration (such as Mortgagee Letters), even if the transaction would not qualify to be insured under that Act (including, for example, because the principal amount exceeds the maximum insurable under that Act).

B. *Non-refundable premiums.* To qualify for the exclusion from points and fees, private mortgage insurance premiums payable at or before consummation must be required to be refunded on a pro rata basis and the refund must be automatically issued upon notification of the satisfaction of the underlying mortgage loan.

C. *Example.* Assume that a $3,000 private mortgage insurance premium charged on a closed-end mortgage loan is payable at or before closing and is required to be refunded on a pro rata basis and that the refund is automatically issued upon notification of the satisfaction of the underlying mortgage loan. Assume also that the maximum premium allowable under the National Housing Act is $2,000. In this case, the creditor could exclude $2,000 from points and fees but would have to include the $1,000 that exceeds the allowable premium under the National Housing Act. However, if the $3,000 private mortgage insurance premium were not required to be refunded on a pro rata basis or if the refund were not automatically issued upon notification of the satisfaction of the underlying mortgage loan, the entire $3,000 premium would be included in points and fees.

2. *Method of paying private mortgage insurance premiums.* The portion of any private mortgage insurance premiums payable at or before consummation that does not qualify for an exclusion from points and fees under § 1026.32(b)(1)(i)(C)(*2*) must be included in points and fees for purposes of § 1026.32(b)(1)(i) whether paid in cash or financed and whether the insurance is optional or required.

Paragraph 32(b)(1)(i)(D).

1. *Charges not retained by the creditor, loan originator, or an affiliate of either.* In general, a creditor is not required to count in points and fees any bona fide third-party charge not retained by the creditor, loan

originator, or an affiliate of either. For example, if bona fide charges are imposed by a third-party settlement agent and are not retained by the creditor, loan originator, or an affiliate of either, those charges are not included in points and fees, even if those charges are included in the finance charge under § 1026.4(a)(2). The term *loan originator* has the same meaning as in § 1026.36(a)(1).

2. *Private mortgage insurance.* The exclusion for bona fide third-party charges not retained by the creditor, loan originator, or an affiliate of either is limited by § 1026.32(b)(1)(i)(C) in the general definition of ''points and fees.'' Section 1026.32(b)(1)(i)(C) requires inclusion in points and fees of premiums or other charges payable at or before consummation for any private guaranty or insurance protecting the creditor against the consumer's default or other credit loss to the extent that the premium or charge exceeds the amount payable under policies in effect at the time of origination under section 203(c)(2)(A) of the National Housing Act (12 U.S.C. 1709(c)(2)(A)). These premiums or charges must also be included if the premiums or charges are not required to be refundable on a pro-rated basis, or the refund is not required to be automatically issued upon notification of the satisfaction of the underlying mortgage loan. Under these circumstances, even if the premiums or other charges are not retained by the creditor, loan originator, or an affiliate of either, they must be included in the points and fees calculation for qualified mortgages. See comments 32(b)(1)(i)(c)-1 and -2 for further discussion of including private mortgage insurance premiums payable at or before consummation in the points and fees calculation.

3. *Real estate-related fees.* The exclusion for bona fide third-party charges not retained by the creditor, loan originator, or an affiliate of either is limited by § 1026.32(b)(1)(iii) in the general definition of points and fees. Section 1026.32(b)(1)(iii) requires inclusion in points and fees of items listed in § 1026.4(c)(7) unless the charge is reasonable, the creditor receives no direct or indirect compensation in connection with the charge, and the charge is not paid to an affiliate of the creditor. If a charge is required to be included in points and fees under § 1026.32(b)(1)(iii), it may not be excluded under § 1026.32(b)(1)(i)(D), even if the criteria for exclusion in § 1026.32(b)(1)(i)(D) are satisfied.

4. *Credit insurance.* The exclusion for bona fide third-party charges not retained by the creditor, loan originator, or an affiliate of either is limited by § 1026.32(b)(1)(iv) in the general definition of points and fees. Section 1026.32(b)(1)(iv) requires inclusion in points and fees of premiums and other charges for credit insurance and certain other types of insurance. If a charge is required to be included in points and fees under § 1026.32(b)(1)(iv), it may not be excluded under § 1026.32(b)(1)(i)(D), even if the criteria for exclusion in § 1026.32(b)(1)(i)(D) are satisfied.

Paragraph 32(b)(1)(i)(E).

1. *Bona fide discount point.* The term *bona fide discount point* is defined in § 1026.32(b)(3).

2. *Average prime offer rate.* The average prime offer rate for purposes of paragraph (b)(1)(i)(E) of this section is the average prime offer rate that applies to a comparable transaction as of the date the discounted interest rate for the transaction is set. For the meaning of ''comparable transaction,'' refer to comment 35(a)(2)-2. The table of average prime offer rates published by the Bureau indicates how to identify the comparable transaction. *See* comment 35(a)(2)-2.

3. *Example.* Assume a transaction that is a first-lien, purchase-money home mortgage with a fixed interest rate and a 30-year term. Assume also that the consumer locks in an interest rate of 6 percent on May 1, 2014 that was discounted from a rate of 6.5 percent because the consumer paid two discount points. Finally, assume that the average prime offer rate as of May 1, 2014 for home mortgages with a fixed interest rate and a 30-year term is 5.5 percent. The creditor may exclude two bona fide discount points from the points and fees calculation because the rate from which the discounted rate was derived (6.5 percent) exceeded the average prime offer rate for a comparable transaction as of the date the rate on the transaction was set (5.5 percent) by only 1 percentage point.

Paragraph 32(b)(1)(i)(F).

1. *Bona fide discount point and average prime offer rate.* Comments 32(b)(1)(i)(E)-1 and -2 provide guidance concerning the definition of *bona fide discount point* and *average prime offer rate,* respectively.

2. *Example.* Assume a transaction that is a first-lien, purchase-money home mortgage with a fixed interest rate and a 30-year term. Assume also that the consumer locks in an interest rate of 6 percent on May 1, 2014, that was discounted from a rate of 7 percent because the consumer paid four discount points. Finally, assume that the average prime offer rate as of May 1, 2014, for home mortgages with a fixed interest rate and a 30-year term is 5 percent. The creditor may exclude one discount point from the points and fees calculation because the rate from which the discounted rate was derived (7 percent) exceeded the average prime offer rate for a comparable transaction as of the date the rate on the transaction was set (5 percent) by only 2 percentage points.

Paragraph 32(b)(1)(ii).

1. *Loan originator compensation—general.* Compensation paid by a consumer or creditor to a loan originator is included in the calculation of points and fees for a transaction, provided that such compensation can be attributed to that particular transaction at the time the interest rate is set. Loan originator compensation includes amounts the loan originator retains and is not dependent on the label or name of any fee imposed in connection with the transaction.

2. *Loan originator compensation—attributable to a particular transaction.* i. Loan originator compensation includes the dollar value of compensation, such as a bonus, commission, or award of merchandise, services, trips, or similar prizes, that is paid by a consumer or creditor to a loan originator and can be attributed to that particular transaction. The amount of compensation that can be attributed to a particular transaction is the dollar value of compensation that the loan originator will receive if the transaction is consummated. As explained in comment 32(b)(1)(ii)-3, the amount of compensation that a loan originator will receive is calculated as of the date the interest rate is set and includes compensation that is paid before, at, or after consummation.

ii. Loan originator compensation excludes compensation that cannot be attributed to that transaction, including, for example:

A. Compensation based on the long term performance of the loan originator's loans.

B. Compensation based on the overall quality of a loan originator's loan files.

C. The base salary of a loan originator. However, any compensation in addition to the base salary that can be attributed to the transaction at the time the interest rate is set must be included in loan originator compensation for the purpose of calculating points and fees.

3. *Loan originator compensation—timing.* Compensation paid to a loan originator that can be attributed to a transaction must be included in the points and fees calculation for that loan regardless of whether the compensation is paid before, at, or after consummation. The amount of loan originator compensation that can be attributed to a transaction is determined as of the date the interest rate is set. Thus, loan originator compensation for a transaction includes the portion of a bonus, commission, or award of merchandise, services, trips, or similar prizes that can be attributed to that transaction at the time the creditor sets the interest rate for the transaction, even if that bonus, commission, or award of merchandise, services, trips, or similar prizes is not paid until after consummation. For example, assume a $100,000 transaction and that, as of the date the interest rate is set, the loan originator is entitled to receive a commission equal to 1 percent of the loan amount at consummation, *i.e.,* $1,000, payable at the end of the month. In addition, assume that after the date the interest rate is set but before consummation of the transaction, the loan originator originates other transactions that enable the loan originator to meet a loan volume threshold, which increases the loan originator's commission to 1.25 percent of the loan amount, *i.e.,* $1,250. In this case, the creditor need include only $1,000 as loan originator compensation in points and fees because, as of the date the interest rate was set, the loan originator would have been entitled to receive $1,000 upon consummation of the transaction.

4. *Loan originator compensation—examples.* The following examples illustrate the rule:

i. Assume that, according to a creditor's compensation policies, the creditor awards its loan officers a bonus every year based on the number of loan applications taken by the loan officer that result in consummated transactions during that year, and that each consummated transaction increases the year-end bonus by $100. In this case, $100 of the bonus is loan originator compensation that must be included in points and fees for the transaction.

ii. Assume that, according to a creditor's compensation policies, the creditor awards its loan officers a year-end bonus equal to a flat dollar amount for each of the consummated transactions originated by the loan officer during that year. Assume also that the per-transaction dollar amount is finalized at the end of the year, according to a predetermined schedule that provides for a specific per-transaction dollar amount based on the total dollar value of consummated transactions originated by the loan officer. If on the date the interest rate for a transaction is set, the loan officer has originated total volume that qualifies the loan officer to receive a $300 bonus per transaction under the predetermined schedule, then $300 of the year-end bonus can be attributed to that particular transaction and therefore is loan originator compensation that must be included in points and fees for that transaction.

iii. Assume that, according to a creditor's compensation policies, the creditor awards its loan officers a bonus at the end of the year based on the number of consummated transactions originated by the loan officer during that year. Assume also that, for the first 10 transactions originated by the loan officer in a given year, no bonus is awarded; for the next 10 transactions originated by the loan officer up to 20, a bonus of $100 per transaction is awarded; and for each transaction originated after the first 20, a bonus of $200 per transaction is awarded. In this case, if, on the date the interest rate for the transaction is set, the loan officer has originated 10 or fewer transactions that year, then none of the year-end bonus is attributable to the transaction and therefore none of the bonus is included in points and fees for that transaction. If, on the date the interest rate for the transaction is set, the loan officer has originated at more than 10 but no more than 20 transactions, $100 of the bonus is attributable to the transaction and is included in points and fees for that transaction. If, on the date the interest rate for the transaction is set, the loan officer has originated more than 20 transactions, $200 of the bonus is attributable to the transaction and is included in points and fees for the transaction.

iv. Assume that, according to a creditor's compensation policies, the creditor pays its loan officers a base salary of $500 per week and awards its loan officers a bonus of $250 for each consummated transaction. For each transaction, none of the $500 base salary is counted in points and fees as loan originator compensation under § 1026.32(b)(1)(ii) because no precise portion of the base salary can be attributed to a particular transaction, but the $250 bonus is counted as loan originator compensation that is included in points and fees.

Paragraph 32(b)(1)(iii).

1. *Other charges.* Section 1026.32(b)(1)(iii) defines points and fees to include all items listed in § 1026.4(c)(7), other than amounts held for the future payment of taxes, unless certain exclusions apply. An item listed in § 1026.4(c)(7) may be excluded from the points and fees calculation if the charge is reasonable; the creditor receives no direct or indirect compensation from the charge; and the charge is not paid to an affiliate of the creditor. For example, a reasonable fee paid by the consumer to an independent, third-party appraiser may be excluded from the points and fees calculation (assuming no compensation is paid to the creditor or its affiliate and no charge is paid to an affiliate). By contrast, a fee paid by the consumer for an appraisal performed by the creditor must be included in the calculation, even though the fee may be excluded from the finance charge if it is bona fide and reasonable in amount.

Paragraph 32(b)(1)(iv).

1. *Credit insurance and debt cancellation or suspension coverage.* In determining points and fees for purposes of § 1026.32(b)(1), premiums paid at or before consummation for credit insurance or any debt cancellation or suspension agreement or contract are included in points and fees whether they are paid in cash or, if permitted by applicable law, financed and whether the insurance or coverage is optional or required. Such charges are also included whether the amount represents the entire premium or payment for the coverage or an initial payment.

2. *Credit property insurance.* Credit property insurance includes insurance against loss of or damage to personal property, such as a houseboat or manufactured home. Credit property insurance covers the creditor's security interest in the property. Credit property insurance does not include homeowners' insurance, which, unlike credit property insurance, typically covers not only the dwelling but its contents and protects the consumer's interest in the property.

3. *Life, accident, health, or loss-of-income insurance.* Premiums or other charges for these types of insurance are included in points and fees only if the creditor is a beneficiary. If the consumer or another person designated by the consumer is the sole beneficiary, then the premiums or other charges are not included in points and fees.

32(b)(3) Bona fide discount point.

32(b)(3)(i) Closed-end credit.

1. *Definition of bona fide discount point.* Section 1026.32(b)(3) provides that, to be bona fide, a discount point must reduce the interest rate based on a calculation that is consistent with established industry practices for determining the amount of reduction in the interest rate or time-price differential appropriate for the amount of discount points paid by the consumer. To satisfy this standard, a creditor may show that the reduction is reasonably consistent with established industry norms and practices for secondary mortgage market transactions. For example, a creditor may rely on pricing in the to-be-announced (TBA) market for mortgage-backed securities (MBS) to establish that the interest rate reduction is consistent with the compensation that the creditor could reasonably expect to receive in the secondary market. The creditor may also establish that its interest rate reduction is consistent with established industry practices by showing that its calculation complies with requirements prescribed in Fannie Mae or Freddie Mac guidelines for interest rate reductions from bona fide discount points. For example, assume that the Fannie Mae Single-Family Selling Guide or the Freddie Mac Single Family Seller/Servicer Guide imposes a cap on points and fees but excludes from the cap discount points that result in a bona fide reduction in the interest rate. Assume the guidelines require that, for a discount point to be bona fide so that it would not count against the cap, a discount point must result in at least a 25 basis point reduction in the interest rate. Accordingly, if the creditor offers a 25 basis point interest rate reduction for a discount point and the requirements of § 1026.32(b)(1)(i)(E) or (F) are satisfied, the discount point is bona fide and is excluded from the calculation of points and fees.

32(b)(4) Total loan amount.

32(b)(4)(i) Closed-end credit.

1. *Total loan amount; examples.* Below are several examples showing how to calculate the total loan amount for closed-end mortgage loans, each using a $10,000 amount borrowed, a $300 appraisal fee, and $400 in prepaid finance charges. A $500 single premium for optional credit unemployment insurance is used in one example.

i. If the consumer finances a $300 fee for a creditor-conducted appraisal and pays $400 in prepaid finance charges at closing, the amount financed under § 1026.18(b) is $9,900 ($10,000 plus the $300 appraisal fee that is paid to and financed by the creditor, less $400 in prepaid finance charges). The $300 appraisal fee paid to the creditor is added to other points and fees under § 1026.32(b)(1)(iii). It is deducted from the amount financed ($9,900) to derive a total loan amount of $9,600.

ii. If the consumer pays the $300 fee for the creditor-conducted appraisal in cash at closing, the $300 is included in the points and fees calculation because it is paid to the creditor. However, because the $300 is not financed by the creditor, the fee is not part of the amount financed under § 1026.18(b). In this case, the amount financed is the same as the total loan amount: $9,600 ($10,000, less $400 in prepaid finance charges).

iii. If the consumer finances a $300 fee for an appraisal conducted by someone other than the creditor or an affiliate, the $300 fee is not included with other points and fees under § 1026.32(b)(1)(iii). In this case, the amount financed is the same as the total loan amount: $9,900 ($10,000 plus the $300 fee for an independently-conducted appraisal that is financed by the creditor, less the $400 paid in cash and deducted as prepaid finance charges).

iv. If the consumer finances a $300 fee for a creditor-conducted appraisal and a $500 single premium for optional credit unemployment insurance, and pays $400 in prepaid finance charges at closing, the amount financed under § 1026.18(b) is $10,400 ($10,000, plus the $300 appraisal fee that is paid to and financed by the creditor, plus the $500 insurance premium that is financed by the creditor, less $400 in prepaid finance charges). The $300 appraisal fee paid to the creditor is added to other points and fees under § 1026.32(b)(1)(ii), and the $500 insurance premium is added under 1026.32(b)(1)(iv). The $300 and $500 costs are deducted from the amount financed

($10,400) to derive a total loan amount of $9,600.

32(b)(6) Prepayment penalty.

1. *Examples of prepayment penalties; closed-end credit transactions.* For purposes of § 1026.32(b)(6)(i), the following are examples of prepayment penalties:

i. A charge determined by treating the loan balance as outstanding for a period of time after prepayment in full and applying the interest rate to such ''balance,'' even if the charge results from interest accrual amortization used for other payments in the transaction under the terms of the loan contract. ''Interest accrual amortization'' refers to the method by which the amount of interest due for each period (*e.g.,* month) in a transaction's term is determined. For example, ''monthly interest accrual amortization'' treats each payment as made on the scheduled, monthly due date even if it is actually paid early or late (until the expiration of any grace period). Thus, under the terms of a loan contract providing for monthly interest accrual amortization, if the amount of interest due on May 1 for the preceding month of April is $3,000, the loan contract will require payment of $3,000 in interest for the month of April whether the payment is made on April 20, on May 1, or on May 10. In this example, if the consumer prepays the loan in full on April 20 and if the accrued interest as of that date is $2,000, then assessment of a charge of $3,000 constitutes a prepayment penalty of $1,000 because the amount of interest actually earned through April 20 is only $2,000.

ii. A fee, such as an origination or other loan closing cost, that is waived by the creditor on the condition that the consumer does not prepay the loan. However, the term prepayment penalty does not include a waived bona fide third-party charge imposed by the creditor if the consumer pays all of a covered transaction's principal before the date on which the principal is due sooner than 36 months after consummation. For example, assume that at consummation, the creditor waives $3,000 in closing costs to cover bona fide third-party charges but the terms of the loan agreement provide that the creditor may recoup the $3,000 in waived charges if the consumer repays the entire loan balance sooner than 36 months after consummation. The $3,000 charge is not a prepayment penalty. In contrast, for example, assume that at consummation, the creditor waives $3,000 in closing costs to cover bona fide third-party charges but the terms of the loan agreement provide that the creditor may recoup $4,500, in part to recoup waived charges, if the consumer repays the entire loan balance sooner than 36 months after consummation. The $3,000 that the creditor may impose to cover the waived bona fide third-party charges is not a prepayment penalty, but the additional $1,500 charge is a prepayment penalty and subject to the restrictions under § 1026.43(g).

iii. A minimum finance charge in a simple interest transaction.

iv. Computing a refund of unearned interest by a method that is less favorable to the consumer than the actuarial method, as defined by section 933(d) of the Housing and Community Development Act of 1992, 15 U.S.C. 1615(d). For purposes of computing a refund of unearned interest, if using the actuarial method defined by applicable State law results in a refund that is greater than the refund calculated by using the method described in section 933(d) of the Housing and Community Development Act of 1992, creditors should use the State law definition in determining if a refund is a prepayment penalty.

2. *Fees that are not prepayment penalties; closed-end credit transactions.* For purposes of § 1026.32(b)(6)(i), fees that are not prepayment penalties include, for example:

i. Fees imposed for preparing and providing documents when a loan is paid in full if such fees are imposed whether or not the loan is prepaid. Examples include a loan payoff statement, a reconveyance document, or another document releasing the creditor's security interest in the dwelling that secures the loan.

ii. Loan guarantee fees.

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Section 1026.43—Minimum Standards for Transactions Secured by a Dwelling

1. *Record retention.* See § 1026.25(c)(3) and comments 25(c)(3)–1 and –2 for guidance on the required retention of records as evidence of compliance with § 1026.43.

43(a) Scope.

1. *Consumer credit.* In general, § 1026.43 applies to consumer credit transactions secured by a dwelling, but certain dwelling-secured consumer credit transactions are exempt or partially exempt from coverage under § 1026.43(a)(1) through (3). (See § 1026.2(a)(12) for the definition of ''consumer credit.'') Section 1026.43 does not apply to an extension of credit primarily for a business, commercial, or agricultural purpose, even if it is secured by a dwelling. See § 1026.3 and associated commentary for guidance in determining the primary purpose of an extension of credit. In addition, § 1026.43 does not apply to any change to an existing loan that is not treated as a refinancing under § 1026.20(a).

2. *Real property.* ''Dwelling'' means a residential structure that contains one to four units, whether or not the structure is attached to real property. *See* § 1026.2(a)(19). For purposes of § 1026.43, the term ''dwelling'' includes any real property to which the residential structure is attached that also secures the covered transaction. For example, for purposes of § 1026.43(c)(2)(i), the value of the dwelling that secures the covered transaction includes the value of any real property to which the residential structure is attached that also secures the covered transaction.

Paragraph 43(a)(3).

1. *Renewable temporary or ''bridge'' loan.* Under § 1026.43(a)(3)(ii), a temporary or ''bridge'' loan with a term of 12 months or less is exempt from § 1026.43(c) through (f). Examples of such a loan are a loan to finance the purchase of a new dwelling where the consumer plans to sell a current dwelling within 12 months and a loan to finance the initial construction of a dwelling. Where a temporary or ''bridge loan'' is renewable, the loan term does not include any additional period of time that could result from a renewal provision provided that any renewal possible under the loan contract is for one year or less. For example, if a construction loan has an initial loan term of 12 months but is renewable for another 12-month loan term, the loan is exempt from § 1026.43(c) through (f) because the initial loan term is 12 months.

2. *Construction phase of a construction-to-permanent loan.* Under § 1026.43(a)(3)(iii), a construction phase of 12 months or less of a construction-to-permanent loan is exempt from § 1026.43(c) through (f). A construction-to-permanent loan is a potentially multiple-advance loan to finance the construction, rehabilitation, or improvement of a dwelling that may be permanently financed by the same creditor. For such a loan, the construction phase and the permanent phase may be treated as separate transactions for the purpose of compliance with § 1026.43(c) through (f), and the construction phase of the loan is exempt from § 1026.43(c) through (f), provided the initial term is 12 months or less. See § 1026.17(c)(6)(ii), allowing similar treatment for disclosures. Where the construction phase of a construction-to-permanent loan is renewable for a period of one year or less, the term of that construction phase does not include any additional period of time that could result from a renewal provision. For example, if the construction phase of a construction-to-permanent loan has an initial term of 12 months but is renewable for another 12-month term before permanent financing begins, the construction phase is exempt from § 1026.43(c) through (f) because the initial term is 12 months. Any renewal of one year or less also qualifies for the exemption. The permanent phase of the loan is treated as a separate transaction and is not exempt under § 1026.43(a)(3)(iii). It may be a qualified mortgage if it satisfies the appropriate requirements.

43(b) Definitions.

43(b)(1) Covered transaction.

1. The definition of covered transaction restates the scope of the rule as described at § 1026.43(a).

43(b)(3) Fully indexed rate.

1. *Discounted and premium adjustable-rate transactions.* In some adjustable-rate transactions, creditors may set an initial interest rate that is not determined by the index or formula used to make later interest rate adjustments. In some cases, the initial rate charged to consumers is lower than the rate would be if it were calculated using the index or formula that will apply after recast, as determined at consummation (*i.e.,* a ''discounted rate''). In other cases, the initial rate may be higher (*i.e.,* a ''premium rate''). For purposes of determining the fully indexed rate where the initial interest rate is not determined using the index or formula for subsequent interest rate adjustments, the creditor must use the interest rate that would have applied had the creditor used such index or formula plus margin at the time of consummation. That is, in determining the fully indexed rate, the creditor must not take into account any discounted or premium rate. To illustrate, assume an adjustable-rate transaction where the initial interest rate is not based on an index or formula, or is based on an index or formula that will not apply after recast, and is set at 5 percent for the first

five years. The loan agreement provides that future interest rate adjustments will be calculated based on a specific index plus a 3 percent margin. If the value of the index at consummation is 5 percent, the interest rate that would have been applied at consummation had the creditor based the initial rate on this index is 8 percent (5 percent plus 3 percent margin). For purposes of § 1026.43(b)(3), the fully indexed rate is 8 percent. For discussion of payment calculations based on the greater of the fully indexed rate or premium rate for purposes of the repayment ability determination under § 1026.43(c), see § 1026.43(c)(5)(i) and comment 43(c)(5)(i)–2.

2. *Index or formula value at consummation.* The value at consummation of the index or formula need not be used if the contract provides for a delay in the implementation of changes in an index value or formula. For example, if the contract specifies that rate changes are based on the index value in effect 45 days before the change date, the creditor may use any index value in effect during the 45 days before consummation in calculating the fully indexed rate.

3. *Interest rate adjustment caps.* If the terms of the legal obligation contain a periodic interest rate adjustment cap that would prevent the initial rate, at the time of the first adjustment, from changing to the rate determined using the index or formula value at consummation (*i.e.,* the fully indexed rate), the creditor must not give any effect to that rate cap when determining the fully indexed rate. That is, a creditor must determine the fully indexed rate without taking into account any periodic interest rate adjustment cap that may limit how quickly the fully indexed rate may be reached at any time during the loan term under the terms of the legal obligation. To illustrate, assume an adjustable-rate mortgage has an initial fixed rate of 5 percent for the first three years of the loan, after which the rate will adjust annually to a specified index plus a margin of 3 percent. The loan agreement provides for a 2 percent annual interest rate adjustment cap, and a lifetime maximum interest rate of 10 percent. The index value in effect at consummation is 4.5 percent; the fully indexed rate is 7.5 percent (4.5 percent plus 3 percent), regardless of the 2 percent annual interest rate adjustment cap that would limit when the fully indexed rate would take effect under the terms of the legal obligation.

4. *Lifetime maximum interest rate.* A creditor may choose, in its sole discretion, to take into account the lifetime maximum interest rate provided under the terms of the legal obligation when determining the fully indexed rate. To illustrate, assume an adjustable-rate mortgage has an initial fixed rate of 5 percent for the first three years of the loan, after which the rate will adjust annually to a specified index plus a margin of 3 percent. The loan agreement provides for a 2 percent annual interest rate adjustment cap and a lifetime maximum interest rate of 7 percent. The index value in effect at consummation is 4.5 percent; under the generally applicable rule, the fully indexed rate is 7.5 percent (4.5 percent plus 3 percent). Nevertheless, the creditor may choose to use the lifetime maximum interest rate of 7 percent as the fully indexed rate, rather than 7.5 percent, for purposes of § 1026.43(b)(3). Furthermore, if the creditor chooses to use the lifetime maximum interest rate and the loan agreement provides a range for the maximum interest rate, then the creditor complies by using the highest rate in that range as the maximum interest rate for purposes of § 1026.43(b)(3).

5. *Step-rate and fixed-rate mortgages.* Where the interest rate offered under the terms of the legal obligation is not based on, and does not vary with, an index or formula (*i.e.,* there is no fully indexed rate), the creditor must use the maximum interest rate that may apply at any time during the loan term. To illustrate:

i. Assume a step-rate mortgage with an interest rate fixed at 6.5 percent for the first two years of the loan, 7 percent for the next three years, and 7.5 percent thereafter for the remainder of loan term. For purposes of this section, the creditor must use 7.5 percent, which is the maximum rate that may apply during the loan term. ''Step-rate mortgage'' is defined in § 1026.18(s)(7)(ii).

ii. Assume a fixed-rate mortgage with an interest rate at consummation of 7 percent that is fixed for the 30-year loan term. For purposes of this section, the maximum interest rate that may apply during the loan term is 7 percent, which is the interest rate that is fixed at consummation. ''Fixed-rate mortgage'' is defined in § 1026.18(s)(7)(iii).

43(b)(4) Higher-priced covered transaction.

1. *Average prime offer rate.* The average prime offer rate is defined in § 1026.35(a)(2). For further explanation of the meaning of ''average prime offer rate,'' and additional guidance on determining the average prime offer rate, see comments 35(a)(2)–1 through –4.

2. *Comparable transaction.* A higher-priced covered transaction is a consumer credit transaction that is secured by the consumer's dwelling with an annual percentage rate that exceeds by the specified amount the average prime offer rate for a comparable transaction as of the date the interest rate is set. The published tables of average prime offer rates indicate how to identify a comparable transaction. *See* comment 35(a)(2)–2.

3. *Rate set.* A transaction's annual percentage rate is compared to the average prime offer rate as of the date the transaction's interest rate is set (or ''locked'') before consummation. Sometimes a creditor sets the interest rate initially and then re-sets it at a different level before consummation. The creditor should use the last date the interest rate is set before consummation.

43(b)(5) Loan amount.

1. *Disbursement of the loan amount.* The definition of ''loan amount'' requires the creditor to use the entire loan amount as reflected in the loan contract or promissory note, even though the loan amount may not be fully disbursed at consummation. For example, assume the consumer enters into a loan agreement where the consumer is obligated to repay the creditor $200,000 over 15 years, but only $100,000 is disbursed at consummation and the remaining $100,000 will be disbursed during the year following consummation in a series of advances ($25,000 each quarter). For purposes of this section, the creditor must use the loan amount of $200,000, even though the loan agreement provides that only $100,000 will be disbursed to the consumer at consummation. Generally, creditors should rely on § 1026.17(c)(6) and associated commentary regarding treatment of multiple-advance and construction-to-permanent loans as single or multiple transactions. *See also* comment 43(a)(3)–2.

43(b)(6) Loan term.

1. *General.* The loan term is the period of time it takes to repay the loan amount in full. For example, a loan with an initial discounted rate that is fixed for the first two years, and that adjusts periodically for the next 28 years has a loan term of 30 years, which is the amortization period on which the periodic amortizing payments are based.

43(b)(7) Maximum loan amount.

1. *Calculation of maximum loan amount.* For purposes of § 1026.43(c)(2)(iii) and (c)(5)(ii)(C), a creditor must determine the maximum loan amount for a negative amortization loan by using the loan amount plus any increase in principal balance that can result from negative amortization based on the terms of the legal obligation. In determining the maximum loan amount, a creditor must assume that the consumer makes the minimum periodic payment permitted under the loan agreement for as long as possible, until the consumer must begin making fully amortizing payments; and that the interest rate rises as quickly as possible after consummation under the terms of the legal obligation. Thus, creditors must assume that the consumer makes the minimum periodic payment until any negative amortization cap is reached or until the period permitting minimum periodic payments expires, whichever occurs first. ''Loan amount'' is defined in § 1026.43(b)(5); ''negative amortization loan'' is defined in § 1026.18(s)(7)(v).

2. *Assumed interest rate.* In calculating the maximum loan amount for an adjustable-rate mortgage that is a negative amortization loan, the creditor must assume that the interest rate will increase as rapidly as possible after consummation, taking into account any periodic interest rate adjustment caps provided in the loan agreement. For an adjustable-rate mortgage with a lifetime maximum interest rate but no periodic interest rate adjustment cap, the creditor must assume that the interest rate increases to the maximum lifetime interest rate at the first adjustment.

3. *Examples.* The following are examples of how to determine the maximum loan amount for a negative amortization loan (all amounts shown are rounded, and all amounts are calculated using non-rounded values):

i. *Adjustable-rate mortgage with negative amortization.* A. Assume an adjustable-rate mortgage in the amount of $200,000 with a 30-year loan term. The loan agreement provides that the consumer can make minimum monthly payments that cover only part of the interest accrued each month until the principal balance reaches 115 percent of its original balance (*i.e.,* a negative amortization cap of 115 percent) or for the first five years of the loan (60 monthly payments), whichever occurs first. The introductory interest rate at consummation is 1.5 percent. One month after the first day of the first full calendar month following consummation, the interest rate adjusts and will adjust monthly thereafter based on the specified index plus a margin of 3.5 percent. The maximum lifetime interest rate is 10.5 percent; there are no other periodic interest rate adjustment caps that limit how quickly the maximum lifetime rate may be reached. The minimum monthly payment for the first year is based on the initial interest rate of 1.5 percent. After that, the minimum monthly payment adjusts annually, but may increase by no more than 7.5 percent over the previous year's payment. The minimum monthly payment is $690 in the first year, $742 in the second year, and $797 in the first part of the third year.

B. To determine the maximum loan amount, assume that the initial interest rate increases to the maximum lifetime interest rate of 10.5 percent at the first adjustment (*i.e.,* the due date of the first periodic monthly payment) and accrues at that rate until the loan is recast. Assume the consumer makes the minimum monthly payments as scheduled, which are capped at 7.5 percent from year-to-year. As a result, the consumer's minimum monthly payments are less than the interest accrued each month, resulting in negative amortization (*i.e.,* the accrued but unpaid interest is added to the principal balance). Thus, assuming that the consumer makes the minimum monthly payments for as long as possible and that the maximum interest rate of 10.5 percent is reached at the first rate adjustment (*i.e.,* the due date of the first periodic monthly payment), the negative amortization cap of 115 percent is reached on the due date of the 27th monthly payment and the loan is recast. The maximum loan amount as of the due date of the 27th monthly payment is $229,251.

ii. *Fixed-rate, graduated payment mortgage with negative amortization.* A loan in the amount of $200,000 has a 30-year loan term. The loan agreement provides for a fixed interest rate of 7.5 percent, and requires the consumer to make minimum monthly payments during the first year, with payments increasing 12.5 percent over the previous year every year for four years. The payment schedule provides for payments of $943 in the first year, $1,061 in the second year, $1,193 in the third year, $1,343 in the fourth year, and $1,511 for the remaining term of the loan. During the first three years of the loan, the payments are less than the interest accrued each month, resulting in negative amortization. Assuming that the consumer makes the minimum periodic payments for as long as possible, the maximum loan amount is $207,662, which is reached at the end of the third year of the loan (on the due date of the 36th monthly payment). See comment 43(c)(5)(ii)(C)–3 providing examples of how to determine the consumer's repayment ability for a negative amortization loan.

43(b)(8) Mortgage-related obligations.

1. *General.* Section 1026.43(b)(8) defines mortgage-related obligations, which must be considered in determining a consumer's ability to repay pursuant to § 1026.43(c). Section 1026.43(b)(8) includes, in the evaluation of mortgage-related obligations, fees and special assessments owed to a condominium, cooperative, or homeowners association. Section 1026.43(b)(8) includes ground rent and leasehold payments in the definition of mortgage-related obligations. See commentary to § 1026.43(c)(2)(v) regarding the requirement to take into account any mortgage-related obligations for purposes of determining a consumer's ability to repay.

2. *Property taxes.* Section 1026.43(b)(8) includes property taxes in the evaluation of mortgage-related obligations. Obligations that are related to the ownership or use of real property and paid to a taxing authority, whether on a monthly, quarterly, annual, or other basis, are property taxes for purposes of § 1026.43(b)(8). Section 1026.43(b)(8) includes obligations that are equivalent to property taxes, even if such obligations are not denominated as ''taxes.'' For example, governments may establish or allow independent districts with the authority to impose levies on properties within the district to fund a special purpose, such as a local development bond district, water district, or other public purpose. These levies may be referred to as taxes, assessments, surcharges, or by some other name. For purposes of § 1026.43(b)(8), these are property taxes and are included in the determination of mortgage-related obligations.

3. *Insurance premiums and similar charges.* Section 1026.43(b)(8) includes in the evaluation of mortgage-related obligations premiums and similar charges identified in § 1026.4(b)(5), (7), (8), or (10) that are required by the creditor. This includes all premiums or charges related to coverage protecting the creditor against a consumer's default, credit loss, collateral loss, or similar loss, if the consumer is required to pay the premium or charge. For example, if Federal law requires flood insurance to be obtained in connection with the mortgage loan, the flood insurance premium is a mortgage-related obligation for purposes of § 1026.43(b)(8). Section 1026.43(b)(8) does not include premiums or similar charges identified in § 1026.4(b)(5), (7), (8), or (10) that are not required by the creditor and that the consumer purchases voluntarily. For example:

i. If a creditor does not require earthquake insurance to be obtained in connection with the mortgage loan, but the consumer voluntarily chooses to purchase such insurance, the earthquake insurance premium is not a mortgage-related obligation for purposes of § 1026.43(b)(8).

ii. If a creditor requires a minimum amount of coverage for homeowners' insurance and the consumer voluntarily chooses to purchase a more comprehensive amount of coverage, the portion of the premium allocated to the required minimum coverage is a mortgage-related obligation for purposes of § 1026.43(b)(8), while the portion of the premium allocated to the more comprehensive coverage voluntarily purchased by the consumer is not a mortgage-related obligation for purposes of § 1026.43(b)(8).

iii. If the consumer purchases insurance or similar coverage not required by the creditor at consummation without having requested the specific non-required insurance or similar coverage and without having agreed to the premium or charge for the specific non-required insurance or similar coverage prior to consummation, the premium or charge is not voluntary for purposes of § 1026.43(b)(8) and is a mortgage-related obligation.

4. *Mortgage insurance, guarantee, or similar charges.* Section 1026.43(b)(8) includes in the evaluation of mortgage-related obligations premiums or charges protecting the creditor against the consumer's default or other credit loss. This includes all premiums or similar charges, whether denominated as mortgage insurance, guarantee insurance, or otherwise, as determined according to applicable State or Federal law. For example, monthly ''private mortgage insurance'' payments paid to a non-governmental entity, annual ''guarantee fee'' payments required by a Federal housing program, and a quarterly ''mortgage insurance'' payment paid to a State agency administering a housing program are all mortgage-related obligations for purposes of § 1026.43(b)(8). Section 1026.43(b)(8) includes these charges in the definition of mortgage-related obligations if the creditor requires the consumer to pay them, even if the consumer is not legally obligated to pay the charges under the terms of the insurance program. For example, if a mortgage insurance program obligates the creditor to make recurring mortgage insurance payments, and the creditor requires the consumer to reimburse the creditor for such recurring payments, the consumer's payments are mortgage-related obligations for purposes of § 1026.43(b)(8). However, if a mortgage insurance program obligates the creditor to make recurring mortgage insurance payments, and the creditor does not require the consumer to reimburse the creditor for the cost of the mortgage insurance payments, the recurring mortgage insurance payments are not mortgage-related obligations for purposes of § 1026.43(b)(8).

5. *Relation to the finance charge.* Section 1026.43(b)(8) includes in the evaluation of mortgage-related obligations premiums and similar charges identified in § 1026.4(b)(5), (7), (8), or (10) that are required by the creditor. These premiums and similar charges are mortgage-related obligations regardless of whether the premium or similar charge is excluded from the finance charge pursuant to § 1026.4(d). For example, a premium for insurance against loss or damage to the property written in connection with the credit transaction is a premium identified in § 1026.4(b)(8). If this premium is required by the creditor, the premium is a mortgage-related obligation pursuant to § 1026.43(b)(8), regardless of whether the premium is excluded from the finance charge pursuant to § 1026.4(d)(2).

43(b)(11) Recast.

1. *Date of the recast.* The term ''recast'' means, for an adjustable-rate mortgage, the expiration of the period during which

payments based on the introductory fixed rate are permitted; for an interest-only loan, the expiration of the period during which the interest-only payments are permitted; and, for a negative amortization loan, the expiration of the period during which negatively amortizing payments are permitted. For adjustable-rate mortgages, interest-only loans, and negative amortization loans, the date on which the recast is considered to occur is the due date of the last monthly payment based on the introductory fixed rate, the interest-only payment, or the negatively amortizing payment, respectively. To illustrate: A loan in an amount of $200,000 has a 30-year loan term. The loan agreement provides for a fixed interest rate and permits interest-only payments for the first five years of the loan (60 months). The loan is recast on the due date of the 60th monthly payment. Thus, the term of the loan remaining as of the date the loan is recast is 25 years (300 months).

43(b)(12) Simultaneous loan.

1. *General.* Section 1026.43(b)(12) defines a simultaneous loan as another covered transaction or a home equity line of credit (HELOC) subject to § 1026.40 that will be secured by the same dwelling and made to the same consumer at or before consummation of the covered transaction, whether it is made by the same creditor or a third-party creditor. (As with all of § 1026.43, the term ''dwelling'' includes any real property attached to a dwelling.) For example, assume a consumer will enter into a legal obligation that is a covered transaction with Creditor A. Immediately prior to consummation of the covered transaction with Creditor A, the consumer opens a HELOC that is secured by the same dwelling with Creditor B. For purposes of this section, the loan extended by Creditor B is a simultaneous loan. See commentary to § 1026.43(c)(2)(iv) and (c)(6), discussing the requirement to consider the consumer's payment obligation on any simultaneous loan for purposes of determining the consumer's ability to repay the covered transaction subject to this section.

2. *Same consumer.* For purposes of the definition of ''simultaneous loan,'' the term ''same consumer'' includes any consumer, as that term is defined in § 1026.2(a)(11), that enters into a loan that is a covered transaction and also enters into another loan (*e.g.,* second-lien covered transaction or HELOC) secured by the same dwelling. Where two or more consumers enter into a legal obligation that is a covered transaction, but only one of them enters into another loan secured by the same dwelling, the ''same consumer'' includes the person that has entered into both legal obligations. For example, assume Consumer A and Consumer B will both enter into a legal obligation that is a covered transaction with a creditor. Immediately prior to consummation of the covered transaction, Consumer B opens a HELOC that is secured by the same dwelling with the same creditor; Consumer A is not a signatory to the HELOC. For purposes of this definition, Consumer B is the same consumer and the creditor must include the HELOC as a simultaneous loan.

43(b)(13) Third-party record.

1. *Electronic records.* Third-party records include records transmitted electronically. For example, to verify a consumer's credit history using third-party records as required by § 1026.43(c)(2)(viii) and 1026.43(c)(3), a creditor may use a credit report prepared by a consumer reporting agency that is transmitted electronically.

2. *Forms.* A record prepared by a third party includes a form a creditor gives to a third party to provide information, even if the creditor completes parts of the form unrelated to the information sought. For example, if a creditor gives a consumer's employer a form for verifying the consumer's employment status and income, the creditor may fill in the creditor's name and other portions of the form unrelated to the consumer's employment status or income.

Paragraph 43(b)(13)(i).

1. *Reviewed record.* Under § 1026.43(b)(13)(i), a third-party record includes a document or other record prepared by the consumer, the creditor, the mortgage broker, or the creditor's or mortgage broker's agent, if the record is reviewed by an appropriate third party. For example, a profit-and-loss statement prepared by a self-employed consumer and reviewed by a third-party accountant is a third-party record under § 1026.43(b)(13)(i). In contrast, a profit-and-loss statement prepared by a self-employed consumer and reviewed by the consumer's non-accountant spouse is not a third-party record under § 1026.43(b)(13)(i).

Paragraph 43(b)(13)(iii).

1. *Creditor's records.* Section 1026.43(b)(13)(iii) provides that a third-party record includes a record the creditor maintains for an account of the consumer held by the creditor. Examples of such accounts include checking accounts, savings accounts, and retirement accounts. Examples of such accounts also include accounts related to a consumer's outstanding obligations to a creditor. For example, a third-party record includes the creditor's records for a first-lien mortgage to a consumer who applies for a subordinate-lien home equity loan.

43(c) Repayment ability.

43(c)(1) General requirement.

1. *Reasonable and good faith determination. i. General.* Creditors generally are required by § 1026.43(c)(1) to make reasonable and good faith determinations of consumers' ability to repay. Section 1026.43(c) and the accompanying commentary describe certain requirements for making this ability-to-repay determination, but do not provide comprehensive underwriting standards to which creditors must adhere. For example, the rule and commentary do not specify how much income is needed to support a particular level of debt or how credit history should be weighed against other factors. So long as creditors consider the factors set forth in § 1026.43(c)(2) according to the requirements of § 1026.43(c), creditors are permitted to develop their own underwriting standards and make changes to those standards over time in response to empirical information and changing economic and other conditions. Whether a particular ability-to-repay determination is reasonable and in good faith will depend not only on the underwriting standards adopted by the creditor, but on the facts and circumstances of an individual extension of credit and how a creditor's underwriting standards were applied to those facts and circumstances. A consumer's statement or attestation that the consumer has the ability to repay the loan is not indicative of whether the creditor's determination was reasonable and in good faith.

ii. *Considerations.* A. The following may be evidence that a creditor's ability-to-repay determination was reasonable and in good faith:

1. The consumer demonstrated actual ability to repay the loan by making timely payments, without modification or accommodation, for a significant period of time after consummation or, for an adjustable-rate, interest-only, or negative-amortization mortgage, for a significant period of time after recast;

2. The creditor used underwriting standards that have historically resulted in comparatively low rates of delinquency and default during adverse economic conditions; or

3. The creditor used underwriting standards based on empirically derived, demonstrably and statistically sound models.

B. In contrast, the following may be evidence that a creditor's ability-to-repay determination was not reasonable or in good faith:

1. The consumer defaulted on the loan a short time after consummation or, for an adjustable-rate, interest-only, or negative-amortization mortgage, a short time after recast;

2. The creditor used underwriting standards that have historically resulted in comparatively high levels of delinquency and default during adverse economic conditions;

3. The creditor applied underwriting standards inconsistently or used underwriting standards different from those used for similar loans without reasonable justification;

4. The creditor disregarded evidence that the underwriting standards it used are not effective at determining consumers' repayment ability;

5. The creditor disregarded evidence that the consumer may have insufficient residual income to cover other recurring obligations and expenses, taking into account the consumer's assets other than the property securing the loan, after paying his or her monthly payments for the covered transaction, any simultaneous loans, mortgage-related obligations, and any current debt obligations; or

6. The creditor disregarded evidence that the consumer would have the ability to repay only if the consumer subsequently refinanced the loan or sold the property securing the loan.

C. All of the considerations listed in paragraphs (A) and (B) above may be relevant to whether a creditor's ability-to-repay determination was reasonable and in good faith. However, these considerations are not requirements or prohibitions with which creditors must comply, nor are they elements of a claim that a consumer must prove to establish a violation of the ability-to-repay requirements. For example, creditors are not required to validate their underwriting criteria using mathematical models. These considerations also are not absolute in their application; instead they exist on a continuum and may apply to varying degrees. For example, the longer a consumer successfully makes timely payments after consummation or recast the less likely it is that the creditor's determination of ability to repay was unreasonable or not in good faith. Finally, each of these considerations must be viewed in the context of all facts and circumstances relevant to a particular extension of credit. For example, in some cases inconsistent application of underwriting standards may indicate that a creditor is manipulating those standards to approve a loan despite a consumer's inability to repay. The creditor's ability-to-repay determination therefore may be unreasonable or in bad faith. However, in other cases inconsistently applied underwriting standards may be the result of, for example, inadequate training and may nonetheless yield a reasonable and good faith ability-to-repay determination in a particular case. Similarly, although an early payment default on a mortgage will often be persuasive evidence that the creditor did not have a reasonable and good faith belief in the consumer's ability to repay (and such evidence may even be sufficient to establish a prima facie case of an ability-to-repay violation), a particular ability-to-repay determination may be reasonable and in good faith even though the consumer defaulted shortly after consummation if, for example, the consumer experienced a sudden and unexpected loss of income. In contrast, an ability-to-repay determination may be unreasonable or not in good faith even though the consumer made timely payments for a significant period of time if, for example, the consumer was able to make those payments only by foregoing necessities such as food and heat.

2. *Repayment ability at consummation.* Section 1026.43(c)(1) requires the creditor to determine, at or before the time the loan is consummated, that a consumer will have a reasonable ability to repay the loan. A change in the consumer's circumstances after consummation (for example, a significant reduction in income due to a job loss or a significant obligation arising from a major medical expense) that cannot be reasonably anticipated from the consumer's application or the records used to determine repayment ability is not relevant to determining a creditor's compliance with the rule. However, if the application or records considered at or before consummation indicate there will be a change in a consumer's repayment ability after consummation (for example, if a consumer's application states that the consumer plans to retire within 12 months without obtaining new employment or that the consumer will transition from full-time to part-time employment), the creditor must consider that information under the rule.

3. *Interaction with Regulation B.* Section 1026.43(c)(1) does not require or permit the creditor to make inquiries or verifications prohibited by Regulation B, 12 CFR part 1002.

43(c)(2) Basis for determination.

1. *General.* Section 1026.43(c)(2) sets forth factors creditors must consider when making the ability-to-repay determination required under § 1026.43(c)(1) and the accompanying commentary provides guidance regarding these factors. Creditors must conform to these requirements and may rely on guidance provided in the commentary. However, § 1026.43(c) and the accompanying commentary do not provide comprehensive guidance on definitions and other technical underwriting criteria necessary for evaluating these factors in practice. So long as a creditor complies with the provisions of § 1026.43(c), the creditor is permitted to use its own definitions and other technical underwriting criteria. A creditor may, but is not required to, look to guidance issued by entities such as the Federal Housing Administration, the U.S. Department of Veterans Affairs, the U.S. Department of Agriculture, or Fannie Mae or Freddie Mac while operating under the conservatorship of the Federal Housing Finance Agency. For example, a creditor may refer to such guidance to classify particular inflows, obligations, or property as ''income,'' ''debt,'' or ''assets.'' Similarly, a creditor may refer to such guidance to determine what information to use when evaluating the income of a self-employed or seasonally employed consumer or what information to use when evaluating the credit history of a consumer who has obtained few or no extensions of traditional ''credit'' as defined in § 1026.2(a)(14). These examples are illustrative, and creditors are not required to conform to guidance issued by these or other such entities. However, as required by § 1026.43(c)(1), a creditor must ensure that its underwriting criteria, as applied to the facts and circumstances of a particular extension of credit, result in a reasonable, good faith determination of a consumer's ability to repay. For example, a definition used in underwriting that is reasonable in isolation may lead to ability-to-repay determinations that are unreasonable or not in good faith when considered in the context of a creditor's underwriting standards or when adopted or applied in bad faith. Similarly, an ability-to-repay determination is not unreasonable or in bad faith merely because the underwriting criteria used included a definition that was by itself unreasonable.

Paragraph 43(c)(2)(i).

1. *Income or assets generally.* A creditor may base its determination of repayment ability on current or reasonably expected income from employment or other sources, assets other than the dwelling that secures the covered transaction, or both. The creditor may consider any type of current or reasonably expected income, including, for example, the following: salary; wages; self-employment income; military or reserve duty income; bonus pay; tips; commissions; interest payments; dividends; retirement benefits or entitlements; rental income; royalty payments; trust income; public assistance payments; and alimony, child support, and separate maintenance payments. The creditor may consider any of the consumer's assets, other than the value of the dwelling that secures the covered transaction, including, for example, the following: funds in a savings or checking account, amounts vested in a retirement account, stocks, bonds, certificates of deposit, and amounts available to the consumer from a trust fund. (As stated in § 1026.43(a), the value of the dwelling includes the value of the real property to which the residential structure is attached, if the real property also secures the covered transaction.)

2. *Income or assets relied on.* A creditor need consider only the income or assets necessary to support a determination that the consumer can repay the covered transaction. For example, if a consumer's loan application states that the consumer earns an annual salary from both a full-time job and a part-time job and the creditor reasonably determines that the consumer's income from the full-time job is sufficient to repay the loan, the creditor need not consider the consumer's income from the part-time job. Further, a creditor need verify only the income (or assets) relied on to determine the consumer's repayment ability. *See* comment 43(c)(4)–1.

3. *Reasonably expected income.* If a creditor relies on expected income in excess of the consumer's income, either in addition to or instead of current income, the expectation that the income will be available for repayment must be reasonable and verified with third-party records that provide reasonably reliable evidence of the consumer's expected income. For example, if the creditor relies on an expectation that a consumer will receive an annual bonus, the creditor may verify the basis for that expectation with records that show the consumer's past annual bonuses, and the expected bonus must bear a reasonable relationship to the past bonuses. Similarly, if the creditor relies on a consumer's expected salary from a job the consumer has accepted and will begin after receiving an educational degree, the creditor may verify that expectation with a written statement from an employer indicating that the consumer will be employed upon graduation at a specified salary.

4. *Seasonal or irregular income.* A creditor reasonably may determine that a consumer can make periodic loan payments even if the consumer's income, such as self-employment income, is seasonal or irregular. For example, assume a consumer receives seasonal income from the sale of crops or from agricultural employment. Each year, the consumer's income arrives during only a few months. If the creditor determines that the consumer's annual income divided equally across 12 months is sufficient for the consumer to make monthly loan payments, the creditor reasonably may determine that the consumer can repay the loan, even though the consumer may not receive income during certain months.

5. *Multiple applicants.* When two or more consumers apply for an extension of credit as joint obligors with primary liability on an obligation, § 1026.43(c)(2)(i) does not require the creditor to consider income or assets that are not needed to support the creditor's repayment ability determination. If the income or assets of one applicant are

sufficient to support the creditor's repayment ability determination, the creditor is not required to consider the income or assets of the other applicant. For example, if a husband and wife jointly apply for a loan and the creditor reasonably determines that the wife's income is sufficient to repay the loan, the creditor is not required to consider the husband's income.

Paragraph 43(c)(2)(ii).

1. *Employment status and income.* Employment status need not be full-time, and employment need not occur at regular intervals. If, in determining the consumer's repayment ability, the creditor relies on income from the consumer's employment, then that employment may be, for example, full-time, part-time, seasonal, irregular, military, or self-employment, so long as the creditor considers those characteristics of the employment. Under § 1026.43(c)(2)(ii), a creditor must verify a consumer's current employment status only if the creditor relies on the consumer's employment income in determining the consumer's repayment ability. For example, if a creditor relies wholly on a consumer's investment income to determine repayment ability, the creditor need not verify or document employment status. See comments 43(c)(2)(i)–5 and 43(c)(4)–2 for guidance on which income to consider when multiple consumers apply jointly for a loan.

Paragraph 43(c)(2)(iii).

1. *General.* For purposes of the repayment ability determination required under § 1026.43(c)(2), a creditor must consider the consumer's monthly payment on a covered transaction that is calculated as required under § 1026.43(c)(5).

Paragraph 43(c)(2)(iv).

1. *Home equity lines of credit.* For purposes of § 1026.43(c)(2)(iv), a simultaneous loan includes any covered transaction or home equity line of credit (HELOC) subject to § 1026.40 that will be made to the same consumer at or before consummation of the covered transaction and secured by the same dwelling that secures the covered transaction. A HELOC that is a simultaneous loan that the creditor knows or has reason to know about must be considered as a mortgage obligation in determining a consumer's ability to repay the covered transaction even though the HELOC is not a covered transaction subject to § 1026.43. See § 1026.43(a) discussing the scope of this section. ''Simultaneous loan'' is defined in § 1026.43(b)(12). For further explanation of ''same consumer,'' see comment 43(b)(12)–2.

2. *Knows or has reason to know.* In determining a consumer's repayment ability for a covered transaction under § 1026.43(c)(2), a creditor must consider the consumer's payment obligation on any simultaneous loan that the creditor knows or has reason to know will be or has been made at or before consummation of the covered transaction. For example, where a covered transaction is a home purchase loan, the creditor must consider the consumer's periodic payment obligation for any ''piggyback'' second-lien loan that the creditor knows or has reason to know will be used to finance part of the consumer's down payment. The creditor complies with this requirement where, for example, the creditor follows policies and procedures that are designed to determine whether at or before consummation the same consumer has applied for another credit transaction secured by the same dwelling. To illustrate, assume a creditor receives an application for a home purchase loan where the requested loan amount is less than the home purchase price. The creditor's policies and procedures must require the consumer to state the source of the down payment and provide verification. If the creditor determines the source of the down payment is another extension of credit that will be made to the same consumer at or before consummation and secured by the same dwelling, the creditor knows or has reason to know of the simultaneous loan and must consider the simultaneous loan. Alternatively, if the creditor has information that suggests the down payment source is the consumer's existing assets, the creditor would be under no further obligation to determine whether a simultaneous loan will be extended at or before consummation of the covered transaction. The creditor is not obligated to investigate beyond reasonable underwriting policies and procedures to determine whether a simultaneous loan will be extended at or before consummation of the covered transaction.

3. *Scope of timing.* For purposes of § 1026.43(c)(2)(iv), a simultaneous loan includes a loan that comes into existence concurrently with the covered transaction subject to § 1026.43(c). A simultaneous loan does not include a credit transaction that occurs after consummation of the covered transaction that is subject to this section. However, any simultaneous loan that specifically covers closing costs of the covered transaction, but is scheduled to be extended after consummation must be considered for the purposes of § 1026.43(c)(2)(iv).

Paragraph 43(c)(2)(v).

1. *General.* A creditor must include in its repayment ability assessment the consumer's monthly payment for mortgage-related obligations, such as the expected property taxes and premiums or similar charges identified in § 1026.4(b)(5), (7), (8), or (10) that are required by the creditor. See § 1026.43(b)(8) defining the term ''mortgage-related obligations.'' Mortgage-related obligations must be included in the creditor's determination of repayment ability regardless of whether the amounts are included in the monthly payment or whether there is an escrow account established. Section 1026.43(c)(2)(v) includes only payments that occur on an ongoing or recurring basis in the evaluation of the consumer's monthly payment for mortgage-related obligations. One-time charges, or obligations satisfied at or before consummation, are not ongoing or recurring, and are therefore not part of the consumer's monthly payment for purposes of § 1026.43(c)(2)(v). For example:

i. Assume that a consumer will be required to pay property taxes, as described in comment 43(b)(8)–2, on a quarterly, annual, or other basis after consummation. Section 1026.43(c)(2)(v) includes these recurring property taxes in the evaluation of the consumer's monthly payment for mortgage-related obligations. However, if the consumer will incur a one-time charge to satisfy property taxes that are past due, § 1026.43(c)(2)(v) does not include this one-time charge in the evaluation of the consumer's monthly payment for mortgage-related obligations.

ii. Assume that a consumer will be required to pay mortgage insurance premiums, as described in comment 43(b)(8)–2, on a monthly, annual, or other basis after consummation. Section 1026.43(c)(2)(v) includes these recurring mortgage insurance payments in the evaluation of the consumer's monthly payment for mortgage-related obligations. However, if the consumer will incur a one-time fee or charge for mortgage insurance or similar purposes, such as an up-front mortgage insurance premium imposed at consummation, § 1026.43(c)(2)(v) does not include this up-front mortgage insurance premium in the evaluation of the consumer's monthly payment for mortgage-related obligations.

2. *Obligations to an association, other than special assessments.* Section 1026.43(b)(8) defines mortgage-related obligations to include obligations owed to a condominium, cooperative, or homeowners association. However, § 1026.43(c)(2)(v) does not require a creditor to include in the evaluation of the consumer's monthly payment for mortgage-related obligations payments to such associations imposed in connection with the extension of credit, or imposed as an incident to the transfer of ownership, if such obligations are fully satisfied at or before consummation. For example, if a homeowners association imposes a one-time transfer fee on the transaction, and the consumer will pay the fee at or before consummation, § 1026.43(c)(2)(v) does not require the creditor to include this one-time transfer fee in the evaluation of the consumer's monthly payment for mortgage-related obligations. Section 1026.43(c)(2)(v) also does not require the creditor to include this fee in the evaluation of the consumer's monthly payment for mortgage-related obligations if the consumer finances the fee in the loan amount. However, if the consumer incurs the obligation and will satisfy the obligation with recurring payments after consummation, regardless of whether the obligation is escrowed, § 1026.43(c)(2)(v) requires the creditor to include the transfer fee in the evaluation of the consumer's monthly payment for mortgage-related obligations.

3. *Special assessments imposed by an association.* Section 1026.43(b)(8) defines mortgage-related obligations to include special assessments imposed by a condominium, cooperative, or homeowners association. Section 1026.43(c)(2)(v) does not require a creditor to include special assessments in the evaluation of the consumer's monthly payment for mortgage-related obligations if the special assessments are fully satisfied at or before consummation. For example, if a homeowners association imposes a special assessment that the consumer will have to pay in full at or before consummation, § 1026.43(c)(2)(v) does not include the special assessment in the

evaluation of the consumer's monthly payment for mortgage-related obligations. Section 1026.43(c)(2)(v) does not require a creditor to include special assessments in the evaluation of the consumer's monthly payment for mortgage-related obligations if the special assessments are imposed as a one-time charge. For example, if a homeowners association imposes a special assessment that the consumer will have to satisfy in one payment, § 1026.43(c)(2)(v) does not include this one-time special assessment in the evaluation of the consumer's monthly payment for mortgage-related obligations. However, if the consumer will pay the special assessment on a recurring basis after consummation, regardless of whether the consumer's payments for the special assessment are escrowed, § 1026.43(c)(2)(v) requires the creditor to include this recurring special assessment in the evaluation of the consumer's monthly payment for mortgage-related obligations.

4. *Pro rata amount.* For purposes of § 1026.43(c)(2)(v), the creditor may divide the recurring payments for mortgage-related obligations into monthly, pro rata amounts. In considering a mortgage-related obligation that is not paid monthly, if the mortgage loan is originated pursuant to a government program the creditor may determine the pro rata monthly amount of the mortgage-related obligation in accordance with the specific requirements of that program. If the mortgage loan is originated pursuant to a government program that does not contain specific standards for determining the pro rata monthly amount of the mortgage-related obligation, or if the mortgage loan is not originated pursuant to a government program, the creditor complies with § 1026.43(c)(2)(v) by dividing the total amount of a particular non-monthly mortgage-related obligation by no more than the number of months from the month that the non-monthly mortgage-related obligation was due prior to consummation until the month that the non-monthly mortgage-related obligation will be due after consummation. When determining the pro rata monthly payment amount, the creditor may also consider comment 43(c)(2)(v)–5, which explains that the creditor need not project potential changes. The following examples further illustrate how a creditor may determine the pro rata monthly amount of mortgage-related obligations, pursuant to § 1026.43(c)(2)(v):

i. Assume that a consumer applies for a mortgage loan on February 1st. Assume further that the subject property is located in a jurisdiction where property taxes are paid in arrears on the first day of October. The creditor complies with § 1026.43(c)(2)(v) by determining the annual property tax amount owed in the prior October, dividing the amount by 12, and using the resulting amount as the pro rata monthly property tax payment amount for the determination of the consumer's monthly payment for mortgage-related obligations. The creditor complies even if the consumer will likely owe more in the next year than the amount owed the prior October because the jurisdiction normally increases the property tax rate annually, provided that the creditor does not have knowledge of an increase in the property tax rate at the time of underwriting. See also comment 43(c)(2)(v)–5 regarding estimates of mortgage-related obligations.

ii. Assume that a subject property is located in a special water district, the assessments for which are billed separately from local property taxes. The creditor complies with § 1026.43(c)(2)(v) by dividing the full amount that will be owed by the number of months in the assessment period, and including the resulting amount in the calculation of monthly mortgage-related obligations. However, § 1026.43(c)(2)(v) does not require a creditor to adjust the monthly amount to account for potential deviations from the average monthly amount. For example, assume in this example that the special water assessment is billed every eight months, that the consumer will have to pay the first water district bill four months after consummation, and that the seller will not provide the consumer with any funds to pay for the seller's obligation (*i.e.,* the four months prior to consummation). Although the consumer will be required to budget twice the average monthly amount to pay the first water district bill, § 1026.43(c)(2)(v) does not require the creditor to use the increased amount; the creditor complies with § 1026.43(c)(2)(v) by using the average monthly amount.

iii. Assume that the subject property is located in an area where flood insurance is required by Federal law, and assume further that the flood insurance policy premium is paid every three years following consummation. The creditor complies with § 1026.43(c)(2)(v) by dividing the three-year premium by 36 months and including the resulting amount in the determination of the consumer's monthly payment for mortgage-related obligations. The creditor complies even if the consumer will not establish a monthly escrow for flood insurance.

iv. Assume that the subject property is part of a homeowners association that has imposed upon the seller a special assessment of $1,200. Assume further that this special assessment will become the consumer's obligation upon consummation of the transaction, that the consumer is permitted to pay the special assessment in twelve $100 installments after consummation, and that the mortgage loan will not be originated pursuant to a government program that contains specific requirements for prorating special assessments. The creditor complies with § 1026.43(c)(2)(v) by dividing the $1,200 special assessment by 12 months and including the resulting $100 monthly amount in the determination of the consumer's monthly payment for mortgage-related obligations. The creditor complies by using this calculation even if the consumer intends to pay the special assessment in a manner other than that used by the creditor in determining the monthly pro rata amount, such as where the consumer intends to pay six $200 installments.

5. *Estimates.* Estimates of mortgage-related obligations should be based upon information that is known to the creditor at the time the creditor underwrites the mortgage obligation. Information is known if it is reasonably available to the creditor at the time of underwriting the loan. Creditors may rely on guidance provided under comment 17(c)(2)(i)–1 in determining if information is reasonably available. For purposes of this section, the creditor need not project potential changes, such as by estimating possible increases in taxes and insurance. See comment 43(c)(2)(v)–4 for additional examples discussing the projection of potential changes. The following examples further illustrate the requirements of § 1026.43(c)(2)(v):

i. Assume that the property is subject to a community governance association, such as a homeowners association. The creditor complies with § 1026.43(c)(2)(v) by relying on an estimate of mortgage-related obligations prepared by the homeowners association. In accordance with the guidance provided under comment 17(c)(2)(i)–1, the creditor need only exercise due diligence in determining mortgage-related obligations, and complies with § 1026.43(c)(2)(v) by relying on the representations of other reliable parties in preparing estimates.

ii. Assume that the homeowners association has imposed a special assessment on the seller, but the seller does not inform the creditor of the special assessment, the homeowners association does not include the special assessment in the estimate of expenses prepared for the creditor, and the creditor is unaware of the special assessment. The creditor complies with § 1026.43(c)(2)(v) if it does not include the special assessment in the determination of mortgage-related obligations. The creditor may rely on the representations of other reliable parties, in accordance with the guidance provided under comment 17(c)(2)(i)–1.

iii. Assume that the homeowners association imposes a special assessment after the creditor has completed underwriting, but prior to consummation. The creditor does not violate § 1026.43(c)(2)(v) if the creditor does not include the special assessment in the determination of the consumer's monthly payment for mortgage-related obligations, provided the homeowners association does not inform the creditor about the special assessment during underwriting. Section 1026.43(c)(2)(v) does not require the creditor to re-underwrite the loan. The creditor has complied with § 1026.43(c)(2)(v) by including the obligations known to the creditor at the time the loan is underwritten, even if the creditor learns of new mortgage-related obligations before the transaction is consummated.

Paragraph 43(c)(2)(vi).

1. *Consideration of current debt obligations.* Section 1026.43(c)(2)(vi) requires creditors to consider a consumer's current debt obligations and any alimony or child support the consumer is required to pay. Examples of current debt obligations include student loans, automobile loans, revolving debt, and existing mortgages that will not be paid off at or before consummation. Creditors have significant flexibility to consider current debt obligations in light of attendant facts and circumstances, including that an obligation is likely to be paid off soon after consummation. For example, a creditor may take into account that an existing mortgage is

likely to be paid off soon after consummation because there is an existing contract for sale of the property that secures that mortgage. Similarly, creditors should consider whether debt obligations in forbearance or deferral at the time of underwriting are likely to affect the consumer's ability to repay based on the payment for which the consumer will be liable upon expiration of the forbearance or deferral period and other relevant facts and circumstances, such as when the forbearance or deferral period will expire.

2. *Multiple applicants.* When two or more consumers apply for an extension of credit as joint obligors with primary liability on an obligation, § 1026.43(c)(2)(vi) requires a creditor to consider the debt obligations of all such joint applicants. For example, if a co-applicant is repaying a student loan at the time of underwriting, the creditor complies with § 1026.43(c)(2)(vi) by considering the co-applicant's student loan obligation. If one consumer is merely a surety or guarantor, § 1026.43(c)(2)(vi) does not require a creditor to consider the debt obligations of such surety or guarantor. The requirements of § 1026.43(c)(2)(vi) do not affect the disclosure requirements of this part, such as, for example, §§ 1026.17(d), 1026.23(b), 1026.31(e), 1026.39(b)(3), and 1026.46(f).

Paragraph 43(c)(2)(vii).

1. *Monthly debt-to-income ratio and residual income.* See § 1026.43(c)(7) and its associated commentary regarding the definitions and calculations for the monthly debt-to-income ratio and residual income.

Paragraph 43(c)(2)(viii).

1. *Consideration of credit history.* ''Credit history'' may include factors such as the number and age of credit lines, payment history, and any judgments, collections, or bankruptcies. Section 1026.43(c)(2)(viii) does not require creditors to obtain or consider a consolidated credit score or prescribe a minimum credit score that creditors must apply. The rule also does not specify which aspects of credit history a creditor must consider or how various aspects of credit history should be weighed against each other or against other underwriting factors. Some aspects of a consumer's credit history, whether positive or negative, may not be directly indicative of the consumer's ability to repay. A creditor therefore may give various aspects of a consumer's credit history as much or as little weight as is appropriate to reach a reasonable, good faith determination of ability to repay. Where a consumer has obtained few or no extensions of traditional ''credit,'' as defined in § 1026.2(a)(14), a creditor may, but is not required to, look to nontraditional credit references, such as rental payment history or utility payments.

2. *Multiple applicants.* When two or more consumers apply for an extension of credit as joint obligors with primary liability on an obligation, § 1026.43(c)(2)(viii) requires a creditor to consider the credit history of all such joint applicants. If a consumer is merely a surety or guarantor, § 1026.43(c)(2)(viii) does not require a creditor to consider the credit history of such surety or guarantor. The requirements of § 1026.43(c)(2)(viii) do not affect the disclosure requirements of this part, such as, for example, §§ 1026.17(d), 1026.23(b), 1026.31(e), 1026.39(b)(3), and 1026.46(f).

43(c)(3) Verification using third-party records.

1. *Records specific to the individual consumer.* Records a creditor uses for verification under § 1026.43(c)(3) and (4) must be specific to the individual consumer. Records regarding average incomes in the consumer's geographic location or average wages paid by the consumer's employer, for example, are not specific to the individual consumer and are not sufficient for verification.

2. *Obtaining records.* To conduct verification under § 1026.43(c)(3) and (4), a creditor may obtain records from a third-party service provider, such as a party the consumer's employer uses to respond to income verification requests, as long as the records are reasonably reliable and specific to the individual consumer. A creditor also may obtain third-party records directly from the consumer, likewise as long as the records are reasonably reliable and specific to the individual consumer. For example, a creditor using payroll statements to verify the consumer's income, as allowed under § 1026.43(c)(4)(iii), may obtain the payroll statements from the consumer.

3. *Credit report as a reasonably reliable third-party record.* A credit report generally is considered a reasonably reliable third-party record under § 1026.43(c)(3) for purposes of verifying items customarily found on a credit report, such as the consumer's current debt obligations, monthly debts, and credit history. Section 1026.43(c)(3) generally does not require creditors to obtain additional reasonably reliable third-party records to verify information contained in a credit report. For example, if a credit report states the existence and amount of a consumer's debt obligation, the creditor is not required to obtain additional verification of the existence or amount of that obligation. In contrast, a credit report does not serve as a reasonably reliably third-party record for purposes of verifying items that do not appear on the credit report. For example, certain monthly debt obligations, such as legal obligations like alimony or child support, may not be reflected on a credit report. Thus, a credit report that does not list a consumer's monthly alimony obligation does not serve as a reasonably reliable third-party record for purposes of verifying that obligation. If a credit report reflects a current debt obligation that a consumer has not listed on the application, the creditor complies with § 1026.43(c)(3) if the creditor considers the existence and amount of the debt obligation as it is reflected in the credit report. However, in some cases a creditor may know or have reason to know that a credit report may be inaccurate in whole or in part. For example, a creditor may have information indicating that a credit report is subject to a fraud alert, extended alert, active duty alert, or similar alert identified in 15 U.S.C. 1681c–1 or that a debt obligation listed on a credit report is subject to a statement of dispute pursuant to 15 U.S.C. 1681i(b). A creditor may also have other reasonably reliable third-party records or other information or evidence that the creditor reasonably finds to be reliable that contradict the credit report or otherwise indicate that the credit report is inaccurate. If a creditor knows or has reason to know that a credit report may be inaccurate in whole or in part, the creditor complies with § 1026.43(c)(3) by disregarding an inaccurate or disputed item, items, or credit report, but does not have to obtain additional third-party records. The creditor may also, but is not required, to obtain other reasonably reliable third-party records to verify information with respect to which the credit report, or item therein, may be inaccurate. For example, the creditor might obtain statements or bank records regarding a particular debt obligation subject to a statement of dispute. See also comment 43(c)(3)–6, which describes a situation in which a consumer reports a debt obligation that is not listed on a credit report.

4. *Verification of simultaneous loans.* Although a credit report may be used to verify current obligations, it will not reflect a simultaneous loan that has not yet been consummated and may not reflect a loan that has just recently been consummated. If the creditor knows or has reason to know that there will be a simultaneous loan extended at or before consummation, the creditor may verify the simultaneous loan by obtaining third-party verification from the third-party creditor of the simultaneous loan. For example, the creditor may obtain a copy of the promissory note or other written verification from the third-party creditor. For further guidance, see comments 43(c)(3)–1 and –2 discussing verification using third-party records.

5. *Verification of mortgage-related obligations.* Creditors must make the repayment ability determination required under § 1026.43(c)(2) based on information verified from reasonably reliable records. For general guidance regarding verification see comments 43(c)(3)–1 and –2, which discuss verification using third-party records. With respect to the verification of mortgage-related obligations that are property taxes required to be considered under § 1026.43(c)(2)(v), a record is reasonably reliable if the information in the record was provided by a governmental organization, such as a taxing authority or local government. The creditor complies with § 1026.43(c)(2)(v) by relying on property taxes referenced in the title report if the source of the property tax information was a local taxing authority. With respect to other information in a record provided by an entity assessing charges, such as a homeowners association, the creditor complies with § 1026.43(c)(2)(v) if it relies on homeowners association billing statements provided by the seller. Records are also reasonably reliable if the information in the record was obtained from a valid and legally executed contract. For example, the creditor complies with § 1026.43(c)(2)(v) by relying on the amount of monthly ground rent referenced in the ground rent agreement currently in effect and applicable to the subject property. Records, other than those discussed above, may be reasonably reliable for purposes of § 1026.43(c)(2)(v) if the source provided the information objectively.

6. *Verification of current debt obligations.* Section 1026.43(c)(3) does not require

creditors to obtain additional records to verify the existence or amount of obligations shown on a consumer's credit report or listed on the consumer's application, absent circumstances described in comment 43(c)(3)–3. Under § 1026.43(c)(3)(iii), if a creditor relies on a consumer's credit report to verify a consumer's current debt obligations and the consumer's application lists a debt obligation not shown on the credit report, the creditor may consider the existence and amount of the obligation as it is stated on the consumer's application. The creditor is not required to further verify of the existence or amount of the obligation, absent circumstances described in comment 43(c)(3)–3.

7. *Verification of credit history.* To verify credit history, a creditor may, for example, look to credit reports from credit bureaus or to reasonably reliable third-party records that evidence nontraditional credit references, such as evidence of rental payment history or public utility payments.

8. *Verification of military employment.* A creditor may verify the employment status of military personnel by using a military Leave and Earnings Statement or by using the electronic database maintained by the Department of Defense to facilitate identification of consumers covered by credit protections provided pursuant to 10 U.S.C. 987.

43(c)(4) Verification of income or assets.

1. *Income or assets relied on.* A creditor need consider, and therefore need verify, only the income or assets the creditor relies on to evaluate the consumer's repayment ability. *See* comment 43(c)(2)(i)–2. For example, if a consumer's application states that the consumer earns a salary and is paid an annual bonus and the creditor relies on only the consumer's salary to evaluate the consumer's repayment ability, the creditor need verify only the salary. *See also* comments 43(c)(3)–1 and –2.

2. *Multiple applicants.* If multiple consumers jointly apply for a loan and each lists income or assets on the application, the creditor need verify only the income or assets the creditor relies on in determining repayment ability. *See* comment 43(c)(2)(i)–5.

3. *Tax-return transcript.* Under § 1026.43(c)(4), a creditor may verify a consumer's income using an Internal Revenue Service (IRS) tax-return transcript, which summarizes the information in a consumer's filed tax return, another record that provides reasonably reliable evidence of the consumer's income, or both. A creditor may obtain a copy of a tax-return transcript or a filed tax return directly from the consumer or from a service provider. A creditor need not obtain the copy directly from the IRS or other taxing authority. *See* comment 43(c)(3)–2.

Paragraph 43(c)(4)(vi).

1. *Government benefits.* In verifying a consumer's income, a creditor may use a written or electronic record from a government agency of the amount of any benefit payments or awards, such as a ''proof of income letter'' issued by the Social Security Administration (also known as a ''budget letter,'' ''benefits letter,'' or ''proof of award letter'').

43(c)(5) Payment calculation.

43(c)(5)(i) General rule.

1. *General.* For purposes of § 1026.43(c)(2)(iii), a creditor must determine the consumer's ability to repay the covered transaction using the payment calculation methods set forth in § 1026.43(c)(5). The payment calculation methods differ depending on the type of credit extended. The payment calculation method set forth in § 1026.43(c)(5)(i) applies to any covered transaction that does not have a balloon payment, or that is not an interest-only or negative amortization loan, whether such covered transaction is a fixed-rate, adjustable-rate or step-rate mortgage. The terms ''fixed-rate mortgage,'' ''adjustable-rate mortgage,'' ''step-rate mortgage,'' ''interest-only loan'' and ''negative amortization loan'' are defined in § 1026.18(s)(7)(iii), (i), (ii), (iv) and (v), respectively. For the meaning of the term ''balloon payment,'' see § 1026.18(s)(5)(i). The payment calculation methods set forth in § 1026.43(c)(5)(ii) apply to any covered transaction that is a loan with a balloon payment, interest-only loan, or negative amortization loan. See comment 43(c)(5)(i)–5 and the commentary to § 1026.43(c)(5)(ii), which provide examples for calculating the monthly payment for purposes of the repayment ability determination required under § 1026.43(c)(2)(iii).

2. *Greater of the fully indexed rate or introductory rate; premium adjustable-rate transactions.* A creditor must determine a consumer's repayment ability for the covered transaction using substantially equal, monthly, fully amortizing payments that are based on the greater of the fully indexed rate or any introductory interest rate. In some adjustable-rate transactions, creditors may set an initial interest rate that is not determined by the index or formula used to make later interest rate adjustments. Sometimes, this initial rate charged to consumers is lower than the rate would be if it were determined by using the index plus margin, or formula (*i.e.,* fully indexed rate). However, an initial rate that is a premium rate is higher than the rate based on the index or formula. In such cases, creditors must calculate the fully amortizing payment based on the initial ''premium'' rate. ''Fully indexed rate'' is defined in § 1026.43(b)(3).

3. *Monthly, fully amortizing payments.* Section 1026.43(c)(5)(i) does not prescribe the terms or loan features that a creditor may choose to offer or extend to a consumer, but establishes the calculation method a creditor must use to determine the consumer's repayment ability for a covered transaction. For example, the terms of the loan agreement may require that the consumer repay the loan in quarterly or bi-weekly scheduled payments, but for purposes of the repayment ability determination, the creditor must convert these scheduled payments to monthly payments in accordance with § 1026.43(c)(5)(i)(B). Similarly, the loan agreement may not require the consumer to make fully amortizing payments, but for purposes of the repayment ability determination under § 1026.43(c)(5)(i), the creditor must convert any non-amortizing payments to fully amortizing payments.

4. *Substantially equal.* In determining whether monthly, fully amortizing payments are substantially equal, creditors should disregard minor variations due to payment-schedule irregularities and odd periods, such as a long or short first or last payment period. That is, monthly payments of principal and interest that repay the loan amount over the loan term need not be equal, but the monthly payments should be substantially the same without significant variation in the monthly combined payments of both principal and interest. For example, where no two monthly payments vary from each other by more than 1 percent (excluding odd periods, such as a long or short first or last payment period), such monthly payments would be considered substantially equal for purposes of this section. In general, creditors should determine whether the monthly, fully amortizing payments are substantially equal based on guidance provided in § 1026.17(c)(3) (discussing minor variations), and § 1026.17(c)(4)(i) through (iii) (discussing payment-schedule irregularities and measuring odd periods due to a long or short first period) and associated commentary.

5. *Examples.* The following are examples of how to determine the consumer's repayment ability based on substantially equal, monthly, fully amortizing payments as required under § 1026.43(c)(5)(i) (all amounts shown are rounded, and all amounts are calculated using non-rounded values):

i. *Fixed-rate mortgage.* A loan in an amount of $200,000 has a 30-year loan term and a fixed interest rate of 7 percent. For purposes of § 1026.43(c)(2)(iii), the creditor must determine the consumer's ability to repay the loan based on a payment of $1,331, which is the substantially equal, monthly, fully amortizing payment that will repay $200,000 over 30 years using the fixed interest rate of 7 percent.

ii. *Adjustable-rate mortgage with discount for five years.* A loan in an amount of $200,000 has a 30-year loan term. The loan agreement provides for a discounted interest rate of 6 percent that is fixed for an initial period of five years, after which the interest rate will adjust annually based on a specified index plus a margin of 3 percent, subject to a 2 percent annual periodic interest rate adjustment cap. The index value in effect at consummation is 4.5 percent; the fully indexed rate is 7.5 percent (4.5 percent plus 3 percent). Even though the scheduled monthly payment required for the first five years is $1199, for purposes of § 1026.43(c)(2)(iii) the creditor must determine the consumer's ability to repay the loan based on a payment of $1,398, which is the substantially equal, monthly, fully amortizing payment that will repay $200,000 over 30 years using the fully indexed rate of 7.5 percent.

iii. *Step-rate mortgage.* A loan in an amount of $200,000 has a 30-year loan term. The loan agreement provides that the interest rate will be 6.5 percent for the first two years of the loan, 7 percent for the next three years of the loan, and 7.5 percent thereafter. Accordingly, the scheduled payment amounts are $1,264 for the first two years, $1,328 for the next three years, and $1,388 thereafter for the remainder of the term. For purposes of § 1026.43(c)(2)(iii), the creditor must determine the consumer's ability to repay the loan based on a payment of $1,398, which is the substantially equal, monthly, fully amortizing payment that would repay $200,000 over 30 years using the fully indexed rate of 7.5 percent.

43(c)(5)(ii) Special rules for loans with a balloon payment, interest-only loans, and negative amortization loans.

Paragraph 43(c)(5)(ii)(A).

1. *General.* For loans with a balloon payment, the rules differ depending on whether the loan is a higher-priced covered transaction, as defined under § 1026.43(b)(4), or is not a higher-priced covered transaction because the annual percentage rate does not exceed the applicable threshold calculated using the applicable average prime offer rate (APOR) for a comparable transaction. ''Average prime offer rate'' is defined in § 1026.35(a)(2); ''higher-priced covered transaction'' is defined in § 1026.43(b)(4). For higher-priced covered transactions with a balloon payment, the creditor must consider the consumer's ability to repay the loan based on the payment schedule under the terms of the legal obligation, including any required balloon payment. For loans with a balloon payment that are not higher-priced covered transactions, the creditor should use the maximum payment scheduled during the first five years of the loan following the date on which the first regular periodic payment will be due. ''Balloon payment'' is defined in § 1026.18(s)(5)(i).

2. *First five years after the date on which the first regular periodic payment will be due.* Under § 1026.43(c)(5)(ii)(A)(*1*), the creditor must determine a consumer's ability to repay a loan with a balloon payment that is not a higher-priced covered transaction using the maximum payment scheduled during the first five years (60 months) after the date on which the first regular periodic payment will be due. To illustrate:

i. Assume a loan that provides for regular monthly payments and a balloon payment due at the end of a six-year loan term. The loan is consummated on August 15, 2014, and the first monthly payment is due on October 1, 2014. The first five years after the first monthly payment end on October 1, 2019. The balloon payment must be made on the due date of the 72nd monthly payment, which is September 1, 2020. For purposes of determining the consumer's ability to repay the loan under § 1026.43(c)(2)(iii), the creditor need not consider the balloon payment that is due on September 1, 2020.

ii. Assume a loan that provides for regular monthly payments and a balloon payment due at the end of a five-year loan term. The loan is consummated on August 15, 2014, and the first monthly payment is due on October 1, 2014. The first five years after the first monthly payment end on October 1, 2019. The balloon payment must be made on the due date of the 60th monthly payment, which is September 1, 2019. For purposes of determining the consumer's ability to repay the loan under § 1026.43(c)(2)(iii), the creditor must consider the balloon payment that is due on September 1, 2019.

3. *Renewable balloon-payment mortgage; loan term.* A balloon-payment mortgage that is not a higher-priced covered transaction could provide that a creditor is unconditionally obligated to renew a balloon-payment mortgage at the consumer's option (or is obligated to renew subject to conditions within the consumer's control). See comment 17(c)(1)–11 discussing renewable balloon-payment mortgages. For purposes of this section, the loan term does not include any period of time that could result from a renewal provision. To illustrate, assume a three-year balloon-payment mortgage that is not a higher-priced covered transaction contains an unconditional obligation to renew for another three years at the consumer's option. In this example, the loan term for the balloon-payment mortgage is three years, and not the potential six years that could result if the consumer chooses to renew the loan. Accordingly, the creditor must underwrite the loan using the maximum payment scheduled in the first five years after consummation, which includes the balloon payment due at the end of the three-year loan term. See comment 43(c)(5)(ii)(A)–4.ii, which provides an example of how to determine the consumer's repayment ability for a three-year renewable balloon-payment mortgage that is not a higher-priced covered transaction.

4. *Examples of loans with a balloon payment that are not higher-priced covered transactions.* The following are examples of how to determine the maximum payment scheduled during the first five years after the date on which the first regular periodic payment will be due (all amounts shown are rounded, and all amounts are calculated using non-rounded values):

i. *Balloon-payment mortgage with a three-year loan term; fixed interest rate.* A loan agreement provides for a fixed interest rate of 6 percent, which is below the APOR-calculated threshold for a comparable transaction; thus the loan is not a higher-priced covered transaction. The loan amount is $200,000, and the loan has a three-year loan term but is amortized over 30 years. The monthly payment scheduled for the first three years following consummation is $1,199, with a balloon payment of $193,367 due at the end of the third year. For purposes of § 1026.43(c)(2)(iii), the creditor must determine the consumer's ability to repay the loan based on the balloon payment of $193,367.

ii. *Renewable balloon-payment mortgage with a three-year loan term.* Assume the same facts above in comment 43(c)(5)(ii)(A)–4.i, except that the loan agreement also provides that the creditor is unconditionally obligated to renew the balloon-payment mortgage at the consumer's option at the end of the three-year term for another three years. In determining the maximum payment scheduled during the first five years after the date on which the first regular periodic payment will be due, the creditor must use a loan term of three years. Accordingly, for purposes of § 1026.43(c)(2)(iii), the creditor must determine the consumer's ability to repay the loan based on the balloon payment of $193,367.

iii. *Balloon-payment mortgage with a six-year loan term; fixed interest rate.* A loan provides for a fixed interest rate of 6 percent, which is below the APOR threshold for a comparable transaction, and thus, the loan is not a higher-priced covered transaction. The loan amount is $200,000, and the loan has a six-year loan term but is amortized over 30 years. The loan is consummated on March 15, 2014, and the monthly payment scheduled for the first six years following consummation is $1,199, with the first monthly payment due on May 1, 2014. The first five years after the date on which the first regular periodic payment will be due end on May 1, 2019. The balloon payment of $183,995 is required on the due date of the 72nd monthly payment, which is April 1, 2020 (more than five years after the date on which the first regular periodic payment will be due). For purposes of § 1026.43(c)(2)(iii), the creditor may determine the consumer's ability to repay the loan based on the monthly payment of $1,199, and need not consider the balloon payment of $183,995 due on April 1, 2020.

5. *Higher-priced covered transaction with a balloon payment.* Where a loan with a balloon payment is a higher-priced covered transaction, the creditor must determine the consumer's repayment ability based on the loan's payment schedule, including any balloon payment. For example (all amounts are rounded): Assume a higher-priced covered transaction with a fixed interest rate of 7 percent. The loan amount is $200,000 and the loan has a ten year loan term, but is amortized over 30 years. The monthly payment scheduled for the first ten years is $1,331, with a balloon payment of $172,955. For purposes of § 1026.43(c)(2)(iii), the creditor must consider the consumer's ability to repay the loan based on the payment schedule that fully repays the loan amount, including the balloon payment of $172,955.

Paragraph 43(c)(5)(ii)(B).

1. *General.* For loans that permit interest-only payments, the creditor must use the fully indexed rate or introductory rate, whichever is greater, to calculate the substantially equal, monthly payment of principal and interest that will repay the loan amount over the term of the loan remaining as of the date the loan is recast. For discussion regarding the fully indexed rate, and the meaning of ''substantially equal,'' see comments 43(b)(3)–1 through –5 and 43(c)(5)(i)–4, respectively. Under § 1026.43(c)(5)(ii)(B), the relevant term of the loan is the period of time that remains as of the date the loan is recast to require fully amortizing payments. For a loan on which only interest and no principal has been paid, the loan amount will be the outstanding principal balance at the time of the recast. ''Loan amount'' and ''recast'' are defined in § 1026.43(b)(5) and (b)(11), respectively. ''Interest-only'' and ''Interest-only loan'' are defined in § 1026.18(s)(7)(iv).

2. *Examples.* The following are examples of how to determine the consumer's repayment ability based on substantially equal, monthly payments of principal and interest under § 1026.43(c)(5)(ii)(B) (all amounts shown are rounded, and all amounts are calculated using non-rounded values):

i. *Fixed-rate mortgage with interest-only payments for five years.* A loan in an amount of $200,000 has a 30-year loan term. The loan agreement provides for a fixed interest rate of 7 percent, and permits interest-only payments for the first five years. The monthly payment of $1,167 scheduled for the first five years would cover only the interest due. The loan is recast on the due date of the 60th monthly payment, after which the scheduled monthly payments increase to $1,414, a monthly payment that repays the loan amount of $200,000 over the 25 years remaining as of the date the loan is recast (300 months). For purposes of § 1026.43(c)(2)(iii), the creditor must determine the consumer's ability to repay the loan based on a payment of $1,414, which is the substantially equal, monthly, fully amortizing payment that would repay $200,000 over the 25 years remaining as of the date the loan is recast using the fixed interest rate of 7 percent.

ii. *Adjustable-rate mortgage with discount for three years and interest-only payments for five years.* A loan in an amount of $200,000 has a 30-year loan term, but provides for interest-only payments for the first five years. The loan agreement provides for a discounted interest rate of 5 percent that is fixed for an initial period of three years, after which the interest rate will adjust each year based on a specified index plus a margin of 3 percent, subject to an annual interest rate adjustment cap of 2 percent. The index value in effect at consummation is 4.5 percent; the fully indexed rate is 7.5 percent (4.5 percent plus 3 percent). The monthly payments for the first three years are $833. For the fourth year, the payments are $1,167, based on an interest rate of 7 percent, calculated by adding the 2 percent annual adjustment cap to the initial rate of 5 percent. For the fifth year, the payments are $1,250, applying the fully indexed rate of 7.5 percent. These first five years of payments will cover only the interest due. The loan is recast on the due date of the 60th monthly payment, after which the scheduled monthly payments increase to $1,478, a monthly payment that will repay the loan amount of $200,000 over the remaining 25 years of the loan (300 months). For purposes of § 1026.43(c)(2)(iii), the creditor must determine the consumer's ability to repay the loan based on a monthly payment of $1,478, which is the substantially equal, monthly payment of principal and interest that would repay $200,000 over the 25 years remaining as of the date the loan is recast using the fully indexed rate of 7.5 percent.

Paragraph 43(c)(5)(ii)(C).

1. *General.* For purposes of determining the consumer's ability to repay a negative amortization loan, the creditor must use substantially equal, monthly payments of principal and interest based on the fully indexed rate or the introductory rate, whichever is greater, that will repay the maximum loan amount over the term of the loan that remains as of the date the loan is recast. Accordingly, before determining the substantially equal, monthly payments the creditor must first determine the maximum loan amount and the period of time that remains in the loan term after the loan is recast. ''Recast'' is defined in § 1026.43(b)(11). Second, the creditor must use the fully indexed rate or introductory rate, whichever is greater, to calculate the substantially equal, monthly payment amount that will repay the maximum loan amount over the term of the loan remaining as of the date the loan is recast. For discussion regarding the fully indexed rate and the meaning of ''substantially equal,'' see comments 43(b)(3)–1 through –5 and 43(c)(5)(i)–4, respectively. For the meaning of the term ''maximum loan amount'' and a discussion of how to determine the maximum loan amount for purposes of § 1026.43(c)(5)(ii)(C), see § 1026.43(b)(7) and associated commentary. ''Negative amortization loan'' is defined in § 1026.18(s)(7)(v).

2. *Term of loan.* Under § 1026.43(c)(5)(ii)(C), the relevant term of the loan is the period of time that remains as of the date the terms of the legal obligation recast. That is, the creditor must determine substantially equal, monthly payments of principal and interest that will repay the maximum loan amount based on the period of time that remains after any negative amortization cap is triggered or any period permitting minimum periodic payments expires, whichever occurs first.

3. *Examples.* The following are examples of how to determine the consumer's repayment ability based on substantially equal, monthly payments of principal and interest as required under § 1026.43(c)(5)(ii)(C) (all amounts shown are rounded, and all amounts are calculated using non-rounded values):

i. *Adjustable-rate mortgage with negative amortization.* A. Assume an adjustable-rate mortgage in the amount of $200,000 with a 30-year loan term. The loan agreement provides that the consumer can make minimum monthly payments that cover only part of the interest accrued each month until the date on which the principal balance reaches 115 percent of its original balance (*i.e.,* a negative amortization cap of 115 percent) or for the first five years of the loan (60 monthly payments), whichever occurs first. The introductory interest rate at consummation is 1.5 percent. One month after consummation, the interest rate adjusts and will adjust monthly thereafter based on the specified index plus a margin of 3.5 percent. The index value in effect at consummation is 4.5 percent; the fully indexed rate is 8 percent (4.5 percent plus 3.5 percent). The maximum lifetime interest rate is 10.5 percent; there are no other periodic interest rate adjustment caps that limit how quickly the maximum lifetime rate may be reached. The minimum monthly payment for the first year is based on the initial interest rate of 1.5 percent. After that, the minimum monthly payment adjusts annually, but may increase by no more than 7.5 percent over the previous year's payment. The minimum monthly payment is $690 in the first year, $742 in the second year, and $797 in the first part of the third year.

B. To determine the maximum loan amount, assume that the interest rate increases to the maximum lifetime interest rate of 10.5 percent at the first adjustment (*i.e.,* the due date of the first periodic monthly payment), and interest accrues at that rate until the loan is recast. Assume that the consumer makes the minimum monthly payments scheduled, which are capped at 7.5 percent from year-to-year, for the maximum possible time. Because the consumer's minimum monthly payments are less than the interest accrued each month, negative amortization occurs (*i.e.,* the accrued but unpaid interest is added to the principal balance). Thus, assuming that the consumer makes the minimum monthly payments for as long as possible and that the maximum interest rate of 10.5 percent is reached at the first rate adjustment (*i.e.,* the due date of the first periodic monthly payment), the negative amortization cap of 115 percent is reached on the due date of the 27th monthly payment and the loan is recast as of that date. The maximum loan amount as of the due date of the 27th monthly payment is $229,251, and the remaining term of the loan is 27 years and nine months (333 months).

C. For purposes of § 1026.43(c)(2)(iii), the creditor must determine the consumer's ability to repay the loan based on a monthly payment of $1,716, which is the substantially equal, monthly payment of principal and interest that will repay the maximum loan amount of $229,251 over the remaining loan term of 333 months using the fully indexed rate of 8 percent. See comments 43(b)(7)–1 and –2 discussing the calculation of the maximum loan amount, and § 1026.43(b)(11) for the meaning of the term ''recast.''

ii. *Fixed-rate, graduated payment mortgage.* A loan in the amount of $200,000 has a 30-year loan term. The loan agreement provides for a fixed interest rate of 7.5 percent, and requires the consumer to make minimum monthly payments during the first year, with payments increasing 12.5 percent over the previous year every year for four years (the annual payment cap). The payment schedule provides for payments of $943 in the first year, $1,061 in the second year, $1,193 in the third year, $1,343 in the fourth year, and then requires $1,511 for the remaining term of the loan. During the first three years of the loan, the payments are less than the interest accrued each month, resulting in negative amortization. Assuming the minimum payments increase year-to-year up to the 12.5 percent payment cap, the consumer will begin making payments that cover at least all of the interest accrued at the end of the third year. Thus, the loan is recast on the due date of the 36th monthly payment. The maximum loan amount on that date is $207,662, and the remaining loan term is 27 years (324 months). For purposes of § 1026.43(c)(2)(iii), the creditor must determine the consumer's ability to repay the loan based on a monthly payment of $1,497, which is the substantially equal, monthly payment of principal and interest that will repay the maximum loan amount of $207,662 over the remaining loan term of 27 years using the fixed interest rate of 7.5 percent.

43(c)(6) Payment calculation for simultaneous loans.

1. *Scope.* In determining the consumer's repayment ability for a covered transaction under § 1026.43(c)(2)(iii), a creditor must include consideration of any simultaneous loan which it knows, or has reason to know, will be made at or before consummation of

the covered transaction. For a discussion of the standard ''knows or has reason to know,'' see comment 43(c)(2)(iv)–2. For the meaning of the term ''simultaneous loan,'' see § 1026.43(b)(12).

2. *Payment calculation—covered transaction.* For a simultaneous loan that is a covered transaction, as that term is defined under § 1026.43(b)(1), a creditor must determine a consumer's ability to repay the monthly payment obligation for a simultaneous loan as set forth in § 1026.43(c)(5), taking into account any mortgage-related obligations required to be considered under § 1026.43(c)(2)(v). For the meaning of the term ''mortgage-related obligations,'' see § 1026.43(b)(8).

3. *Payment calculation—home equity line of credit.* For a simultaneous loan that is a home equity line of credit subject to § 1026.40, the creditor must consider the periodic payment required under the terms of the plan when assessing the consumer's ability to repay the covered transaction secured by the same dwelling as the simultaneous loan. Under § 1026.43(c)(6)(ii), a creditor must determine the periodic payment required under the terms of the plan by considering the actual amount of credit to be drawn by the consumer at consummation of the covered transaction. The amount to be drawn is the amount requested by the consumer; when the amount requested will be disbursed, or actual receipt of funds, is not determinative. Any additional draw against the line of credit that the creditor of the covered transaction does not know or have reason to know about before or during underwriting need not be considered in relation to ability to repay. For example, where the creditor's policies and procedures require the source of down payment to be verified, and the creditor verifies that a simultaneous loan that is a HELOC will provide the source of down payment for the first-lien covered transaction, the creditor must consider the periodic payment on the HELOC by assuming the amount drawn is at least the down payment amount. In general, a creditor should determine the periodic payment based on guidance in the commentary to § 1026.40(d)(5) (discussing payment terms).

43(c)(7) Monthly debt-to-income ratio or residual income.

1. *Monthly debt-to-income ratio or monthly residual income.* Under § 1026.43(c)(2)(vii), the creditor must consider the consumer's monthly debt-to-income ratio, or the consumer's monthly residual income, in accordance with the requirements in § 1026.43(c)(7). In contrast to the qualified mortgage provisions in § 1026.43(e), § 1026.43(c) does not prescribe a specific monthly debt-to-income ratio with which creditors must comply. Instead, an appropriate threshold for a consumer's monthly debt-to-income ratio or monthly residual income is for the creditor to determine in making a reasonable and good faith determination of a consumer's ability to repay.

2. *Use of both monthly debt-to-income ratio and monthly residual income.* If a creditor considers the consumer's monthly debt-to-income ratio, the creditor may also consider the consumer's residual income as further validation of the assessment made using the consumer's monthly debt-to-income ratio.

3. *Compensating factors.* The creditor may consider factors in addition to the monthly debt-to-income ratio or residual income in assessing a consumer's repayment ability. For example, the creditor may reasonably and in good faith determine that a consumer has the ability to repay despite a higher debt-to-income ratio or lower residual income in light of the consumer's assets other than the dwelling, including any real property attached to the dwelling, securing the covered transaction, such as a savings account. The creditor may also reasonably and in good faith determine that a consumer has the ability to repay despite a higher debt-to-income ratio in light of the consumer's residual income.

43(d) Refinancing of non-standard mortgages.

43(d)(1) Definitions.

43(d)(1)(i) Non-standard mortgage.

Paragraph 43(d)(1)(i)(A).

1. *Adjustable-rate mortgage with an introductory fixed rate.* Under § 1026.43(d)(1)(i)(A), an adjustable-rate mortgage with an introductory fixed interest rate for one year or longer is considered a ''non-standard mortgage.'' For example, a covered transaction that has a fixed introductory rate for the first two, three, or five years and then converts to a variable rate for the remaining 28, 27, or 25 years, respectively, is a ''non-standard mortgage.'' A covered transaction with an introductory rate for six months that then converts to a variable rate for the remaining 29 and one-half years is not a ''non-standard mortgage.''

43(d)(1)(ii) Standard mortgage.

Paragraph 43(d)(1)(ii)(A).

1. *Regular periodic payments.* Under § 1026.43(d)(1)(ii)(A), a ''standard mortgage'' must provide for regular periodic payments that do not result in an increase of the principal balance (negative amortization), allow the consumer to defer repayment of principal (*see* comment 43(e)(2)(i)–2), or result in a balloon payment. Thus, the terms of the legal obligation must require the consumer to make payments of principal and interest on a monthly or other periodic basis that will repay the loan amount over the loan term. Except for payments resulting from any interest rate changes after consummation in an adjustable-rate or step-rate mortgage, the periodic payments must be substantially equal. For an explanation of the term ''substantially equal,'' see comment 43(c)(5)(i)–4. In addition, a single-payment transaction is not a ''standard mortgage'' because it does not require ''regular periodic payments.'' *See also* comment 43(e)(2)(i)–1.

Paragraph 43(d)(1)(ii)(D).

1. *First five years after consummation.* A ''standard mortgage'' must have an interest rate that is fixed for at least the first five years (60 months) after consummation. For example, assume an adjustable-rate mortgage that applies the same fixed interest rate to determine the first 60 payments of principal and interest due. The loan is consummated on August 15, 2013, and the first monthly payment is due on October 1, 2013. The date that is five years after consummation is August 15, 2018. The first interest rate adjustment occurs on September 1, 2018. This loan meets the criterion for a ''standard mortgage'' under § 1026.43(d)(1)(ii)(D) because the interest rate is fixed until September 1, 2018, which is more than five years after consummation. For guidance regarding step-rate mortgages, see comment 43(e)(2)(iv)–3.iii.

Paragraph 43(d)(1)(ii)(E).

1. *Permissible use of proceeds.* To qualify as a ''standard mortgage,'' the loan's proceeds may be used for only two purposes: paying off the non-standard mortgage and paying for closing costs, including paying escrow amounts required at or before closing. If the proceeds of a covered transaction are used for other purposes, such as to pay off other liens or to provide additional cash to the consumer for discretionary spending, the transaction does not meet the definition of a ''standard mortgage.''

43(d)(2) Scope.

1. *Written application.* For an explanation of the requirements for a ''written application'' in § 1026.43(d)(2)(iii), (d)(2)(iv), and (d)(2)(v), see comment 19(a)(1)(i)–3.

Paragraph 43(d)(2)(ii).

1. *Materially lower.* The exemptions afforded under § 1026.43(d)(3) apply to a refinancing only if the monthly payment for the new loan is ''materially lower'' than the monthly payment for an existing non-standard mortgage. The payments to be compared must be calculated based on the requirements under § 1026.43(d)(5). Whether the new loan payment is ''materially lower'' than the non-standard mortgage payment depends on the facts and circumstances. In all cases, a payment reduction of 10 percent or more meets the ''materially lower'' standard.

Paragraph 43(d)(2)(iv).

1. *Late payment—12 months prior to application.* Under § 1026.43(d)(2)(iv), the exemptions in § 1026.43(d)(3) apply to a covered transaction only if, during the 12 months immediately preceding the creditor's receipt of the consumer's written application for a refinancing, the consumer has made no more than one payment on the non-standard mortgage more than 30 days late. (For an explanation of ''written application,'' see comment 43(d)(2)–1.) For example, assume a consumer applies for a refinancing on May 1, 2014. Assume also that the consumer made a non-standard mortgage payment on August 15, 2013, that was 45 days late. The consumer made no other late payments on the non-standard mortgage between May 1, 2013, and May 1, 2014. In this example, the requirement under § 1026.43(d)(2)(iv) is met because the consumer made only one payment that was over 30 days late within the 12 months prior to applying for the refinancing (*i.e.,* eight and one-half months prior to application).

2. *Payment due date.* Whether a payment is more than 30 days late is measured in relation to the contractual due date not accounting for any grace period. For example, if the contractual due date for a non-standard mortgage payment is the first day of every month, but no late fee will be charged as long as the payment is received

by the 16th of the month, the payment due date for purposes of § 1026.43(d)(2)(iv) and (v) is the first day of the month, not the 16th day of the month. Thus, a payment due under the contract on October 1st that is paid on November 1st is made more than 30 days after the payment due date.

Paragraph 43(d)(2)(v).

1. *Late payment—six months prior to application.* Under § 1026.43(d)(2)(v), the exemptions in § 1026.43(d)(3) apply to a covered transaction only if, during the six months immediately preceding the creditor's receipt of the consumer's written application for a refinancing, the consumer has made no payments on the non-standard mortgage more than 30 days late. (For an explanation of ''written application'' and how to determine the payment due date, see comments 43(d)(2)–1 and 43(d)(2)(iv)–2.) For example, assume a consumer with a non-standard mortgage applies for a refinancing on May 1, 2014. If the consumer made a payment on March 15, 2014, that was 45 days late, the requirement under § 1026.43(d)(2)(v) is not met because the consumer made a payment more than 30 days late one and one-half months prior to application. If the number of months between consummation of the non-standard mortgage and the consumer's application for the standard mortgage is six or fewer, the consumer may not have made any payment more than 30 days late on the non-standard mortgage.

Paragraph 43(d)(2)(vi).

1. *Non-standard mortgage loan made in accordance with ability-to-repay or qualified mortgage requirements.* For non-standard mortgages that are consummated on or after January 10, 2014, § 1026.43(d)(2)(vi) provides that the refinancing provisions set forth in § 1026.43(d) apply only if the non-standard mortgage was made in accordance with the requirements of § 1026.43(c) or (e), as applicable. For example, if a creditor originated a non-standard mortgage on or after January 10, 2014 that did not comply with the requirements of § 1026.43(c) and was not a qualified mortgage pursuant to § 1026.43(e), § 1026.43(d) would not apply to the refinancing of the non-standard mortgage loan into a standard mortgage loan. However, § 1026.43(d) applies to the refinancing of a non-standard mortgage loan into a standard mortgage loan, regardless of whether the non-standard mortgage loan was made in compliance with § 1026.43(c) or (e), if the non-standard mortgage loan was consummated prior to January 10, 2014.

43(d)(3) Exemption from repayment ability requirements.

1. *Two-part determination.* To qualify for the exemptions in § 1026.43(d)(3), a creditor must have considered, first, whether the consumer is likely to default on the existing mortgage once that loan is recast and, second, whether the new mortgage likely would prevent the consumer's default.

43(d)(4) Offer of rate discounts and other favorable terms.

1. *Documented underwriting practices.* In connection with a refinancing made pursuant to § 1026.43(d), § 1026.43(d)(4) requires a creditor offering a consumer rate discounts and terms that are the same as, or better than, the rate discounts and terms offered to new consumers to make such an offer consistent with the creditor's documented underwriting practices. Section 1026.43(d)(4) does not require a creditor making a refinancing pursuant to § 1026.43(d) to comply with the underwriting requirements of § 1026.43(c). Rather, § 1026.43(d)(4) requires creditors providing such discounts to do so consistent with documented policies related to loan pricing, loan term qualifications, or other similar underwriting practices. For example, assume that a creditor is providing a consumer with a refinancing made pursuant to § 1026.43(d) and that this creditor has a documented practice of offering rate discounts to consumers with credit scores above a certain threshold. Assume further that the consumer receiving the refinancing has a credit score below this threshold, and therefore would not normally qualify for the rate discount available to consumers with high credit scores. This creditor complies with § 1026.43(d)(4) by offering the consumer the discounted rate in connection with the refinancing made pursuant to § 1026.43(d), even if the consumer would not normally qualify for that discounted rate, provided that the offer of the discounted rate is not prohibited by applicable State or Federal law. However, § 1026.43(d)(4) does not require a creditor to offer a consumer such a discounted rate.

43(d)(5) Payment calculations.

43(d)(5)(i) Non-Standard mortgage.

1. *Payment calculation for a non-standard mortgage.* In determining whether the monthly periodic payment for a standard mortgage is materially lower than the monthly periodic payment for the non-standard mortgage under § 1026.43(d)(2)(ii), the creditor must consider the monthly payment for the non-standard mortgage that will result after the loan is ''recast,'' assuming substantially equal payments of principal and interest that amortize the remaining loan amount over the remaining term as of the date the mortgage is recast. For guidance regarding the meaning of ''substantially equal,'' see comment 43(c)(5)(i)–4. For the meaning of ''recast,'' see § 1026.43(b)(11) and associated commentary.

2. *Fully indexed rate.* The term ''fully indexed rate'' in § 1026.43(d)(5)(i)(A) for calculating the payment for a non-standard mortgage is generally defined in § 1026.43(b)(3) and associated commentary. Under § 1026.43(b)(3) the fully indexed rate is calculated at the time of consummation. For purposes of § 1026.43(d)(5)(i), however, the fully indexed rate is calculated within a reasonable period of time before or after the date the creditor receives the consumer's written application for the standard mortgage. Thirty days is generally considered ''a reasonable period of time.''

3. *Written application.* For an explanation of the requirements for a ''written application'' in § 1026.43(d)(5)(i), see comment 19(a)(1)(i)–3.

4. *Payment calculation for an adjustable-rate mortgage with an introductory fixed rate.* Under § 1026.43(d)(5)(i), the monthly periodic payment for an adjustable-rate mortgage with an introductory fixed interest rate for a period of one or more years must be calculated based on several assumptions.

i. First, the payment must be based on the outstanding principal balance as of the date on which the mortgage is recast, assuming all scheduled payments have been made up to that date and the last payment due under those terms is made and credited on that date. For example, assume an adjustable-rate mortgage with a 30-year loan term. The loan agreement provides that the payments for the first 24 months are based on a fixed rate, after which the interest rate will adjust annually based on a specified index and margin. The loan is recast on the due date of the 24th payment. If the 24th payment is due on September 1, 2014, the creditor must calculate the outstanding principal balance as of September 1, 2014, assuming that all 24 payments under the fixed rate terms have been made and credited timely.

ii. Second, the payment calculation must be based on substantially equal monthly payments of principal and interest that will fully repay the outstanding principal balance over the term of the loan remaining as of the date the loan is recast. Thus, in the example above, the creditor must assume a loan term of 28 years (336 monthly payments).

iii. Third, the payment must be based on the fully indexed rate, as described in § 1026.43(d)(5)(i)(A).

5. *Example of payment calculation for an adjustable-rate mortgage with an introductory fixed rate.* The following example illustrates the rule described in comment 43(d)(5)(i)–4:

i. A loan in an amount of $200,000 has a 30-year loan term. The loan agreement provides for a discounted introductory interest rate of 5 percent that is fixed for an initial period of two years, after which the interest rate will adjust annually based on a specified index plus a margin of 3 percentage points.

ii. The non-standard mortgage is consummated on February 15, 2014, and the first monthly payment is due on April 1, 2014. The loan is recast on the due date of the 24th monthly payment, which is March 1, 2016.

iii. On March 15, 2015, the creditor receives the consumer's written application for a refinancing after the consumer has made 12 monthly on-time payments. On this date, the index value is 4.5 percent.

iv. To calculate the non-standard mortgage payment that must be compared to the standard mortgage payment under § 1026.43(d)(2)(ii), the creditor must use:

A. The outstanding principal balance as of March 1, 2016, assuming all scheduled payments have been made up to March 1, 2016, and the last payment due under the fixed rate terms is made and credited on March 1, 2016. In this example, the outstanding principal balance is $193,948.

B. The fully indexed rate of 7.5 percent, which is the index value of 4.5 percent as of March 15, 2015 (the date on which the application for a refinancing is received) plus the margin of 3 percent.

C. The remaining loan term as of March 1, 2016, the date of the recast, which is 28 years (336 monthly payments).

v. Based on these assumptions, the monthly payment for the non-standard mortgage for purposes of determining whether the standard mortgage monthly payment is lower than the non-standard mortgage monthly payment (*see* § 1026.43(d)(2)(ii)) is $1,383. This is the substantially equal, monthly payment of principal and interest required to repay the outstanding principal balance at the fully indexed rate over the remaining term.

6. *Payment calculation for an interest-only loan.* Under § 1026.43(d)(5)(i), the monthly periodic payment for an interest-only loan must be calculated based on several assumptions:

i. First, the payment must be based on the outstanding principal balance as of the date of the recast, assuming all scheduled payments are made under the terms of the legal obligation in effect before the mortgage is recast. For a loan on which only interest and no principal has been paid, the outstanding principal balance at the time of recast will be the loan amount, as defined in § 1026.43(b)(5), assuming all scheduled payments are made under the terms of the legal obligation in effect before the mortgage is recast. For example, assume that a mortgage has a 30-year loan term, and provides that the first 24 months of payments are interest-only. If the 24th payment is due on September 1, 2015, the creditor must calculate the outstanding principal balance as of September 1, 2015, assuming that all 24 payments under the interest-only payment terms have been made and credited timely and that no payments of principal have been made.

ii. Second, the payment calculation must be based on substantially equal monthly payments of principal and interest that will fully repay the loan amount over the term of the loan remaining as of the date the loan is recast. Thus, in the example above, the creditor must assume a loan term of 28 years (336 monthly payments).

iii. Third, the payment must be based on the fully indexed rate, as described in § 1026.43(d)(5)(i)(A).

7. *Example of payment calculation for an interest-only loan.* The following example illustrates the rule described in comment 43(d)(5)(i)–6:

i. A loan in an amount of $200,000 has a 30-year loan term. The loan agreement provides for a fixed interest rate of 7 percent, and permits interest-only payments for the first two years (the first 24 payments), after which time amortizing payments of principal and interest are required.

ii. The non-standard mortgage is consummated on February 15, 2014, and the first monthly payment is due on April 1, 2014. The loan is recast on the due date of the 24th monthly payment, which is March 1, 2016.

iii. On March 15, 2015, the creditor receives the consumer's written application for a refinancing, after the consumer has made 12 monthly on-time payments. The consumer has made no additional payments of principal.

iv. To calculate the non-standard mortgage payment that must be compared to the standard mortgage payment under § 1026.43(d)(2)(ii), the creditor must use:

A. The loan amount, which is the outstanding principal balance as of March 1, 2016, assuming all scheduled interest-only payments have been made and credited up to that date. In this example, the loan amount is $200,000.

B. An interest rate of 7 percent, which is the interest rate in effect at the time of consummation of this fixed-rate non-standard mortgage.

C. The remaining loan term as of March 1, 2016, the date of the recast, which is 28 years (336 monthly payments).

v. Based on these assumptions, the monthly payment for the non-standard mortgage for purposes of determining whether the standard mortgage monthly payment is lower than the non-standard mortgage monthly payment (*see* § 1026.43(d)(2)(ii)) is $1,359. This is the substantially equal, monthly payment of principal and interest required to repay the loan amount at the fully indexed rate over the remaining term.

8. *Payment calculation for a negative amortization loan.* Under § 1026.43(d)(5)(i), the monthly periodic payment for a negative amortization loan must be calculated based on several assumptions:

i. First, the calculation must be based on the maximum loan amount, determined after adjusting for the outstanding principal balance. If the consumer makes only the minimum periodic payments for the maximum possible time, until the consumer must begin making fully amortizing payments, the outstanding principal balance will be the maximum loan amount, as defined in § 1026.43(b)(7). In this event, the creditor complies with § 1026.43(d)(5)(i)(C)(*3*) by relying on the examples of how to calculate the maximum loan amount, see comment 43(b)(7)–3. If the consumer makes payments above the minimum periodic payments for the maximum possible time, the creditor must calculate the maximum loan amount based on the outstanding principal balance. In this event, the creditor complies with § 1026.43(d)(5)(i)(C)(*3*) by relying on the examples of how to calculate the maximum loan amount in comment 43(d)(5)(i)–10.

ii. Second, the calculation must be based on substantially equal monthly payments of principal and interest that will fully repay the maximum loan amount over the term of the loan remaining as of the date the loan is recast. For example, if the loan term is 30 years and the loan is recast on the due date of the 60th monthly payment, the creditor must assume a remaining loan term of 25 years (300 monthly payments).

iii. Third, the payment must be based on the fully indexed rate as of the date of the written application for the standard mortgage.

9. *Example of payment calculation for a negative amortization loan if only minimum payments made.* The following example illustrates the rule described in comment 43(d)(5)(i)–8:

i. A loan in an amount of $200,000 has a 30-year loan term. The loan agreement provides that the consumer can make minimum monthly payments that cover only part of the interest accrued each month until the date on which the principal balance increases to the negative amortization cap of 115 percent of the loan amount, or for the first five years of monthly payments (60 payments), whichever occurs first. The loan is an adjustable-rate mortgage that adjusts monthly according to a specified index plus a margin of 3.5 percent.

ii. The non-standard mortgage is consummated on February 15, 2014, and the first monthly payment is due on April 1, 2014. Assume that the consumer has made only the minimum periodic payments. Assume further that, based on the calculation of the maximum loan amount required under § 1026.43(b)(7) and associated commentary, the negative amortization cap of 115 percent would be reached on June 1, 2016, the due date of the 27th monthly payment.

iii. On March 15, 2015, the creditor receives the consumer's written application for a refinancing, after the consumer has made 12 monthly on-time payments. On this date, the index value is 4.5 percent.

iv. To calculate the non-standard mortgage payment that must be compared to the standard mortgage payment under § 1026.43(d)(2)(ii), the creditor must use:

A. The maximum loan amount of $229,251 as of June 1, 2016;

B. The fully indexed rate of 8 percent, which is the index value of 4.5 percent as of March 15, 2015 (the date on which the creditor receives the application for a refinancing) plus the margin of 3.5 percent; and

C. The remaining loan term as of June 1, 2016, the date of the recast, which is 27 years and nine months (333 monthly payments).

v. Based on these assumptions, the monthly payment for the non-standard mortgage for purposes of determining whether the standard mortgage monthly payment is lower than the non-standard mortgage monthly payment (*see* § 1026.43(d)(2)(ii)) is $1,716. This is the substantially equal, monthly payment of principal and interest required to repay the maximum loan amount at the fully indexed rate over the remaining term.

10. *Example of payment calculation for a negative amortization loan if payments above minimum amount made.* The following example illustrates the rule described in comment 43(d)(5)(i)–8:

i. A loan in an amount of $200,000 has a 30-year loan term. The loan agreement provides that the consumer can make minimum monthly payments that cover only part of the interest accrued each month until the date on which the principal balance increases to the negative amortization cap of 115 percent of the loan amount, or for the first five years of monthly payments (60 payments), whichever occurs first. The loan is an adjustable-rate mortgage that adjusts monthly according to a specified index plus a margin of 3.5 percent. The introductory interest rate at consummation is 1.5 percent. One month after consummation, the interest rate adjusts and will adjust monthly thereafter based on the specified index plus a margin of 3.5 percent. The maximum lifetime interest rate is 10.5 percent; there are no other periodic interest rate adjustment caps that limit how quickly the maximum lifetime rate may be reached. The minimum monthly payment for the first year is based on the initial interest rate of 1.5 percent. After that, the minimum monthly payment adjusts annually, but may increase by no more than 7.5 percent over the previous year's payment. The minimum monthly payment is $690 in the first year, $742 in the second year, $798 in the third year, $857 in the fourth year, and $922 in the fifth year.

ii. The non-standard mortgage is consummated on February 15, 2014, and the first monthly payment is due on April 1, 2014. Assume that the consumer has made more than the minimum periodic payments, and that after the consumer's 12th monthly on-time payment the outstanding principal balance is $195,000. Based on the calculation of the maximum loan amount after adjusting for this outstanding principal balance, the negative amortization cap of 115 percent would be reached on March 1, 2019, the due date of the 60th monthly payment.

iii. On March 15, 2015, the creditor receives the consumer's written application for a refinancing, after the consumer has made 12 monthly on-time payments. On this date, the index value is 4.5 percent.

iv. To calculate the non-standard mortgage payment that must be compared to the standard mortgage payment under § 1026.43(d)(2)(ii), the creditor must use:

A. The maximum loan amount of $229,219 as of March 1, 2019.

B. The fully indexed rate of 8 percent, which is the index value of 4.5 percent as of March 15, 2015 (the date on which the creditor receives the application for a refinancing) plus the margin of 3.5 percent.

C. The remaining loan term as of March 1, 2019, the date of the recast, which is exactly 25 years (300 monthly payments).

v. Based on these assumptions, the monthly payment for the non-standard mortgage for purposes of determining whether the standard mortgage monthly payment is lower than the non-standard mortgage monthly payment (*see* § 1026.43(d)(2)(ii)) is $1,769. This is the substantially equal, monthly payment of principal and interest required to repay the maximum loan amount at the fully indexed rate over the remaining term.

43(d)(5)(ii) Standard mortgage.

1. *Payment calculation for a standard mortgage.* In determining whether the monthly periodic payment for a standard mortgage is materially lower than the monthly periodic payment for a non-standard mortgage, the creditor must consider the monthly payment for the standard mortgage that will result in substantially equal, monthly, fully amortizing payments (as defined in § 1026.43(b)(2)) using the rate as of consummation. For guidance regarding the meaning of ''substantially equal'' see comment 43(c)(5)(i)–4. For a mortgage with a single, fixed rate for the first five years after consummation, the maximum rate that will apply during the first five years after consummation will be the rate at consummation. For a step-rate mortgage, however, the rate that must be used is the highest rate that will apply during the first five years after consummation. For example, if the rate for the first two years after the date on which the first regular periodic payment will be due is 4 percent, the rate for the following two years is 5 percent, and the rate for the next two years is 6 percent, the rate that must be used is 6 percent.

2. *Example of payment calculation for a standard mortgage.* The following example illustrates the rule described in comment 43(d)(5)(ii)–1: A loan in an amount of $200,000 has a 30-year loan term. The loan agreement provides for an interest rate of 6 percent that is fixed for an initial period of five years, after which time the interest rate will adjust annually based on a specified index plus a margin of 3 percent, subject to a 2 percent annual interest rate adjustment cap. The creditor must determine whether the standard mortgage monthly payment is materially lower than the non-standard mortgage monthly payment (*see* § 1026.43(d)(2)(ii)) based on a standard mortgage payment of $1,199. This is the substantially equal, monthly payment of principal and interest required to repay $200,000 over 30 years at an interest rate of 6 percent.

43(e) Qualified mortgages.

43(e)(1) Safe harbor and presumption of compliance.

1. *General.* Section 1026.43(c) requires a creditor to make a reasonable and good faith determination at or before consummation that a consumer will be able to repay a covered transaction. Section 1026.43(e)(1)(i) and (ii) provide a safe harbor and presumption of compliance, respectively, with the repayment ability requirements of § 1026.43(c) for creditors and assignees of covered transactions that satisfy the requirements of a qualified mortgage under § 1026.43(e)(2), (e)(4), or (f). *See* § 1026.43(e)(1)(i) and (ii) and associated commentary.

43(e)(1)(i) Safe harbor for transactions that are not higher-priced covered transactions.

1. *Safe harbor.* To qualify for the safe harbor in § 1026.43(e)(1)(i), a covered transaction must meet the requirements of a qualified mortgage under § 1026.43(e)(2), (e)(4), or (f) and must not be a higher-priced covered transaction, as defined in § 1026.43(b)(4). For guidance on determining whether a loan is a higher-priced covered transaction, see comment 43(b)(4)–1.

43(e)(1)(ii) Presumption of compliance for higher-priced covered transactions.

1. *General.* Under § 1026.43(e)(1)(ii), a creditor or assignee of a qualified mortgage under § 1026.43(e)(2), (e)(4), or (f) that is a higher-priced covered transaction is presumed to comply with the repayment ability requirements of § 1026.43(c). To rebut the presumption, it must be proven that, despite meeting the standards for a qualified mortgage (including either the debt-to-income standard in § 1026.43(e)(2)(vi) or the standards of one of the entities specified in § 1026.43(e)(4)(ii)), the creditor did not have a reasonable and good faith belief in the consumer's repayment ability. Specifically, it must be proven that, at the time of consummation, based on the information available to the creditor, the consumer's income, debt obligations, alimony, child support, and the consumer's monthly payment (including mortgage-related obligations) on the covered transaction and on any simultaneous loans of which the creditor was aware at consummation would leave the consumer with insufficient residual income or assets other than the value of the dwelling (including any real property attached to the dwelling) that secures the loan with which to meet living expenses, including any recurring and material non-debt obligations of which the creditor was aware at the time of consummation, and that the creditor thereby did not make a reasonable and good faith determination of the consumer's repayment ability. For example, a consumer may rebut the presumption with evidence demonstrating that the consumer's residual income was insufficient to meet living expenses, such as food, clothing, gasoline, and health care, including the payment of recurring medical expenses of which the creditor was aware at the time of consummation, and after taking into account the consumer's assets other than the value of the dwelling securing the loan, such as a savings account. In addition, the longer the period of time that the consumer has demonstrated actual ability to repay the loan by making timely payments, without modification or accommodation, after consummation or, for an adjustable-rate mortgage, after recast, the less likely the consumer will be able to rebut the presumption based on insufficient residual income and prove that, at the time the loan was made, the creditor failed to make a reasonable and good faith determination that the consumer had the reasonable ability to repay the loan.

43(e)(2) Qualified mortgage defined—general.

Paragraph 43(e)(2)(i).

1. *Regular periodic payments.* Under § 1026.43(e)(2)(i), a qualified mortgage must provide for regular periodic payments that may not result in an increase of the principal balance (negative amortization), deferral of principal repayment, or a balloon payment. Thus, the terms of the legal obligation must require the consumer to make payments of principal and interest, on a monthly or other periodic basis, that will fully repay the loan amount over the loan term. The periodic payments must be substantially equal except for the effect that any interest rate change after consummation has on the payment in the case of an adjustable-rate or step-rate mortgage. In addition, because § 1026.43(e)(2)(i) requires that a qualified mortgage provide for regular periodic payments, a single-payment transaction may not be a qualified mortgage.

2. *Deferral of principal repayment.* Under § 1026.43(e)(2)(i)(B), a qualified mortgage's regular periodic payments may not allow the consumer to defer repayment of principal, except as provided in § 1026.43(f). A loan allows the deferral of principal repayment if one or more of the periodic payments may be applied solely to accrued interest and not to loan principal. Deferred principal repayment also occurs if the payment is applied to both accrued interest and principal but the consumer is permitted to make periodic payments that are less than the amount that would be required under a payment schedule that has substantially equal payments that fully repay the loan amount over the loan term. Graduated payment mortgages, for

example, allow deferral of principal repayment in this manner and therefore may not be qualified mortgages.

Paragraph 43(e)(2)(ii).

1. *General.* The 30-year term limitation in § 1026.43(e)(2)(ii) is applied without regard to any interim period between consummation and the beginning of the first full unit period of the repayment schedule. For example, assume a covered transaction is consummated on March 20, 2014 and the due date of the first regular periodic payment is April 30, 2014. The beginning of the first full unit period of the repayment schedule is April 1, 2014 and the loan term therefore ends on April 1, 2044. The transaction would comply with the 30-year term limitation in § 1026.43(e)(2)(ii).

Paragraph 43(e)(2)(iv).

1. *Maximum interest rate during the first five years.* For a qualified mortgage, the creditor must underwrite the loan using a periodic payment of principal and interest based on the maximum interest rate that may apply during the first five years after the date on which the first regular periodic payment will be due. Creditors must use the maximum rate that could apply at any time during the first five years after the date on which the first regular periodic payment will be due, regardless of whether the maximum rate is reached at the first or subsequent adjustment during the five year period.

2. *Fixed-rate mortgage.* For a fixed-rate mortgage, creditors should use the interest rate in effect at consummation. ''Fixed-rate mortgage'' is defined in § 1026.18(s)(7)(iii).

3. *Interest rate adjustment caps.* For an adjustable-rate mortgage, creditors should assume the interest rate increases after consummation as rapidly as possible, taking into account the terms of the legal obligation. That is, creditors should account for any periodic interest rate adjustment cap that may limit how quickly the interest rate can increase under the terms of the legal obligation. Where a range for the maximum interest rate during the first five years is provided, the highest rate in that range is the maximum interest rate for purposes of § 1026.43(e)(2)(iv). Where the terms of the legal obligation are not based on an index plus margin or formula, the creditor must use the maximum interest rate that occurs during the first five years after the date on which the first regular periodic payment will be due. To illustrate:

i. *Adjustable-rate mortgage with discount for three years.* Assume an adjustable-rate mortgage has an initial discounted rate of 5 percent that is fixed for the first three years, measured from the first day of the first full calendar month following consummation, after which the rate will adjust annually based on a specified index plus a margin of 3 percent. The index value in effect at consummation is 4.5 percent. The loan agreement provides for an annual interest rate adjustment cap of 2 percent, and a lifetime maximum interest rate of 12 percent. The first rate adjustment occurs on the due date of the 36th monthly payment; the rate can adjust to no more than 7 percent (5 percent initial discounted rate plus 2 percent annual interest rate adjustment cap). The second rate adjustment occurs on the due date of the 48th monthly payment; the rate can adjust to no more than 9 percent (7 percent rate plus 2 percent annual interest rate adjustment cap). The third rate adjustment occurs on the due date of the 60th monthly payment; the rate can adjust to no more than 11 percent (9 percent rate plus 2 percent annual interest rate cap adjustment). The maximum interest rate during the first five years after the date on which the first regular periodic payment will be due is 11 percent (the rate on the due date of the 60th monthly payment). For further discussion of how to determine whether a rate adjustment occurs during the first five years after the date on which the first regular periodic payment will be due, see comment 43(e)(2)(iv)–7.

ii. *Adjustable-rate mortgage with discount for three years.* Assume the same facts as in paragraph 3.i except that the lifetime maximum interest rate is 10 percent, which is less than the maximum interest rate in the first five years after the date on which the first regular periodic payment will be due of 11 percent that would apply but for the lifetime maximum interest rate. The maximum interest rate during the first five years after the date on which the first regular periodic payment will be due is 10 percent.

iii. *Step-rate mortgage.* Assume a step-rate mortgage with an interest rate fixed at 6.5 percent for the first two years, measured from the first day of the first full calendar month following consummation, 7 percent for the next three years, and then 7.5 percent for the remainder of the loan term. The maximum interest rate during the first five years after the date on which the first regular periodic payment will be due is 7.5 percent.

4. *First five years after the date on which the first regular periodic payment will be due.* Under § 1026.43(e)(2)(iv)(A), the creditor must underwrite the loan using the maximum interest rate that may apply during the first five years after the date on which the first regular periodic payment will be due. To illustrate, assume an adjustable-rate mortgage with an initial fixed interest rate of 5 percent for the first five years, measured from the first day of the first full calendar month following consummation, after which the interest rate will adjust annually to the specified index plus a margin of 6 percent, subject to a 2 percent annual interest rate adjustment cap. The index value in effect at consummation is 5.5 percent. The loan consummates on September 15, 2014, and the first monthly payment is due on November 1, 2014. The first rate adjustment to no more than 7 percent (5 percent plus 2 percent annual interest rate adjustment cap) occurs on the due date of the 60th monthly payment, which is October 1, 2019, and therefore, the rate adjustment occurs during the first five years after the date on which the first regular periodic payment will be due. To meet the definition of qualified mortgage under § 1026.43(e)(2), the creditor must underwrite the loan using a monthly payment of principal and interest based on an interest rate of 7 percent.

5. *Loan amount.* To meet the definition of qualified mortgage under § 1026.43(e)(2), a creditor must determine the periodic payment of principal and interest using the maximum interest rate permitted during the first five years after the date on which the first regular periodic payment will be due that repays either:

i. The outstanding principal balance as of the earliest date the maximum interest rate during the first five years after the date on which the first regular periodic payment will be due can take effect under the terms of the legal obligation, over the remaining term of the loan. To illustrate, assume a loan in an amount of $200,000 has a 30-year loan term. The loan agreement provides for a discounted interest rate of 5 percent that is fixed for an initial period of three years, measured from the first day of the first full calendar month following consummation, after which the interest rate will adjust annually based on a specified index plus a margin of 3 percent, subject to a 2 percent annual interest rate adjustment cap and a lifetime maximum interest rate of 9 percent. The index value in effect at consummation equals 4.5 percent. Assuming the interest rate increases after consummation as quickly as possible, the rate adjustment to the lifetime maximum interest rate of 9 percent occurs on the due date of the 48th monthly payment. The outstanding principal balance on the loan at the end of the fourth year (after the 48th monthly payment is credited) is $188,218. The creditor will meet the definition of qualified mortgage if it underwrites the covered transaction using the monthly payment of principal and interest of $1,564 to repay the outstanding principal balance of $188,218 over the remaining 26 years of the loan term (312 months) using the maximum interest rate during the first five years of 9 percent; or

ii. The loan amount, as that term is defined in § 1026.43(b)(5), over the entire loan term, as that term is defined in § 1026.43(b)(6). Using the same example above, the creditor will meet the definition of qualified mortgage if it underwrites the covered transaction using the monthly payment of principal and interest of $1,609 to repay the loan amount of $200,000 over the 30-year loan term using the maximum interest rate during the first five years of 9 percent.

6. *Mortgage-related obligations.* Section 1026.43(e)(2)(iv) requires creditors to take the consumer's monthly payment for mortgage-related obligations into account when underwriting the loan. For the meaning of the term ''mortgage-related obligations,'' see § 1026.43(b)(8) and associated commentary.

7. *Examples.* The following are examples of how to determine the periodic payment of principal and interest based on the maximum interest rate during the first five years after the date on which the first regular periodic payment will be due for purposes of meeting the definition of qualified mortgage under § 1026.43(e) (all payment amounts shown are rounded, and all amounts are calculated using non-rounded values; all initial fixed interest rate periods are measured from the first day of the first full calendar month following consummation):

i. *Fixed-rate mortgage.* A loan in an amount of $200,000 has a 30-year loan term and a fixed interest rate of 7 percent. The maximum interest rate during the first five years after the date on which the first regular periodic payment will be due for a fixed-rate mortgage is the interest rate in effect at consummation, which is 7 percent under this example. The monthly fully amortizing payment scheduled over the 30 years is $1,331. The creditor will meet the definition of qualified mortgage if it underwrites the loan using the fully amortizing payment of $1,331.

ii. *Adjustable-rate mortgage with discount for three years.* A. A loan in an amount of $200,000 has a 30-year loan term. The loan agreement provides for a discounted interest rate of 5 percent that is fixed for an initial period of three years, after which the interest rate will adjust annually based on a specified index plus a margin of 3 percent, subject to a 2 percent annual interest rate adjustment cap and a lifetime maximum interest rate of 9 percent. The index value in effect at consummation is 4.5 percent. The loan is consummated on March 15, 2014, and the first regular periodic payment is due May 1, 2014. The loan agreement provides that the first rate adjustment occurs on April 1, 2017 (the due date of the 36th monthly payment); the second rate adjustment occurs on April 1, 2018 (the due date of the 48th monthly payment); and the third rate adjustment occurs on April 1, 2019 (the due date of the 60th monthly payment). Under this example, the maximum interest rate during the first five years after the date on which the first regular periodic payment due is 9 percent (the lifetime interest rate cap), which applies beginning on April 1, 2018 (the due date of the 48th monthly payment). The outstanding principal balance at the end of the fourth year (after the 48th payment is credited) is $188,218.

B. The transaction will meet the definition of a qualified mortgage if the creditor underwrites the loan using the monthly payment of principal and interest of $1,564 to repay the outstanding principal balance at the end of the fourth year of $188,218 over the remaining 26 years of the loan term (312 months), using the maximum interest rate during the first five years after the date on which the first regular periodic payment will be due of 9 percent. Alternatively, the transaction will meet the definition of a qualified mortgage if the creditor underwrites the loan using the monthly payment of principal and interest of $1,609 to repay the loan amount of $200,000 over the 30-year loan term, using the maximum interest rate during the first five years after the date on which the first regular periodic payment will be due of 9 percent.

iii. *Adjustable-rate mortgage with discount for five years.* A. A loan in an amount of $200,000 has a 30-year loan term. The loan agreement provides for a discounted interest rate of 6 percent that is fixed for an initial period of five years, after which the interest rate will adjust annually based on a specified index plus a margin of 3 percent, subject to a 2 percent annual interest rate adjustment cap. The index value in effect at consummation is 4.5 percent. The loan consummates on March 15, 2014 and the first regular periodic payment is due May 1, 2014. Under the terms of the loan agreement, the first rate adjustment to no more than 8 percent (6 percent plus 2 percent annual interest rate adjustment cap) is on April 1, 2019 (the due date of the 60th monthly payment), which occurs less than five years after the date on which the first regular periodic payment will be due. Thus, the maximum interest rate under the terms of the loan during the first five years after the date on which the first regular periodic payment will be due is 8 percent.

B. The transaction will meet the definition of a qualified mortgage if the creditor underwrites the loan using the monthly payment of principal and interest of $1,436 to repay the outstanding principal balance at the end of the fifth year of $186,109 over the remaining 25 years of the loan term (300 months), using the maximum interest rate during the first five years after the date on which the first regular periodic payment will be due of 8 percent. Alternatively, the transaction will meet the definition of a qualified mortgage if the creditor underwrites the loan using the monthly payment of principal and interest of $1,468 to repay the loan amount of $200,000 over the 30-year loan term, using the maximum interest rate during the first five years after the date on which the first regular periodic payment will be due of 8 percent.

iv. *Adjustable-rate mortgage with discount for seven years.* A. A loan in an amount of $200,000 has a 30-year loan term. The loan agreement provides for a discounted interest rate of 6 percent that is fixed for an initial period of seven years, after which the interest rate will adjust annually based on a specified index plus a margin of 3 percent, subject to a 2 percent annual interest rate adjustment cap. The index value in effect at consummation is 4.5 percent. The loan is consummated on March 15, 2014, and the first regular periodic payment is due May 1, 2014. Under the terms of the loan agreement, the first rate adjustment is on April 1, 2021 (the due date of the 84th monthly payment), which occurs more than five years after the date on which the first regular periodic payment will be due. Thus, the maximum interest rate under the terms of the loan during the first five years after the date on which the first regular periodic payment will be due is 6 percent.

B. The transaction will meet the definition of a qualified mortgage if the creditor underwrites the loan using the monthly payment of principal and interest of $1,199 to repay the loan amount of $200,000 over the 30-year loan term using the maximum interest rate during the first five years after the date on which the first regular periodic payment will be due of 6 percent.

iv. *Step-rate mortgage.* A. A loan in an amount of $200,000 has a 30-year loan term. The loan agreement provides that the interest rate is 6.5 percent for the first two years of the loan, 7 percent for the next three years, and then 7.5 percent for remainder of the loan term. The maximum interest rate during the first five years after the date on which the first regular periodic payment will be due is 7.5 percent, which occurs on the due date of the 60th monthly payment. The outstanding principal balance at the end of the fifth year (after the 60th payment is credited) is $187,868.

B. The transaction will meet the definition of a qualified mortgage if the creditor underwrites the loan using a monthly payment of principal and interest of $1,388 to repay the outstanding principal balance of $187,868 over the remaining 25 years of the loan term (300 months), using the maximum interest rate during the first five years after the date on which the first regular periodic payment will be due of 7.5 percent. Alternatively, the transaction will meet the definition of a qualified mortgage if the creditor underwrites the loan using a monthly payment of principal and interest of $1,398 to repay $200,000 over the 30-year loan term using the maximum interest rate during the first five years after the date on which the first regular periodic payment will be due of 7.5 percent.

Paragraph 43(e)(2)(v).

1. *General.* For guidance on satisfying § 1026.43(e)(2)(v), a creditor may rely on commentary to § 1026.43(c)(2)(i) and (vi), (c)(3), and (c)(4).

2. *Income or assets.* Section 1026.43(e)(2)(v)(A) requires creditors to consider and verify the consumer's current or reasonably expected income or assets. For purposes of this requirement, the creditor must consider and verify, at a minimum, any income specified in appendix Q. A creditor may also consider and verify any other income in accordance with § 1026.43(c)(2)(i) and (c)(4); however, such income would not be included in the total monthly debt-to-income ratio determination required by § 1026.43(e)(2)(vi).

3. *Debts.* Section 1026.43(e)(2)(v)(B) requires creditors to consider and verify the consumer's current debt obligations, alimony, and child support. For purposes of this requirement, the creditor must consider and verify, at a minimum, any debt or liability specified in appendix Q. A creditor may also consider and verify other debt in accordance with § 1026.43(c)(2)(vi) and (c)(3); however, such debt would not be included in the total monthly debt-to-income ratio determination required by § 1026.43(e)(2)(vi).

Paragraph 43(e)(2)(vi).

1. *Calculation of monthly payment on the covered transaction and simultaneous loans.* As provided in appendix Q, for purposes of § 1026.43(e)(2)(vi), creditors must include in the definition of ''debt'' a consumer's monthly housing expense. This includes, for example, the consumer's monthly payment on the covered transaction (including mortgage-related obligations) and on simultaneous loans. Accordingly, § 1026.43(e)(2)(vi)(B) provides the method by which a creditor calculates the consumer's monthly payment on the covered transaction and on any simultaneous loan that the creditor knows or has reason to know will be made.

43(e)(3) Limits on points and fees for qualified mortgages.

Paragraph 43(e)(3)(i).

1. *Total loan amount.* The term ''total loan amount'' is defined in § 1026.32(b)(4)(i). For an explanation of how to calculate the ''total loan amount'' under § 1026.43(e)(3)(i), see comment 32(b)(4)(i)–1.

2. *Calculation of allowable points and fees.* A creditor must determine which category the loan falls into based on the face amount

of the note (the ''loan amount'' as defined in § 1026.43(b)(5)). For categories with a percentage limit, the creditor must apply the allowable points and fees percentage to the ''total loan amount,'' which may be different than the loan amount. A creditor must calculate the allowable amount of points and fees for a qualified mortgage as follows:

i. First, the creditor must determine the ''tier'' into which the loan falls based on the loan amount. The loan amount is the principal amount the consumer will borrow, as reflected in the promissory note or loan contract. *See* § 1026.43(b)(5). For example, if the loan amount is $55,000, the loan falls into the tier for loans greater than or equal to $20,000 but less than $60,000, to which a 5 percent cap on points and fees applies. For tiers with a prescribed dollar limit on points and fees (*e.g.,* for loans from $60,000 up to $100,000, the limit is $3,000), the creditor does not need to do any further calculations.

ii. Second, for tiers with a percentage limit, the creditor must determine the total loan amount based on the calculation for the total loan amount under comment 32(b)(4)(i)–1. If the loan amount is $55,000, for example, the total loan amount may be a different amount, such as $52,000.

iii. Third, the creditor must apply the percentage cap on points and fees to the total loan amount. For example, for a loan of $55,000 where the total loan amount is $52,000, the allowable points and fees are 5 percent of $52,000, or $2,600.

3. *Sample determination of allowable points and fees.*

i. A covered transaction with a loan amount of $105,000 falls into the first points and fees tier, to which a points and fees cap of 3 percent of the total loan amount applies. *See* § 1026.43(e)(3)(i)(A). Therefore, if the calculation under comment 32(b)(4)(i)–1 results in a total loan amount of $102,000, then the allowable total points and fees for this loan are 3 percent of $102,000, or $3,060.

ii. A covered transaction with a loan amount of $75,000 falls into the second points and fees tier, to which a points and fees cap of $3,000 applies. *See* § 1026.43(e)(3)(i)(B). The allowable total points and fees for this loan are $3,000, regardless of the total loan amount.

iii. A covered transaction with a loan amount of $50,000 falls into the third points and fees tier, to which a points and fees cap of 5 percent of the total loan amount applies. *See* § 1026.43(e)(3)(i)(C). Therefore, if the calculation under comment 32(b)(4)(i)–1 results in a total loan amount of $48,000, then the allowable total points and fees for this loan are 5 percent of $48,000, or $2,400.

iv. A covered transaction with a loan amount of $15,000 falls into the fourth points and fees tier, to which a points and fees cap of $1,000 applies. *See* § 1026.43(e)(3)(i)(D). The allowable total points and fees for this loan are $1,000, regardless of the total loan amount.

v. A covered transaction with a loan amount of $10,000 falls into the fifth points and fees tier, to which a points and fees cap of 8 percent of the total loan amount applies. *See* § 1026.43(e)(3)(i)(E). Therefore, if the calculation under comment 32(b)(4)(i)–1 results in a total loan amount of $7,000, then the allowable total points and fees for this loan are 8 percent of $7,000, or $560.

Paragraph 43(e)(3)(ii).

1. *Annual adjustment for inflation.* The dollar amounts, including the loan amounts, in § 1026.43(e)(3)(i) will be adjusted annually on January 1 by the annual percentage change in the CPI–U that was in effect on the preceding June 1. The Bureau will publish adjustments after the June figures become available each year.

43(e)(4) Qualified mortgage defined—special rules.

1. *Alternative definition.* Subject to the sunset provided under § 1026.43(e)(4)(iii), § 1026.43(e)(4) provides an alternative definition of qualified mortgage to the definition provided in § 1026.43(e)(2). To be a qualified mortgage under § 1026.43(e)(4), the creditor must satisfy the requirements under § 1026.43(e)(2)(i) through (iii), in addition to being one of the types of loans specified in § 1026.43(e)(4)(ii)(A) through (E).

2. *Termination of conservatorship.* Section 1026.43(e)(4)(ii)(A) requires that a covered transaction be eligible for purchase or guarantee by the Federal National Mortgage Association (''Fannie Mae'') or the Federal Home Loan Mortgage Corporation (''Freddie Mac'') (or any limited-life regulatory entity succeeding the charter of either) operating under the conservatorship or receivership of the Federal Housing Finance Agency pursuant to section 1367 of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (12 U.S.C. 4617). The special rule under § 1026.43(e)(4)(ii)(A) does not apply if Fannie Mae or Freddie Mac (or any limited-life regulatory entity succeeding the charter of either) has ceased operating under the conservatorship or receivership of the Federal Housing Finance Agency. For example, if either Fannie Mae or Freddie Mac (or succeeding limited-life regulatory entity) ceases to operate under the conservatorship or receivership of the Federal Housing Finance Agency, § 1026.43(e)(4)(ii)(A) would no longer apply to loans eligible for purchase or guarantee by that entity; however, the special rule would be available for a loan that is eligible for purchase or guarantee by the other entity still operating under conservatorship or receivership.

3. *Timing.* Under § 1026.43(e)(4)(iii), the definition of qualified mortgage under paragraph (e)(4) applies only to loans consummated on or before January 10, 2021, regardless of whether Fannie Mae or Freddie Mac (or any limited-life regulatory entity succeeding the charter of either) continues to operate under the conservatorship or receivership of the Federal Housing Finance Agency. Accordingly, § 1026.43(e)(4) is available only for covered transactions consummated on or before the earlier of either:

i. The date Fannie Mae or Freddie Mac (or any limited-life regulatory entity succeeding the charter of either), respectively, cease to operate under the conservatorship or receivership of the Federal Housing Finance Agency pursuant to section 1367 of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (12 U.S.C. 4617); or

ii. January 10, 2021, as provided by § 1026.43(e)(4)(iii).

4. *Eligible for purchase, guarantee, or insurance.* To satisfy § 1026.43(e)(4)(ii), a loan need not be actually purchased or guaranteed by Fannie Mae or Freddie Mac or insured or guaranteed by the U.S. Department of Housing and Urban Development, U.S. Department of Veterans Affairs, U.S. Department of Agriculture, or Rural Housing Service. Rather, § 1026.43(e)(4)(ii) requires only that the loan be eligible (*i.e.,* meet the criteria) for such purchase, guarantee, or insurance. For example, for purposes of § 1026.43(e)(4), a creditor is not required to sell a loan to Fannie Mae or Freddie Mac (or any limited-life regulatory entity succeeding the charter of either) to be a qualified mortgage; however, the loan must be eligible for purchase or guarantee by Fannie Mae or Freddie Mac (or any limited-life regulatory entity succeeding the charter of either), including satisfying any requirements regarding consideration and verification of a consumer's income or assets, credit history, and debt-to-income ratio or residual income. To determine eligibility, a creditor may rely on an underwriting recommendation provided by Fannie Mae or Freddie Mac's Automated Underwriting Systems (AUSs) or written guide in effect at the time. Accordingly, a covered transaction is eligible for purchase or guarantee by Fannie Mae or Freddie Mac if:

i. The loan conforms to the standards set forth in the Fannie Mae Single-Family Selling Guide or the Freddie Mac Single-Family Seller/Servicer Guide; or

ii. The loan receives one of the following recommendations from the corresponding automated underwriting system:

A. An ''Approve/Eligible'' recommendation from Desktop Underwriter (DU); or

B. An ''Accept and Eligible to Purchase'' recommendation from Loan Prospector (LP).

43(f) Balloon-Payment qualified mortgages made by certain creditors.

43(f)(1) Exemption.

Paragraph 43(f)(1)(i).

1. *Satisfaction of qualified mortgage requirements.* Under § 1026.43(f)(1)(i), for a mortgage that provides for a balloon payment to be a qualified mortgage, the mortgage must satisfy the requirements for a qualified mortgage in paragraphs (e)(2)(i)(A), (e)(2)(ii), (iii), and (v). Therefore, a covered transaction with balloon payment terms must provide for regular periodic payments that do not result in an increase of the principal balance, pursuant to § 1026.43(e)(2)(i)(A); must have a loan term that does not exceed 30 years, pursuant to § 1026.43(e)(2)(ii); must have total points and fees that do not exceed specified thresholds pursuant to § 1026.43(e)(2)(iii); and must satisfy the consideration and verification requirements in § 1026.43(e)(2)(v).

Paragraph 43(f)(1)(ii).

1. *Example.* Under § 1026.43(f)(1)(ii), if a qualified mortgage provides for a balloon payment, the creditor must determine that the consumer is able to make all scheduled payments under the legal obligation other than the balloon payment. For example, assume a loan in an amount of $200,000 that has a five-year loan term, but is amortized

over 30 years. The loan agreement provides for a fixed interest rate of 6 percent. The loan consummates on March 3, 2014, and the monthly payment of principal and interest scheduled for the first five years is $1,199, with the first monthly payment due on April 1, 2014. The balloon payment of $187,308 is required on the due date of the 60th monthly payment, which is April 1, 2019. The loan can be a qualified mortgage if the creditor underwrites the loan using the scheduled principal and interest payment of $1,199, plus the consumer's monthly payment for all mortgage-related obligations, and satisfies the other criteria set forth in § 1026.43(f).

2. *Creditor's determination.* A creditor must determine that the consumer is able to make all scheduled payments other than the balloon payment to satisfy § 1026.43(f)(1)(ii), in accordance with the legal obligation, together with the consumer's monthly payments for all mortgage-related obligations and excluding the balloon payment, to meet the repayment ability requirements of § 1026.43(f)(1)(ii). A creditor satisfies § 1026.43(f)(1)(ii) if it uses the maximum payment in the payment schedule, excluding any balloon payment, to determine if the consumer has the ability to make the scheduled payments.

Paragraph 43(f)(1)(iii).

1. *Debt-to-income or residual income.* A creditor must consider and verify the consumer's monthly debt-to-income ratio or residual income to meet the requirements of § 1026.43(f)(1)(iii). To calculate the consumer's monthly debt-to-income or residual income for purposes of § 1026.43(f)(1)(iii), the creditor may rely on the definitions and calculation rules in § 1026.43(c)(7) and its accompanying commentary, except for the calculation rules for a consumer's total monthly debt obligations (which is a component of debt-to-income and residual income under § 1026.43(c)(7)). For purposes of calculating the consumer's total monthly debt obligations under § 1026.43(f)(1)(iii), the creditor must calculate the monthly payment on the covered transaction using the payment calculation rules in § 1026.43(f)(1)(iv)(A), together with all mortgage-related obligations and excluding the balloon payment.

Paragraph 43(f)(1)(iv).

1. *Scheduled payments.* Under § 1026.43(f)(1)(iv)(A), the legal obligation must provide that scheduled payments must be substantially equal and determined using an amortization period that does not exceed 30 years. Balloon payments often result when the periodic payment would fully repay the loan amount only if made over some period that is longer than the loan term. For example, a loan term of 10 years with periodic payments based on an amortization period of 20 years would result in a balloon payment being due at the end of the loan term. Whatever the loan term, the amortization period used to determine the scheduled periodic payments that the consumer must pay under the terms of the legal obligation may not exceed 30 years.

2. *Substantially equal.* The calculation of payments scheduled by the legal obligation under § 1026.43(f)(1)(iv)(A) are required to result in substantially equal amounts. This means that the scheduled payments need to be similar, but need not be equal. For further guidance on substantially equal payments, see comment 43(c)(5)(i)–4.

3. *Interest-only payments.* A mortgage that only requires the payment of accrued interest each month does not meet the requirements of § 1026.43(f)(1)(iv)(A).

Paragraph 43(f)(1)(v).

1. *Forward commitments.* A creditor may make a mortgage loan that will be transferred or sold to a purchaser pursuant to an agreement that has been entered into at or before the time the transaction is consummated. Such an agreement is sometimes known as a ''forward commitment.'' A balloon-payment mortgage that will be acquired by a purchaser pursuant to a forward commitment does not satisfy the requirements of § 1026.43(f)(1)(v), whether the forward commitment provides for the purchase and sale of the specific transaction or for the purchase and sale of transactions with certain prescribed criteria that the transaction meets. However, a purchase and sale of a balloon-payment qualified mortgage to another person that separately meets the requirements of § 1026.43(f)(1)(vi) is permitted. For example: assume a creditor that meets the requirements of § 1026.43(f)(1)(vi) makes a balloon-payment mortgage that meets the requirements of § 1026.43(f)(1)(i) through (iv); if the balloon-payment mortgage meets the purchase criteria of an investor with which the creditor has an agreement to sell such loans after consummation, then the balloon-payment mortgage does not meet the definition of a qualified mortgage in accordance with § 1026.43(f)(1)(v). However, if the investor meets the requirement of § 1026.43(f)(1)(vi), the balloon-payment qualified mortgage retains its qualified mortgage status.

Paragraph 43(f)(1)(vi).

1. *Creditor qualifications.* Under § 1026.43(f)(1)(vi), to make a qualified mortgage that provides for a balloon payment, the creditor must satisfy three criteria that are also required under § 1026.35(b)(2)(iii)(A), (B) and (C), which require:

i. During the preceding calendar year, the creditor extended over 50 percent of its total first-lien covered transactions, as defined in § 1026.43(b)(1), on properties that are located in counties that are designated either ''rural'' or ''underserved,'' as defined in § 1026.35(b)(2)(iv), to satisfy the requirement of § 1026.35(b)(2)(iii)(A). Pursuant to § 1026.35(b)(2)(iv), a county is considered to be rural if it is neither in a metropolitan statistical area, nor a micropolitan statistical area adjacent to a metropolitan statistical area, as those terms are defined by the U.S. Office of Management and Budget. A county is considered to be underserved if no more than two creditors extend covered transactions secured by a first lien five or more times in that county during a calendar year. The Bureau determines annually which counties in the United States are rural or underserved and publishes on its public Web site lists of those counties to enable creditors to determine whether they meet this criterion. Thus, for example, if a creditor originated 90 first-lien covered transactions during 2013, the creditor meets this element of the exception in 2014 if at least 46 of those transactions are secured by first liens on properties located in one or more counties that are on the Bureau's lists for 2013.

ii. During the preceding calendar year, the creditor together with its affiliates originated 500 or fewer first-lien covered transactions, as defined by § 1026.43(b)(1), to satisfy the requirement of § 1026.35(b)(2)(iii)(B).

iii. As of the end of the preceding calendar year, the creditor had total assets that do not exceed the current asset threshold established by the Bureau, to satisfy the requirement of § 1026.35(b)(2)(iii)(C). For calendar year 2013, the asset threshold was $2,000,000,000.

43(f)(2) Post-consummation transfer of balloon-payment qualified mortgage.

1. *Requirement to hold in portfolio.* Creditors generally must hold a balloon-payment qualified mortgage in portfolio to maintain the transaction's status as a qualified mortgage under § 1026.43(f)(1), subject to four exceptions. Unless one of these exceptions applies, a balloon-payment qualified mortgage is no longer a qualified mortgage under § 1026.43(f)(1) once legal title to the debt obligation is sold, assigned, or otherwise transferred to another person. Accordingly, unless one of the exceptions applies, the transferee could not benefit from the presumption of compliance for qualified mortgages under § 1026.43(f)(1) unless the loan also met the requirements of another qualified mortgage definition.

2. *Application to subsequent transferees.* The exceptions contained in § 1026.43(f)(2) apply not only to an initial sale, assignment, or other transfer by the originating creditor but to subsequent sales, assignments, and other transfers as well. For example, assume Creditor A originates a qualified mortgage under § 1026.43(f)(1). Six months after consummation, Creditor A sells the qualified mortgage to Creditor B pursuant to § 1026.43(f)(2)(ii) and the loan retains its qualified mortgage status because Creditor B complies with the limits on operating predominantly in rural or underserved areas, asset size, and number of transactions. If Creditor B sells the qualified mortgage, it will lose its qualified mortgage status under § 1026.43(f)(1) unless the sale qualifies for one of the § 1026.43(f)(2) exceptions for sales three or more years after consummation, to another qualifying institution, as required by supervisory action, or pursuant to a merger or acquisition.

Paragraph 43(f)(2)(i).

1. *Transfer three years after consummation.* Under § 1026.43(f)(2)(i), if a balloon-payment qualified mortgage under § 1026.43(f)(1) is sold, assigned, or otherwise transferred three years or more after consummation, the balloon-payment qualified mortgage retains its status as a qualified mortgage under § 1026.43(f)(1) following the sale. The transferee need not be eligible to originate qualified mortgages under § 1026.43(f)(1)(vi). The balloon-payment qualified mortgage will continue to be a qualified mortgage throughout its life, and the transferee, and any subsequent transferees, may invoke the presumption of compliance for qualified mortgages under § 1026.43(f)(1).

Paragraph 43(f)(2)(ii).

1. *Transfer to another qualifying creditor.* Under § 1026.43(f)(2)(ii), a balloon-payment qualified mortgage under § 1026.43(f)(1) may be sold, assigned, or otherwise transferred at any time to another creditor that meets the requirements of § 1026.43(f)(1)(vi). That section requires that a creditor: (1) Operate predominantly in a rural or underserved area during the preceding calendar year; (2) during the preceding calendar year, together with all affiliates, originated 500 or fewer first-lien covered transactions; and (3) had total assets less than $2 billion (as adjusted for inflation) at the end of the preceding calendar year. A balloon-payment qualified mortgage under § 1026.43(f)(1) transferred to a creditor that meets these criteria would retain its qualified mortgage status even if it is transferred less than three years after consummation.

Paragraph 43(f)(2)(iii).

1. *Supervisory sales.* Section 1026.43(f)(2)(iii) facilitates sales that are deemed necessary by supervisory agencies to revive troubled creditors and resolve failed creditors. A balloon-payment qualified mortgage under § 1026.43(f)(1) retains its qualified mortgage status if it is sold, assigned, or otherwise transferred to another person pursuant to: (1) A capital restoration plan or other action under 12 U.S.C. 1831o; (2) the actions or instructions of any person acting as conservator, receiver, or bankruptcy trustee; (3) an order of a State or Federal government agency with jurisdiction to examine the creditor pursuant to State or Federal law; or (4) an agreement between the creditor and such an agency. A balloon-payment qualified mortgage under § 1026.43(f)(1) that is sold, assigned, or otherwise transferred under these circumstances retains its qualified mortgage status regardless of how long after consummation it is sold and regardless of the size or other characteristics of the transferee. Section 1026.43(f)(2)(iii) does not apply to transfers done to comply with a generally applicable regulation with future effect designed to implement, interpret, or prescribe law or policy in the absence of a specific order by or a specific agreement with a governmental agency described in § 1026.43(f)(2)(iii) directing the sale of one or more qualified mortgages under § 1026.43(f)(1) held by the creditor or one of the other circumstances listed in § 1026.43(f)(2)(iii). For example, a balloon-payment qualified mortgage under § 1026.43(f)(1) that is sold pursuant to a capital restoration plan under 12 U.S.C. 1831o would retain its status as a qualified mortgage following the sale. However, if the creditor simply chose to sell the same qualified mortgage as one way to comply with general regulatory capital requirements in the absence of supervisory action or agreement it would lose its status as a qualified mortgage following the sale unless it qualifies under another definition of qualified mortgage.

Paragraph 43(f)(2)(iv).

1. *Mergers and acquisitions.* A qualified mortgage under § 1026.43(f)(1) retains its qualified mortgage status if a creditor merges with, is acquired by another person, or acquires another person regardless of whether the creditor or its successor is eligible to originate new balloon-payment qualified mortgages under § 1026.43(f)(1) after the merger or acquisition. However, the creditor or its successor can originate new balloon-payment qualified mortgages under § 1026.43(f)(1) only if it complies with all of the requirements of § 1026.43(f)(1) after the merger or acquisition. For example, assume a small creditor that originates 250 first-lien covered transactions each year and originates balloon-payment qualified mortgages under § 1026.43(f)(1) is acquired by a larger creditor that originates 10,000 first-lien covered transactions each year. Following the acquisition, the small creditor would no longer be able to originate balloon-payment qualified mortgages because, together with its affiliates, it would originate more than 500 first-lien covered transactions each year. However, the balloon-payment qualified mortgages originated by the small creditor before the acquisition would retain their qualified mortgage status.

43(g) Prepayment penalties.

43(g)(2) Limits on prepayment penalties.

1. *Maximum period and amount.* Section 1026.43(g)(2) establishes the maximum period during which a prepayment penalty may be imposed and the maximum amount of the prepayment penalty. A covered transaction may include a prepayment penalty that may be imposed during a shorter period or in a lower amount than provided under § 1026.43(g)(2). For example, a covered transaction may include a prepayment penalty that may be imposed for two years after consummation and that equals 1 percent of the amount prepaid in each of those two years.

43(g)(3) Alternative offer required.

Paragraph 43(g)(3)(i).

1. *Same type of interest rate.* Under § 1026.43(g)(3)(i), if a creditor offers a consumer a covered transaction with a prepayment penalty, the creditor must offer the consumer an alternative covered transaction without a prepayment penalty and with an annual percentage rate that cannot increase after consummation. Under § 1026.43(g)(3)(i), if the covered transaction with a prepayment penalty is a fixed-rate mortgage, as defined in § 1026.18(s)(7)(iii), then the alternative covered transaction without a prepayment penalty must also be a fixed-rate mortgage. Likewise, if the covered transaction with a prepayment penalty is a step-rate mortgage, as defined in § 1026.18(s)(7)(ii), then the alternative covered transaction without a prepayment penalty must also be a step-rate mortgage.

Paragraph 43(g)(3)(iv).

1. *Points and fees.* Whether or not an alternative covered transaction without a prepayment penalty satisfies the points and fees conditions for a qualified mortgage is determined based on the information known to the creditor at the time the creditor offers the consumer the transaction. At the time a creditor offers a consumer an alternative covered transaction without a prepayment penalty under § 1026.43(g)(3), the creditor may know the amount of some, but not all, of the points and fees that will be charged for the transaction. For example, a creditor may not know that a consumer intends to buy single-premium credit unemployment insurance, which would be included in the points and fees for the covered transaction. The points and fees condition under § 1026.43(g)(3)(iv) is satisfied if a creditor reasonably believes, based on information known to the creditor at the time the offer is made, that the amount of points and fees to be charged for an alternative covered transaction without a prepayment penalty will be less than or equal to the amount of points and fees allowed for a qualified mortgage under § 1026.43(e)(2)(iii).

Paragraph 43(g)(3)(v).

1. *Transactions for which the consumer likely qualifies.* Under § 1026.43(g)(3)(v), the alternative covered transaction without a prepayment penalty the creditor must offer under § 1026.43(g)(3) must be a transaction for which the creditor has a good faith belief the consumer likely qualifies. For example, assume the creditor has a good faith belief the consumer can afford monthly payments of up to $800. If the creditor offers the consumer a fixed-rate mortgage with a prepayment penalty for which monthly payments are $700 and an alternative covered transaction without a prepayment penalty for which monthly payments are $900, the requirements of § 1026.43(g)(3)(v) are not met. The creditor's belief that the consumer likely qualifies for the covered transaction without a prepayment penalty should be based on the information known to the creditor at the time the creditor offers the transaction. In making this determination, the creditor may rely on information provided by the consumer, even if the information subsequently is determined to be inaccurate.

43(g)(4) Offer through a mortgage broker.

1. *Rate sheet.* Under § 1026.43(g)(4), where the creditor offers covered transactions with a prepayment penalty to consumers through a mortgage broker, as defined in § 1026.36(a)(2), the creditor must present the mortgage broker an alternative covered transaction that satisfies the requirements of § 1026.43(g)(3). Creditors may comply with this requirement by providing a rate sheet to the mortgage broker that states the terms of such an alternative covered transaction without a prepayment penalty.

2. *Alternative to creditor's offer.* Section 1026.43(g)(4)(ii) requires that the creditor provide, by agreement, for the mortgage broker to present the consumer an alternative covered transaction that satisfies the requirements of § 1026.43(g)(3) offered by either the creditor or by another creditor, if the other creditor offers a covered transaction with a lower interest rate or a lower total dollar amount of discount points and origination points or fees. The agreement may provide for the mortgage broker to present both the creditor's covered transaction and an alternative covered transaction offered by another creditor with a lower interest rate or a lower total dollar amount of origination discount points and points or fees. See comment 36(e)(3)–3 for guidance in determining which step-rate mortgage has a lower interest rate.

3. *Agreement.* The creditor's agreement with a mortgage broker for purposes of

§ 1026.43(g)(4) may be part of another agreement with the mortgage broker, for example, a compensation agreement. Thus, the creditor need not enter into a separate agreement with the mortgage broker with respect to each covered transaction with a prepayment penalty.

43(g)(5) Creditor that is a loan originator.

1. *Loan originator.* The definition of ''loan originator'' in § 1026.36(a)(1) applies for purposes of § 1026.43(g)(5). Thus, a loan originator includes any creditor that satisfies the definition of loan originator but makes use of ''table-funding'' by a third party. *See* comment 36(a)–1.i and ii.

2. *Lower interest rate.* Under § 1026.43(g)(5), a creditor that is a loan originator must present an alternative covered transaction without a prepayment penalty that satisfies the requirements of § 1026.43(g)(3) offered by either the assignee for the covered transaction or another person, if that other person offers a transaction with a lower interest rate or a lower total dollar amount of origination points or fees or discount points. See comment 36(e)(3)–3 for guidance in determining which step-rate mortgage has a lower interest rate.

43(h) Evasion; open-end credit.

1. *Subject to closed-end credit rules.* Where a creditor documents a loan as open-end credit but the features and terms, or other circumstances, demonstrate that the loan does not meet the definition of open-end credit in § 1026.2(a)(20), the loan is subject to the rules for closed-end credit, including § 1026.43.

Dated: January 10, 2013.

Richard Cordray,

Director, Bureau of Consumer Financial Protection.

[FR Doc. 2013–00736 Filed 1–16–13; 11:15 am]

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Part III

Bureau of Consumer Financial Protection

12 CFR Part 1026

Ability To Repay Standards Under the Truth in Lending Act (Regulation Z); Proposed Rule

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1026

[Docket No. CFPB–2013–0002]

RIN 3170–AA34

Ability To Repay Standards Under the Truth in Lending Act (Regulation Z)

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Proposed rule with request for public comment.

SUMMARY: The Bureau of Consumer Financial Protection (Bureau) is proposing to amend Regulation Z, which implements the Truth in Lending Act (TILA). This proposal is related to a final rule published elsewhere in today's **Federal Register**. That final rule implements sections 1411, 1412, and 1414 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), which creates new TILA section 129C. Among other things, the Dodd-Frank Act requires creditors to make a reasonable, good faith determination of a consumer's ability to repay any consumer credit transaction secured by a dwelling (excluding an open-end credit plan, timeshare plan, reverse mortgage, or temporary loan) and establishes certain protections from liability under this requirement for ''qualified mortgages.'' The Bureau is proposing certain amendments to the final rule implementing these requirements, including exemptions for certain nonprofit creditors and certain homeownership stabilization programs and an additional definition of a qualified mortgage for certain loans made and held in portfolio by small creditors. The Bureau is also seeking feedback on whether additional clarification is needed regarding the inclusion of loan originator compensation in the points and fees calculation.

DATES: Comments must be received on or before February 25, 2013, except that comments on the Paperwork Reduction Act analysis in part VIII of this **Federal Register** notice must be received on or before March 1, 2013.

ADDRESSES: You may submit comments, identified by Docket No. CFPB–2013–0002 or RIN 3170–AA34, by any of the following methods:

- *Electronic: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail/Hand Delivery/Courier:* Monica Jackson, Office of the Executive Secretary, Consumer Financial Protection Bureau, 1700 G Street NW., Washington, DC 20552.

Instructions: All submissions should include the agency name and docket number or Regulatory Information Number (RIN) for this rulemaking. Because paper mail in the Washington, DC area and at the Bureau is subject to delay, commenters are encouraged to submit comments electronically. In general, all comments received will be posted without change to *http://www.regulations.gov.* In addition, comments will be available for public inspection and copying at 1700 G Street NW., Washington, DC 20552, on official business days between the hours of 10 a.m. and 5 p.m. Eastern Time. You can make an appointment to inspect the documents by telephoning (202) 435–7275.

All comments, including attachments and other supporting materials, will become part of the public record and subject to public disclosure. Sensitive personal information, such as account numbers or Social Security numbers, should not be included. Comments will not be edited to remove any identifying or contact information.

FOR FURTHER INFORMATION CONTACT: Jennifer B. Kozma, Eamonn K. Moran, or Priscilla Walton-Fein, Counsels; Thomas J. Kearney or Mark Morelli, Senior Counsels; or Stephen Shin, Managing Counsel, Office of Regulations, at (202) 435–7700.

SUPPLEMENTARY INFORMATION:

I. Summary of Proposed Rule

As discussed in detail under part II below, sections 1411, 1412, and 1414 of the Dodd-Frank Act created new TILA section 129C, which establishes, among other things, new ability-to-repay requirements. The Bureau is adopting final rules implementing these ability-to-repay requirements in a rule published elsewhere in today's **Federal Register** (the Bureau's 2013 ATR Final Rule). The Bureau believes that several exemptions and modifications to the ability-to-repay requirements may be appropriate. The Bureau is also proposing two alternative comments intended to clarify the calculation of points and fees in a transaction involving loan originator compensation. Accordingly, the Bureau solicits feedback regarding these exemptions and modifications.

A. Proposed Exemption for Credit Extended Pursuant to a Community-Focused Lending Program

The Bureau is proposing to exempt an extension of credit made pursuant to a program administered by a housing finance agency (HFA) from the ability-to-repay requirements. The Bureau believes that this exemption may be necessary to preserve access to credit for low- to moderate-income (LMI) consumers. The Bureau is concerned that the ability-to-repay requirements may undermine the underwriting requirements of these programs. For example, the ability-to-repay provisions may require consideration of underwriting factors that are not required under HFA programs, such as the consumer's credit history. The Bureau is also concerned that the ability-to-repay requirements may affect the ability of HFAs to offer extensions of credit customized to meet the needs of LMI consumers while promoting long-term housing stability. Furthermore, the Bureau is concerned that the costs of implementing and complying with the ability-to-repay requirements would result in a severe curtailment of the credit offered under these programs. The proposed exemption related to HFAs is discussed in more detail below in the section-by-section analysis of § 1026.43(a)(3)(iv).

The Bureau is also proposing to exempt an extension of credit made by certain types of nonprofit creditors from the ability-to-repay requirements. Creditors designated by the U.S. Department of the Treasury as Community Development Financial Institutions and creditors designated by the U.S. Department of Housing and Urban Development as either a Community Housing Development Organization or a Downpayment Assistance Provider of Secondary Financing are included in this proposed exemption. The proposal also exempts creditors designated as nonprofit organizations under section 501(c)(3) of the Internal Revenue Code, provided that the extension of credit is to a consumer with income that does not exceed the qualifying limit for moderate income families as established pursuant to section 8 of the United States Housing Act of 1937, that during the calendar year preceding receipt of the consumer's application the creditor extended credit no more than 100 times, and only to consumers with income that did not exceed the above qualifying limit, and that the creditor determines, in accordance with written procedures, that the consumer has a reasonable ability to repay the extension of credit. The Bureau is concerned that nonprofit creditors may not have the resources to implement and comply with the ability-to-repay requirements, and may be forced to cease or severely limit extending credit to LMI consumers, which would result in the denial of responsible, affordable mortgage credit. However, to prevent circumvention of TILA, the Bureau believes that this exemption should be limited to the nonprofit creditors identified above. The proposed exemption related to these nonprofit creditors is discussed in more detail below in the section-by-section analysis of § 1026.43(a)(3)(v).

B. Proposed Exemption for Credit Extended Pursuant to a Homeownership Stabilization and Foreclosure Prevention Program, Federal Agency Refinancing Program, or GSE Refinancing Program

The Bureau is proposing to exempt an extension of credit made pursuant to an Emergency Economic Stabilization Act (EESA) program, such as extensions of credit made pursuant to a State Hardest Hit Fund (HHF) program, from the ability-to-repay requirements. The Bureau believes that this exemption may be necessary to preserve access to credit. The Bureau is concerned that requiring credit extended pursuant to these programs to comply with the ability-to-repay provisions may unnecessarily interfere with these programs' unique underwriting requirements, which would make it more difficult for many consumers to qualify for assistance and increase the cost of credit for those who do, thereby impacting the availability of credit for these at-risk consumers. Further, the Bureau is concerned that creditors may elect not to participate in these programs, rather than investing resources complying with the requirements of both homeownership stabilization programs and the ability-to-repay requirements, which would frustrate efforts to ameliorate the effects of the financial crisis and disrupt the financial market for consumers at risk of foreclosure or default, thereby harming those in need of the assistance provided under these programs. The proposed exemption related to these emergency programs is discussed in more detail below in the section-by-section analysis of § 1026.43(a)(3)(vi).

The Bureau is proposing to exempt from the ability-to-repay requirements a refinancing that is eligible to be insured, guaranteed, or made pursuant to a program administered by the Federal Housing Administration, U.S. Department of Veterans Affairs, or the U.S. Department of Agriculture. The proposed exemption is available only until the Federal agency administering the program under which the extension of credit is eligible to be insured, guaranteed, or made prescribes rules pursuant to section 129C(a)(5) or 129C(b)(3)(B)(ii) of TILA. The Bureau believes that this exemption is necessary to preserve access to credit. The Federal agencies described above have not yet prescribed rules related to the ability-to-repay requirements for refinances, pursuant to TILA section 129C(a)(5), or the definition of qualified mortgage, pursuant to TILA section 129C(b)(3)(B)(ii). The Bureau is concerned that the ability-to-repay provisions would unnecessarily interfere with requirements of these Federal agency refinance programs, which would make it more difficult for many consumers to qualify for these programs and increase the cost of credit for those who do, thereby constraining the availability of responsible, affordable credit for consumers. The proposed exemption related to these Federal agencies is discussed in more detail below in the section-by-section analysis of § 1026.43(a)(3)(vii).

The Bureau is proposing to exempt an extension of credit that is a refinancing that is eligible to be purchased or guaranteed by the Federal National Mortgage Association (Fannie Mae) or the Federal Home Loan Mortgage Corporation (Freddie Mac) (collectively, the GSEs) from the ability-to-repay requirements. This proposed exemption only applies if:

- The refinancing is made pursuant to an eligible targeted refinancing program, as defined under regulations promulgated by the Federal Housing Finance Agency;
- Such entities are operating under the conservatorship or receivership of the Federal Housing Finance Agency on the date the refinancing is consummated;
- The existing obligation satisfied and replaced by the refinancing is owned by Fannie Mae or Freddie Mac;
- The existing obligation satisfied and replaced by the refinancing was not consummated on or after January 10, 2014; and
- The refinancing is not consummated on or after January 10, 2021.

The Bureau is concerned that the ability-to-repay requirements may add unnecessary additional costs and may cause needless delays for distressed consumers whose current mortgage obligations are owned by Fannie Mae or Freddie Mac and who seek refinancings pursuant to these eligible targeted refinancing programs. The proposed exemption related to these GSE refinancing programs is discussed in more detail below in the section-by-section analysis of § 1026.43(a)(3)(viii).

C. Loans Held in Portfolio by Small Creditors

The 2013 ATR Final Rule defines three categories of qualified mortgages. Qualified mortgages are provided either a conclusive or rebuttable presumption of compliance with the requirement that creditors make a reasonable, good faith determination of a consumer's ability to repay before originating a mortgage loan. The Bureau is proposing to define a new, fourth category of qualified mortgages.

The proposed new category would include certain loans originated by small creditors [1] that:

- Have total assets of $2 billion or less at the end of the previous calendar year; and
- Together with all affiliates, originated 500 or fewer first-lien covered transactions during the previous calendar year.

The proposed new category would include only loans held in portfolio by these creditors. Therefore, if a creditor agreed prior to consummation to sell a loan, that loan would not be a qualified mortgage under the proposed definition. Such loans often are described as being subject to a ''forward commitment.'' The rule would provide an exception that would allow forward commitments to sell to a creditor that also meets the limits on asset size and number of first-lien covered transactions. To prevent evasion, a loan in the proposed new category would lose its status as a qualified mortgage if it is held in portfolio for less than three years after consummation, with certain exceptions.

The loan also would have to conform to all of the requirements under the general definition of a qualified mortgage except the 43 percent limit on monthly debt-to-income ratio. In other words, the loan could not have:

- Negative-amortization, interest-only, or balloon-payment features;
- A term longer than 30 years; and
- Points and fees greater than 3 percent of the total loan amount (or, for smaller loans, the amount specified in the regulation).

When underwriting the loan the creditor would have to:

- Consider and verify the consumer's income and assets; and
- Base the underwriting on a monthly payment calculated using the maximum interest rate that may apply during the

[1] The $2 billion threshold reflects the purposes of the proposed category and the structure of the mortgage lending industry. The Bureau's choice of $2 billion in assets as a threshold for purposes of TILA section 129C does not imply that a threshold of that type or of that magnitude would be an appropriate way to distinguish small firms for other purposes or in other industries.

first five years of the loan and that is fully amortizing.

The creditor also would have to consider the consumer's debt-to-income ratio or residual income and verify the underlying information. In contrast, the general definition of a qualified mortgage requires creditors to calculate debt-to-income ratio according to the instructions in appendix Q to the rule and prohibits debt-to-income ratios above 43 percent. In other words, under the proposed additional definition, a creditor would not have to use the instructions in appendix Q to calculate debt-to-income ratio, and a loan with a consumer debt-to-income ratio higher than 43 percent could be a qualified mortgage if all other criteria are met.

The Bureau also is proposing to allow small creditors to charge a higher annual percentage rate for first-lien qualified mortgages in the proposed new category and still benefit from a conclusive presumption of compliance or ''safe harbor.'' Qualified mortgages can have different levels of protection from liability depending on their annual percentage rate. Under the existing rules, first-lien qualified mortgages with an annual percentage rate less than or equal to the average prime offer rate plus 1.5 percentage points and subordinate-lien qualified mortgages with an annual percentage rate less than or equal to the average prime offer rate plus 3.5 percentage points are within the safe harbor. A qualified mortgage with an annual percentage rate above those thresholds is presumed to comply with the ability-to-repay rules, but a consumer could rebut that presumption under certain circumstances. A qualified mortgage in the proposed new category would be conclusively presumed to comply if the annual percentage rate is equal to or less than the average prime offer rate plus 3.5 percentage points for both first-lien and subordinate-lien loans.

The Bureau is proposing these changes because it believes they may be necessary to preserve access to responsible, affordable mortgage credit for some consumers. Small creditors are a significant source of loans that, for various reasons, do not qualify for government guarantee and insurance programs and cannot be sold for securitization. Larger creditors often are unwilling to make these loans because they involve consumers or properties with unique features that make them difficult to assess using larger creditors' underwriting standards or because larger creditors are unwilling to hold the loans in portfolio. Small creditors often are willing and able to consider these consumers and properties individually and to hold the loans on their balance sheets. Small creditors also may be the predominant source of credit in many rural areas where large creditors do not operate.

Small creditors may be particularly well suited to make mortgage loans that are responsible and affordable because their small size, relationship-based lending model, and ties to their communities enable them to make more accurate assessments of consumers' ability to repay than larger creditors. Small creditors also have strong incentives to carefully consider whether a consumer will be able to repay a portfolio loan at least in part because the small creditor retains the risk of default.

Small creditors often charge higher interest rates and fees for legitimate business reasons. For example, small creditors often pay more for the funds they lend and may charge more to compensate for the interest rate and other risks associated with holding a loan in portfolio.

Many small creditors have expressed concerns about the litigation risk associated with the requirement to make a reasonable and good faith determination of consumers' ability to pay based on verified and documented information. Indeed, small creditors assert that they will not continue to make mortgage loans unless they are protected from liability for violations of the ability-to-repay rules by a conclusive presumption of compliance or ''safe harbor.'' The Bureau therefore believes that creating a new category of qualified mortgages that would include small creditor portfolio loans and raising the annual percentage rate threshold for the safe harbor to accommodate small creditors' higher costs may be necessary to preserve some consumers' access to mortgage credit and also would ensure that the mortgage credit is provided in a responsible, affordable way.

The Bureau is soliciting comment on both the proposed approach to small creditor portfolio loans generally and on the specific criteria proposed. The proposed amendments related to small creditor portfolio loans are discussed in more detail below in the section-by-section analysis of § 1026.43(b)(4) and (e)(5).

D. Higher-Priced Covered Transaction Threshold for Balloon-Payment Qualified Mortgages

The Bureau also is proposing to allow small creditors operating predominantly in rural or underserved areas to offer first-lien balloon loans with a higher annual percentage rate and still benefit from a conclusive presumption of compliance with the ability-to-repay rules or ''safe harbor.'' The Bureau believes this change may be necessary to preserve access to responsible, affordable mortgage credit in rural and underserved areas.

Consumers in rural and underserved areas may be able to obtain a mortgage loan only from small creditors because larger creditors often do not lend in those areas. Small creditors operating predominantly in rural and underserved areas assert that they cannot offer mortgage loans unless they are allowed to make balloon loans that are protected from liability for violations of the ability-to-repay rules by a safe harbor.

The Bureau's current rule provides that certain balloon loans made by small creditors operating predominantly in rural or underserved areas are qualified mortgages. However, qualified mortgages can have different levels of protection from liability depending on their annual percentage rate. Under the existing rules, first-lien qualified mortgages with an annual percentage rate less than or equal to the average prime offer rate plus 1.5 percentage points and subordinate-lien qualified mortgages with an annual percentage rate less than or equal to the average prime offer rate plus 3.5 percentage points are within the safe harbor. Qualified mortgages with annual percentage rates above these thresholds are presumed to comply with the ability-to-repay rules, but a consumer can rebut that presumption under certain circumstances.

Small creditors often charge higher interest rates and fees for legitimate business reasons, such as to cover their higher costs and to compensate for interest rate and other risks associated with holding a loan in portfolio. Therefore, the Bureau is concerned that many balloon-payment qualified mortgages will have annual percentage rates that are too high to qualify for the safe harbor. Because small creditors operating in rural and underserved areas insist that they are unwilling to make mortgage loans outside of the safe harbor because of litigation risk, this could limit access to credit for some consumers.

The Bureau is soliciting comment on adjusting the annual percentage rate threshold for balloon-payment qualified mortgages generally and on the specific threshold proposed. The proposed amendment is discussed in more detail below in the section-by-section analysis of § 1026.43(b)(4).

II. Background

For over 20 years, consumer advocates, legislators, and regulators have raised concerns about creditors originating mortgage loans without regard to the consumer's ability to repay the loan. Beginning in about 2006, these concerns were heightened as mortgage delinquencies and foreclosure rates increased dramatically, caused in part by the gradual deterioration in underwriting standards. *See* 73 FR 44524 (Jul. 30, 2008). The following is presented as background information, including a brief summary of the legislative and regulatory responses to this issue, which culminated in the enactment of the Dodd-Frank Act on July 21, 2010, the Board of Governors of the Federal Reserve System's (the Board) issuance of a proposed rule on May 11, 2011 to implement certain amendments to TILA made by the Dodd-Frank Act, the Bureau's issuance of the final rule to implement sections 1411, 1412, and 1414 of the Dodd-Frank Act, and this proposal to provide certain exemptions from and amendments to the ability-to-repay requirements. For additional detailed background regarding the issues addressed in this proposal, see the discussion in part II of the Bureau's final rule, published elsewhere in today's **Federal Register**.

A. TILA and Regulation Z

In 1968, Congress enacted TILA, 15 U.S.C. 1601 *et seq.,* based on findings that economic stability would be enhanced and competition among consumer credit providers would be strengthened by the informed use of credit resulting from consumers' awareness of the cost of credit. One of the purposes of TILA is to promote the informed use of consumer credit by requiring disclosures about its costs and terms. *See* 15 U.S.C. 1601(a). TILA requires additional disclosures for loans secured by consumers' homes and permits consumers to rescind certain transactions secured by their principal dwellings. *See* 15 U.S.C. 1635, 1637a. Section 105(a) of TILA directs the Bureau (formerly the Board) [2] to prescribe regulations to carry out TILA's purposes, and specifically authorizes the Bureau, among other things, to issue regulations that contain such additional requirements, classifications, differentiations, or other provisions, or that provide for such adjustments and exceptions for all or any class of transactions, that in the Bureau's judgment are necessary or proper to effectuate the purposes of TILA, facilitate compliance with TILA, or prevent circumvention or evasion therewith. *See* 15 U.S.C. 1604(a). TILA is implemented by the Bureau's Regulation Z, 12 CFR part 1026. Commentary provided in the Official Interpretations supplement to Regulation Z interprets the requirements of the regulation and provides guidance to creditors in applying the rules to specific transactions. *See* 12 CFR part 1026, Supp. I.

B. Ability-to-Repay Requirements Prior to the Dodd-Frank Act

In response to evidence of abusive practices in the home-equity lending market, Congress amended TILA by enacting the Home Ownership and Equity Protection Act (HOEPA) in 1994. Public Law 103–325, 108 Stat. 2160. HOEPA created special substantive protections for ''high-cost mortgage loans,'' [3] including prohibiting a creditor from engaging in a pattern or practice of extending a high-cost mortgage to a consumer based on the consumer's collateral without regard to the consumer's repayment ability, including the consumer's current and expected income, current obligations, and employment. TILA section 129(h); 15 U.S.C. 1639(h). In addition to the disclosures and limitations specified in the statute, TILA section 129, as added by HOEPA, expanded the Board's rulemaking authority by authorizing the Board to prohibit acts or practices the Board found to be unfair and deceptive in connection with mortgage loans.[4]

In 1995, the Board implemented the HOEPA amendments at §§ 226.31, 226.32, and 226.33 of Regulation Z. *See* 60 FR 15463 (Mar. 24, 1995). In particular, § 226.32(e)(1) implemented TILA section 129(h) to prohibit a creditor from extending a high-cost mortgage based on the consumer's collateral if, considering the consumer's current and expected income, current obligations, and employment status, the consumer would be unable to make the scheduled payments. In 2001, the Board amended these regulations to expand HOEPA's protections to more loans by revising the annual percentage rate (APR) threshold and the points and fees definition. *See* 66 FR 65604 (Dec. 20, 2001). In addition, the ability-to-repay provisions in the regulation were revised to provide for a presumption of a violation of the rule if the creditor engages in a pattern or practice of making high-cost mortgages without verifying and documenting the consumer's repayment ability.

After the Board finalized the 2001 HOEPA rules, new consumer protection issues arose in the mortgage market. During a series of national hearings held by the Board in 2006 and 2007, consumer advocates and government officials expressed a number of concerns and urged the Board to use HOEPA to prohibit or restrict certain underwriting practices, such as ''stated income'' or ''low documentation'' loans, and certain product features, such as prepayment penalties. *See* 73 FR 44527 (Jul. 30, 2008). In response to these hearings, in July of 2008, the Board adopted final rules adding new protections under HOEPA. *See* 73 FR 44522 (Jul. 30, 2008) (the Board's 2008 HOEPA Final Rule). The Board's 2008 HOEPA Final Rule defined a new class of ''higher-priced mortgage loans'' (HPMLs) [5] with APRs that are lower than those prescribed for HOEPA loans but that nevertheless exceed the average prime offer rate by prescribed amounts. This new category of loans was designed to include subprime credit. Among other things, the Board's 2008 HOEPA Final Rule revised the ability-to-repay requirements for high-cost mortgages

[2] General rulemaking authority for TILA transferred to the Bureau in July 2011, other than for certain motor vehicle dealers in accordance with Dodd-Frank Act section 1029, 12 U.S.C. 5519. Pursuant to that transferred rulemaking authority, the Bureau issued its own Regulation Z, 12 CFR part 1026, which substantially parallels the Board's Regulation Z, 12 CFR part 226. *See* 76 FR 79767 (Dec. 22, 2011).

[3] HOEPA defines a class of ''high-cost mortgages,'' which are generally consumer credit transactions secured by the consumers' principal dwellings (originally excluding home-purchase loans and open-end lines of credit, although the Dodd-Frank Act amended HOEPA to cover such transactions) with annual percentage rates or total points and fees exceeding prescribed thresholds. Mortgages covered by the HOEPA amendments have been referred to as ''HOEPA loans,'' ''section 32 loans,'' ''high-cost mortgages,'' or ''high-cost mortgage loans.'' The Dodd-Frank Act now refers to these loans as ''high-cost mortgages.'' *See* Dodd-Frank Act section 1431; TILA section 103(aa). For simplicity and consistency, this proposed rule uses the term ''high-cost mortgages'' to refer to mortgage loans covered by the HOEPA provisions.

[4] Originally 15 U.S.C. 1639(*l*)(2)(A), subsequently recodified by the Dodd-Frank Act as 15 U.S.C. 1639(p)(2)(A).

[5] Under the Board's 2008 HOEPA Final Rule, a higher-priced mortgage loan is a consumer credit transaction secured by the consumer's principal dwelling with an APR that exceeds the average prime offer rate (APOR) for a comparable transaction, as of the date the interest rate is set, by 1.5 or more percentage points for loans secured by a first lien on the dwelling, or by 3.5 or more percentage points for loans secured by a subordinate lien on the dwelling. The definition of a ''higher-priced mortgage loan'' includes practically all ''high-cost mortgages'' because the latter transactions are determined by higher loan pricing threshold tests. *See* 12 CFR 226.35(a)(1), since codified in parallel by the Bureau at 12 CFR 1026.35(a)(1).

and extended these requirements to higher-priced mortgage loans.[6]

Significantly, the Board's 2008 HOEPA Final Rule prohibited individual high-cost mortgage loans or higher-priced mortgage loans from being extended based on the collateral without regard to repayment ability, rather than simply prohibiting a pattern or practice of making extensions based on the collateral without regard to ability to repay.[7] The Board exercised its authority under TILA section 129(*l*)(2) [8] to revise HOEPA's restrictions based on a conclusion that the revisions were necessary to prevent unfair and deceptive acts or practices in connection with mortgage loans. *See* 73 FR 44545 (July 30, 2008). In particular, the Board concluded that a prohibition on making individual loans without regard for repayment ability was necessary to ensure a remedy for consumers who are given unaffordable loans and to deter irresponsible lending, which injures individual consumers. The Board determined that imposing the burden to prove ''pattern or practice'' on an individual consumer would leave many consumers with a lesser remedy, such as those provided under some State laws, or without any remedy, for loans made without regard to repayment ability. The Board further determined that removing this burden would not only improve remedies for individual consumers, it would also increase deterrence of irresponsible lending.

C. The Dodd-Frank Act

In 2007, Congress held hearings focused on the extent to which lending practices contributed to rising subprime foreclosure rates. Consumer advocates testified that certain lending terms or practices contributed to the foreclosures, including a failure to consider the consumer's ability to repay, low- or no-documentation loans, hybrid adjustable-rate mortgages, and prepayment penalties. Industry representatives, on the other hand, testified that adopting substantive restrictions on subprime loan terms would risk reducing access to credit for some consumers. In response to these hearings, the House of Representatives passed the Mortgage Reform and Anti-Predatory Lending Act, both in 2007 and again in 2009. H.R. 3915, 110th Cong. (2007); H.R. 1728, 111th Cong. (2009). Both bills would have amended TILA to provide consumer protections for mortgages, including ability-to-repay requirements, but neither bill was passed by the Senate. Instead, both houses shifted their focus to enacting comprehensive financial reform legislation, and the Senate passed its own version of ability-to-repay requirements as part of that effort, called the Restoring American Financial Stability Act of 2010. S. 3217, 111th Cong. (2010).

After several months of additional debate and negotiations, the Dodd-Frank Act was signed into law on July 21, 2010. Public Law 111–203, 124 Stat. 1376 (2010). In the Dodd-Frank Act, Congress established the Bureau and, under sections 1061 and 1100A, consolidated the rulemaking authority for many consumer financial protection statutes, including the two primary Federal consumer protection statutes governing mortgage credit, TILA and the Real Estate Settlement Procedures Act (RESPA), in the Bureau.[9] Congress also provided the Bureau with supervision authority for certain consumer financial protection statutes over certain entities, including insured depository institutions with total assets over $10 billion and their affiliates, and all mortgage-related non-depository financial service providers.[10]

At the same time, Congress significantly amended the statutory requirements governing mortgage practices with the intent to restrict the practices that contributed to the crisis. Title XIV of the Dodd-Frank Act, titled the Mortgage Reform and Anti-Predatory Lending Act, contains several new regulations designed to prevent the mortgage lending practices that harmed consumers and contributed to the financial crisis.[11] Sections 1411, 1412, and 1414 of the Dodd-Frank Act created new TILA section 129C, which establishes, among other things, new ability-to-repay requirements and new limits on prepayment penalties. Section 1402 of the Dodd-Frank Act states that Congress created new TILA section 129C upon a finding that ''economic stabilization would be enhanced by the protection, limitation, and regulation of the terms of residential mortgage credit and the practices related to such credit, while ensuring that responsible, affordable mortgage credit remains available to consumers.'' TILA section 129B(a)(1), 15 U.S.C. 1639b(a)(1). Section 1402 of the Dodd-Frank Act further states that the purpose of TILA section 129C is to ''assure that consumers are offered and receive residential mortgage loans on terms that reasonably reflect their ability to repay the loans.'' TILA section 129B(a)(2), 15 U.S.C. 1639b(a)(2).

Specifically, TILA section 129C:

- Expands coverage of the ability-to-repay requirements to any consumer credit transaction secured by a dwelling, except an open-end credit plan, credit secured by an interest in a timeshare plan, reverse mortgage, or temporary loan.
- Prohibits a creditor from making a mortgage loan unless the creditor makes a reasonable and good faith determination, based on verified and documented information, that the consumer has a reasonable ability to repay the loan according to its terms, and all applicable taxes, insurance, and assessments.
- Provides a presumption of compliance with the ability-to-repay requirements if the mortgage loan is a ''qualified mortgage,'' which does not contain certain risky features and limits points and fees on the loan.

The statutory ability-to-repay standards reflect Congress's belief that certain lending practices (such as low- or no-documentation loans) and terms (such as hybrid adjustable-rate mortgages and loans with negative amortization) led to consumers having mortgages they could not afford, resulting in high default and foreclosure rates. Accordingly, new TILA section 129C prohibits a creditor from making a residential mortgage loan unless the creditor makes a reasonable and good faith determination, based on verified and documented information, that the consumer has a reasonable ability to repay the loan according to its terms.

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[6] Originally adopted as 12 CFR 226.34(a)(4), 226.35(b)(2), since recodified as 12 CFR 1026.34(a)(4), 1026.35(b)(1).

[7] Specifically, the rule prohibits a creditor from extending a higher-priced mortgage loan based on the collateral and without regard to the consumer's repayment ability, and prohibits a creditor from relying on income or assets to assess repayment ability unless the creditor verifies such amounts using third party documents that provide reasonably reliable evidence of the consumer's income and assets. For further information, see the Bureau's 2012 HOEPA Proposal, 77 FR 49090 (Aug. 15, 2012).

[8] Subsequently renumbered by the Dodd-Frank Act as TILA section 129(p)(2).

[9] Sections 1011 and 1021 of the Dodd-Frank Act, in title X, the ''Consumer Financial Protection Act,'' Public Law 111–203, sections 1001–1100H, codified at 12 U.S.C. 5491, 5511. The Consumer Financial Protection Act is substantially codified at 12 U.S.C. 5481–5603. Section 1029 of the Dodd-Frank Act excludes from this transfer of authority, subject to certain exceptions, any rulemaking authority over a motor vehicle dealer that is predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both. 12 U.S.C. 5519.

[10] Sections 1024 through 1026 of the Dodd-Frank Act, codified at 12 U.S.C. 5514 through 5516.

[11] Although S. Rpt. No. 111–176 contains general legislative history concerning the Dodd-Frank Act and the Senate ability-to-repay provisions, it does not address the House Mortgage Reform and Anti-Predatory Lending Act. Separate legislative history for the predecessor House bills is available in H. Rpt. No. 110–441 for H.R. 3915 (2007), and H. Rpt. No. 111–194 for H.R. 1728 (2009).

To provide more certainty to creditors while protecting consumers from unaffordable loans, the Dodd-Frank Act provides a presumption of compliance with the ability-to-repay requirements for certain ''qualified mortgages.'' Qualified mortgages are prohibited from containing certain features that Congress considered to increase risks to consumers and must comply with certain limits on points and fees. The Act states that a creditor or assignee may presume that a loan has met the repayment ability requirement if the loan is a qualified mortgage, but does not address whether the presumption is conclusive or, if it can be rebutted, on what grounds it may be challenged.

The Dodd-Frank Act creates special remedies for violations of TILA section 129C. As amended by section 1416 of the Dodd-Frank Act, TILA section 130(a) provides that a consumer who brings a timely action against a creditor for a violation of TILA section 129C(a) (the ability-to-repay requirements) may be able to recover special statutory damages equal to the sum of all finance charges and fees paid by the consumer, unless the creditor demonstrates that the failure to comply is not material. 15 U.S.C. 1640(a). This recovery is in addition to actual damages; statutory damages in an individual action or class action, up to a prescribed threshold; and court costs and attorney fees that would be available for violations of other TILA provisions. In addition, the statute of limitations for an action for a violation of TILA section 129C is three years from the date of the occurrence of the violation (as compared to one year for most other TILA violations). TILA section 130(e), 15 U.S.C. 1640(e). Moreover, as amended by section 1413 of the Dodd-Frank Act, TILA section 130(k) provides that when a creditor or an assignee initiates a foreclosure action, a consumer may assert a violation of TILA section 129C(a) ''as a matter of defense by recoupment or setoff.'' 15 U.S.C. 1640(k). There is no time limit on the use of this defense, nor is there any requirement that the violation be apparent to the assignee on the face of the documents obtained from the creditor. However, the amount of special statutory damages that may be recovered in recoupment or setoff is limited to no more than three years of finance charges and fees.

In addition to the foregoing ability-to-repay provisions, the Dodd-Frank Act established other new standards concerning a wide range of mortgage lending practices, including compensation of mortgage loan originators,[12] Federal mortgage loan disclosures [13] and mortgage loan servicing.[14] Those and other Dodd-Frank Act provisions are the subjects of other rulemakings by the Bureau. For additional information on these rulemakings, see part III of the Bureau's 2013 ATR Final Rule.

D. The Board's Proposed and the Bureau's Final Rules

In 2011, the Board published for public comment a proposed rule amending Regulation Z to implement the foregoing ability-to-repay amendments to TILA made by the Dodd-Frank Act. *See* 76 FR 27390 (May 11, 2011) (Board's 2011 ATR Proposal or Board's proposal). Consistent with the Dodd-Frank Act, the Board's proposal applied the ability-to-repay requirements to any consumer credit transaction secured by a dwelling (including vacation homes and home equity loans), except an open-end credit plan, extension of credit secured by a consumer's interest in a timeshare plan, reverse mortgage, or temporary loan with a term of 12 months or less.

The Board's proposal provided four options for complying with the ability-to-repay requirement. First, the proposal would have allowed a creditor to meet the general ability-to-repay standard by originating a mortgage loan for which the creditor considered and verified eight underwriting factors in determining repayment ability, and the mortgage payment calculation is based on the fully indexed rate.[15] Second, the proposal would have allowed a creditor to meet the general ability-to-repay standard by refinancing a ''non-standard mortgage'' into a ''standard mortgage.'' [16] Under this option, the proposal would not have required the creditor to verify the consumer's income or assets. Third, the proposal would have allowed a creditor to meet the general ability-to-repay standard by originating a ''qualified mortgage,'' which provides special protection from liability for creditors. Because the Board determined that it was unclear whether that protection is intended to be a safe harbor or a rebuttable presumption of compliance with the repayment ability requirement, the Board proposed two alternative definitions of a ''qualified mortgage.'' [17] Finally, the proposal would have allowed a small creditor operating predominantly in rural or underserved areas to originate a balloon-payment qualified mortgage if the loan term is five years or more, and the payment calculation is based on the scheduled periodic payments, excluding the balloon payment.[18] The Board's proposal also would have implemented the Dodd-Frank Act's limits on prepayment penalties, lengthened the time creditors must retain evidence of compliance with the ability-to-repay and prepayment penalty provisions, and prohibited evasion of the rule by structuring a closed-end extension of credit as an open-end plan.

As discussed above, the Bureau inherited rulemaking authority under TILA from the Board in July 2011, including the authority to finalize the Board's 2011 ATR Proposal. *See* sections 1061 and 1100A of the Dodd-Frank Act. The Bureau's 2013 ATR Final Rule implemented the ability-to-repay requirements. Consistent with TILA section 129C, the Bureau's 2013 ATR Final Rule adopted § 1026.43(a), which applies the ability-to-repay requirements to any consumer credit transaction secured by a dwelling, except an open-end credit plan,

[12] Sections 1402 through 1405 of the Dodd-Frank Act, codified at 15 U.S.C. 1639b.

[13] Section 1032(f) of the Dodd-Frank Act, codified at 12 U.S.C. 5532(f).

[14] Sections 1418, 1420, 1463, and 1464 of the Dodd-Frank Act, codified at 12 U.S.C. 2605; 15 U.S.C. 1638, 1638a, 1639f, and 1639g.

[15] The eight proposed factors were: (1) Current or reasonably expected income or assets; (2) current employment status; (3) the monthly payment on the mortgage; (4) the monthly payment on any simultaneous loan; (5) the monthly payment for mortgage-related obligations; (6) current debt obligations; (7) the monthly debt-to-income ratio, or residual income; and (8) credit history.

[16] The alternative is based on a Dodd-Frank Act provision that is meant to provide flexibility for certain refinancings, which are no- or low-documentation transactions designed to move consumers out of risky mortgage loans and into more stable mortgage loan products, what the proposal defined as mortgage loans that, among other things, do not contain negative amortization, interest-only payments, or balloon payments, and have limited points and fees.

[17] The Board's proposed first alternative would have operated as a legal safe harbor and defined a ''qualified mortgage'' as a mortgage for which: (a) The loan does not contain negative amortization, interest-only payments, or balloon payments, or a loan term exceeding 30 years; (b) the total points and fees do not exceed 3 percent of the total loan amount; (c) the consumer's income or assets are verified and documented; and (d) the underwriting of the mortgage is based on the maximum interest rate in the first five years, uses a payment schedule that fully amortizes the loan over the loan term, and takes into account any mortgage-related obligations. The Board's proposed second alternative would have provided a rebuttable presumption of compliance and defined a ''qualified mortgage'' as including the criteria listed above in the first alternative as well as the following additional underwriting requirements from the ability-to-repay standard: the consumer's employment status, the monthly payment for any simultaneous loan, the consumer's current debt obligations, the total debt-to-income ratio or residual income, and the consumer's credit history.

[18] As the Board's proposal noted, this standard is evidently meant to accommodate community banks that originate balloon loans to hedge against interest rate risk.

timeshare plan, reverse mortgage, or temporary loan.

As adopted, § 1026.43(c) provides that a creditor is prohibited from making a covered mortgage loan unless the creditor makes a reasonable and good faith determination, based on verified and documented information, that the consumer will have a reasonable ability to repay the loan, including any mortgage-related obligations (such as property taxes and mortgage insurance). Section 1026.43(c) describes certain requirements for making ability-to-repay determinations, but does not provide comprehensive underwriting standards to which creditors must adhere. At a minimum, however, the creditor must consider and verify eight underwriting factors: (1) Current or reasonably expected income or assets; (2) current employment status; (3) the monthly payment on the covered transaction; (4) the monthly payment on any simultaneous loan; (5) the monthly payment for mortgage-related obligations; (6) current debt obligations; (7) the monthly debt-to-income ratio or residual income; and (8) credit history.

Section 1026.43(c)(3) generally requires the creditor to verify the information relied on in determining a consumer's repayment ability using reasonably reliable third-party records, with special rules for verifying a consumer's income or assets. Section 1026.43(c)(5)(i) requires the creditor to calculate the monthly mortgage payment based on the greater of the fully indexed rate or any introductory rate, assuming monthly, fully amortizing payments that are substantially equal. Section 1026.43(c)(5)(ii) provides special payment calculation rules for loans with balloon payments, interest-only loans, and negative amortization loans.

Section 1026.43(d) provides special rules for complying with the ability-to-repay requirements for a creditor refinancing a ''non-standard mortgage'' into a ''standard mortgage.'' This provision is based on TILA section 129C(a)(6)(E), which contains special rules for the refinancing of a ''hybrid loan'' into a ''standard loan.'' The purpose of this provision is to provide flexibility for creditors to refinance a consumer out of a risky mortgage into a more stable one without undertaking a full underwriting process. Under § 1026.43(d), a non-standard mortgage is defined as an adjustable-rate mortgage with an introductory fixed interest rate for a period of one year or longer, an interest-only loan, or a negative amortization loan. Under this option, a creditor refinancing a non-standard mortgage into a standard mortgage does not have to consider the eight specific underwriting criteria listed under § 1026.43(c), if certain conditions are met.

Section 1026.43(e) specifies requirements for originating ''qualified mortgages,'' as well as standards for when the presumption of compliance with ability-to-repay requirements can be rebutted. Section 1026.43(e)(1)(i) provides a safe harbor under the ability-to-repay requirements for loans that satisfy the definition of a qualified mortgage and are not higher-priced covered transactions (*i.e.,* the APR does not exceed the Average Prime Offer Rate (APOR)[19] plus 1.5 percentage points for first-lien loans or 3.5 percentage points for subordinate-lien loans). Section 1026.43(e)(1)(ii) provides a rebuttable presumption for qualified mortgage loans that are higher-priced covered transactions (*i.e.,* the APR exceeds APOR plus 1.5 percent for first lien or 3.5 percent for subordinate lien). Section 1026.43 also provides three options for creditors to originate a qualified mortgage:

Qualified mortgage—general. Under the general definition for qualified mortgages in § 1026.43(e)(2), a creditor must satisfy the statutory criteria restricting certain product features and points and fees on the loan, consider and verify certain underwriting requirements that are part of the general ability-to-repay standard, and confirm that the consumer has a total (or ''back-end'') debt-to-income ratio that is less than or equal to 43 percent. To determine whether the consumer meets the specific debt-to-income ratio requirement, the creditor must calculate the consumer's monthly debt-to-income ratio in accordance with appendix Q. A loan that satisfies these criteria and is not a higher-priced covered transaction receives a legal safe harbor from the ability-to-repay requirements. A loan that satisfies these criteria and is a higher-priced covered transaction receives a rebuttable presumption of compliance with the ability-to-repay requirements.

Qualified mortgage—special rules. The second option for originating a qualified mortgage provides a temporary alternative to the general definition in § 1026.43(e)(2). This option is intended to avoid unnecessarily disrupting the mortgage market at a time when it is especially fragile, as a result of the recent mortgage crisis. Section 1026.43(e)(4) provides that a loan is a qualified mortgage if it meets the statutory limitations on product features and points and fees, satisfies certain other requirements, and is eligible for purchase, guarantee, or insurance by one of the following entities:

- Fannie Mae or Freddie Mac, while operating under the conservatorship or receivership of the Federal Housing Finance Agency pursuant to section 1367 of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992;
- Any limited-life regulatory entity succeeding the charter of either Fannie Mae or Freddie Mac pursuant to section 1367(i) of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992;
- The U.S. Department of Housing and Urban Development under the National Housing Act (FHA);
- The U.S. Department of Veterans Affairs (VA);
- The U.S. Department of Agriculture (USDA); or
- The U.S. Department of Agriculture Rural Housing Service (RHS).

With respect to GSE-eligible loans, this temporary provision expires when conservatorship of the GSEs ends. With respect to each other category of loan, this provision expires on the effective date of a rule issued by each respective Federal agency pursuant to its authority under TILA section 129C(b)(3)(ii) to define a qualified mortgage. In any event, this temporary provision expires no later than January 10, 2021.

Qualified mortgage—balloon-payment loans by certain creditors. The third option for originating qualified mortgages is included under § 1026.43(f), which provides that a small creditor operating predominantly in rural or underserved areas can originate a balloon-payment qualified mortgage. The Dodd-Frank Act generally prohibits balloon-payment mortgages from being qualified mortgages. However, the statute creates a limited exception, with special underwriting rules, for loans made by a creditor that: (1) Operates predominantly in rural or underserved areas; (2) together with affiliates, has total annual residential mortgage loan originations that do not exceed a limit set by the Bureau; and (3) retains the balloon loans in portfolio. The purpose of this definition is to preserve credit availability in rural or underserved areas by assuring that small creditors offering loans that cannot be sold on the secondary market, and therefore must be placed on the creditor's balance sheet, are able to use a balloon-payment structure as a means of controlling interest rate risk.

[19] TILA section 129C(b)(2)(B) defines the Average Prime Offer Rate as ''the average prime offer rate for a comparable transaction as of the date on which the interest rate for the transaction is set, as published by the Bureau.'' 15 U.S.C. 1639c(b)(2)B).

Section 1026.43(f)(1)(vi) limits eligibility to creditors that originated 500 or fewer covered transactions in the preceding calendar year and that have assets of no more than $2 billion (to be adjusted annually). In addition, to originate a balloon-payment qualified mortgage more than 50 percent of a creditor's total first-lien covered transactions must have been secured by properties in counties that are ''rural'' or ''underserved,'' as designated by the Bureau. A county is ''rural'' if, during a calendar year, it is located in neither a metropolitan statistical area nor a micropolitan statistical area adjacent to a metropolitan statistical area, as those terms are defined by the U.S. Office of Management and Budget. A county is ''underserved'' if no more than two creditors extend covered transactions five or more times in that county during a calendar year. Also, during the preceding and current calendar years, the creditor must not have sold or assigned legal title to any balloon-payment qualified mortgage originated pursuant to this provision. Balloon loans by such creditors are eligible for qualified mortgage status if they meet the statutory limitations on product features and points and fees, and if the creditor follows certain other requirements that are part of the general ability-to-repay standard.

The Bureau's 2013 ATR Final Rule contains two additional requirements relevant to this proposal. Section 1026.43(g) implements the Dodd-Frank Act limits on prepayment penalties. Section 1026.43(h) prohibits a creditor from structuring a closed-end extension of credit as an open-end plan to evade the ability-to-repay requirements.

III. The Mortgage Loan Market Overview

For a complete discussion of the mortgage market, the financial crisis that precipitated the Dodd-Frank Act, and more recent efforts at stabilization, see part II of the Bureau's 2013 ATR Final Rule. The mortgage market is the single largest market for consumer financial products and services in the United States. In 2008 this market collapsed, greatly diminishing the wealth of millions of American consumers and sending the economy into a severe recession. A primary cause of the collapse was the steady deterioration of credit standards in mortgage lending. Evidence demonstrates that many mortgage loans were made solely against collateral and without consideration of ability to repay, particularly in the markets for ''subprime'' and ''Alt-A'' products, which more than doubled from $400 billion in originations in 2003 to $830 billion in originations in 2006.[20] Subprime products were sold primarily to consumers with poor or no credit history, while Alt-A loans were sold primarily to consumers who provided little or no documentation of income or other evidence of repayment ability.[21]

Because subprime and Alt-A loans involved additional risk, they were typically more expensive to consumers than ''prime'' mortgage loans, although many of them had very low introductory interest rates. While housing prices continued to increase, it was relatively easy for consumers to refinance their existing loans into more affordable products to avoid interest rate resets and other adjustments. When housing prices began to decline in 2005, however, refinancing became more difficult and delinquency rates on subprime and Alt-A products increased dramatically.[22] By the summer of 2006, 1.5 percent of loans less than a year old were in default, and this figure peaked at 2.5 percent in late 2007.[23] As the economy worsened, the rates of serious delinquency (90 or more days past due or in foreclosure) for the subprime and Alt-A products began a steep increase from approximately 10 percent in 2006, to 20 percent in 2007, to over 40 percent in 2010.[24]

Although the mortgage market is recovering, consumers today continue to feel the effects of the financial crisis.

A. Community-Focused Lending Programs

While governmental and nonprofit programs have always been an important source of assistance for low- to moderate-income (LMI) consumers, these programs have taken on even greater significance in light of current tight mortgage credit standards and Federal initiatives to stabilize the housing market. There are a variety of programs designed to assist LMI consumers with access to homeownership. These programs are generally offered through a nonprofit entity, local government, or a housing finance agency (HFA). These programs play a significant role in the housing sector of the economy.

Types of Financial Assistance Available

Community-focused lending programs typically provide LMI consumers with assistance ranging from housing counseling services to full mortgage loan financing. Some programs offer financial assistance through land trust programs, in which the consumer leases the real property and takes ownership of only the improvements. Many organizations provide ''downpayment assistance'' in connection with mortgage loan financing. This can be a gift, grant, or loan to the consumer to assist with the consumer's down payment, or to pay for some of the closing costs. These programs often rely on subsidies from Federal government funds (such as through the HUD HOME program), local government funds, foundations, or employer funding.[25]

Some programs offer first-lien mortgage loans designed to meet the needs of LMI consumers. These first-lien mortgage loans may have a discounted interest rate, limited origination fees, or permit high loan-to-value ratios. Many programs offer subordinate financing. Subordinate-financing options may be simple, such as a relatively inexpensive subordinate-lien loan to pay for closing costs. Other methods of subordinate financing may be complex. For example, one HFA program offers a 30-year, fixed-rate, subordinate-lien mortgage loan through partner creditors, with interest-only payments for the first 11 years of the loan's term, and which also provides the LMI consumer with an interest subsidy, resulting in a graduated monthly payment between the fifth and eleventh

[20] Inside Mortg. Fin., *The 2011 Mortgage Market Statistical Annual* (2011).

[21] There is evidence that some consumers who would have qualified for ''prime'' loans were steered into subprime loans as well. The Federal Reserve Board on July 18, 2011 issued a consent cease and desist order and assessed an $85 million civil money penalty against Wells Fargo & Company of San Francisco, a registered bank holding company, and Wells Fargo Financial, Inc., of Des Moines. The order addresses allegations that Wells Fargo Financial employees steered potential prime-eligible consumers into more costly subprime loans and separately falsified income information in mortgage applications. In addition to the civil money penalty, the order requires that Wells Fargo compensate affected consumers. *See* Press Release, Federal Reserve Board (July 20, 2011), available at *http://www.federalreserve.gov/newsevents/press/enforcement/20110720a.htm.*

[22] U.S. Fin. Crisis Inquiry Comm'n, *The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States* at 215–217 (Official Gov't ed. 2011) (*FCIC Report*), available at *http://www.gpo.gov/fdsys/pkg/GPO–FCIC/pdf/GPO-FCIC.pdf.*

[23] *FCIC Report* at 215. CoreLogic Chief Economist Mark Fleming told the FCIC that the early payment default rate ''certainly correlates with the increase in the Alt-A and subprime shares and the turn of the housing market and the sensitivity of those loan products.'' *Id.*

[24] *FCIC Report* at 217.

[25] Abigail Pound, *Challenges and Changes in Community-Based Lending for Homeownership,* NeighborWorks America, Joint Center for Housing Studies of Harvard University (February 2011), available at *http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/w11-2_pound.pdf.*

year of the loan; an additional 30-year deferred, 0 percent subordinate-lien mortgage loan is extended by the HFA equal to the amount of the subsidy.[26] Some of the loans offered by these programs, whether first-lien or subordinate-financing, are structured as hybrid grant products that commonly will be forgiven.

Housing Finance Agencies

For over 50 years, HFAs have provided LMI consumers with opportunities for affordable homeownership.[27] HFAs are quasi-governmental entities, chartered by either a State or a municipality, that engage in diverse housing financing activities for the promotion of affordable housing. Some HFAs are chartered to promote affordable housing goals across an entire state, while others' jurisdiction extends to only particular cities or counties.[28] These agencies are generally funded through tax-exempt bonds.[29] HFAs issue these tax-exempt bonds, also known as Mortgage Revenue Bonds, and use the proceeds of the bond sale to finance affordable mortgage loans to LMI consumers. As of June, 2012, the 51 State HFAs (SHFAs) had $107 billion in outstanding tax-free municipal debt available. These Mortgage Revenue Bonds funded approximately 100,000 first-time homeowners per year. HFAs may also receive funding through Federal programs, such as HUD's HOME Investment Partnerships Program, which is the largest Federal block grant for affordable housing.[30]

HFAs employ several methods of promoting affordable homeownership. These agencies may partner with local governments to develop and implement long-term community-development strategies. For example, HFAs may provide tax credits to companies that build or rehabilitate affordable housing.[31] These agencies may also administer affordable housing trust funds or other State programs to facilitate the affordable housing development.[32] Many HFAs also provide education or training courses to first-time or LMI consumers.

HFAs also provide financial assistance directly to consumers. Typically, HFAs offer the first-lien mortgage loan, subordinate financing, and downpayment assistance programs described above. HFAs may also establish pooled loss reserves to self-insure mortgage loans originated pursuant to the program, thereby permitting LMI consumers to avoid private mortgage insurance. In 2010, HFAs provided about $10 billion in affordable financing.[33] In 2010, 89 percent of SHFAs provided down payment assistance loan or grant assistance and 57 percent of SHFAs provided assistance in conjunction with FHA or USDA programs.[34] However, HFAs generally do not provide direct financing to LMI consumers. HFAs partner with creditors, such as local banks, that extend credit pursuant to the HFA's program guidelines.

Private Organizations

While entities such as HFAs develop and finance affordable housing programs, these mortgage loans are generally extended by private organizations. These organizations often are structured as nonprofit 501(c)(3) organizations. Under Internal Revenue Code section 501(c)(3), the designation is for nonprofit, tax-exempt, charitable organizations not operated for the benefit of private interests.[35] Under Federal tax law, 501(c)(3) organizations are restricted from lobbying activities, while 501(c)(4) organizations, which must exist to promote social welfare, may engage in political campaigning and lobbying.[36] Most organizations that provide support to LMI consumers are structured as 501(c)(3) organizations. However, some organizations are structured as nonprofit 501(c)(4) organizations.

Various Federal programs establish eligibility requirements and provide ongoing monitoring of specific types of creditors that receive Federal grants and other support. For example, Community Development Financial Institutions (CDFIs) are approved by the U.S. Department of the Treasury (Treasury Department) to receive monetary awards from the Treasury Department's CDFI Fund, which was established to promote capital development and growth in underserved communities. Promoting homeownership and providing safe lending alternatives are among the Fund's main goals. The Treasury Department created the CDFI designation to identify and support small-scale creditors that are committed to community-focused lending, but have difficulty raising the capital needed to provide affordable housing services.[37] CDFIs may operate on a for-profit or nonprofit basis, provided the CDFI has a primary mission of promoting community development.[38] These programs are also subject to other eligibility requirements.[39] As of July 2012 there were 999 such organizations in the U.S., 62 percent of which are classified as Community Development (CD) Loan Funds, 22 percent as CD Credit Unions, while the rest are CD Banks, Thrifts, or CD Venture Capital Funds.[40]

The U.S. Department of Housing and Urban Development (HUD) may designate nonprofits engaging in affordable housing activities as Downpayment Assistance through Secondary Financing Providers (DAPs).[41] HUD established this designation as part of an effort to promote nonprofit involvement in affordable housing programs.[42] HUD-

[26] See *http://www.mhp.net/homeownership/homebuyer/soft_second_works.php,* describing the SoftSecond program offered by the Massachusetts Housing Partnership.

[27] The first State housing finance agency was established in New York in 1960. *See* New York State Housing Finance Agency Act, 1960 Laws of New York, 183rd Session, Chap. 671.

[28] For example, the Louisiana Housing Corporation administers affordable housing programs across all of Louisiana, while The Finance Authority of New Orleans administers programs only in Orleans Parish. *See www.lhfa.state.la.us* and *www.financeauthority.org.*

[29] Bonds issued by SHFAs are tax-exempt if the proceeds are used to provide assistance to first-time or LMI-homebuyers. *See* 26 U.S.C. 143.

[30] *See www.hud.gov/homeprogram.*

[31] The Tax Reform Act of 1986, Public Law 99–514, 100 Stat. 2085 (1986), included the Low-Income Housing Tax Credit Program. Under this program, the IRS provides tax credits to SHFAs. SHFAs may transfer these tax credits to developers of affordable housing. Developers then sell these credits to fund the development program. *See http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/affordablehousing/training/web/lihtc/basics.*

[32] The Massachusetts Affordable Housing Trust Fund provides funds to governmental subdivisions, nonprofit organizations, and other entities seeking to provide for the development of affordable housing. *See www.masshousing.com.* New York State's Mitchell-Lama program provides subsidies such as property tax exemptions to affordable housing developers. *See http://www.nyshcr.org/Programs/mitchell-lama/.*

[33] National Council of State Housing Agencies, *State HFA Factbook* (2010), p. 33.

[34] *Id.* at 21–22, 35–36.

[35] *See http://www.irs.gov/Charities-&-Non-Profits/Charitable-Organizations/Exemption-Requirements—Section-501(c)(3)-Organizations.*

[36] *See http://www.irs.gov/Charities-&-Non-Profits/Other-Non-Profits/Social-Welfare-Organizations.*

[37] *See* 68 FR 5704 (Feb. 4, 2003).

[38] *See* 12 CFR 1805.201(b).

[39] *Id.* Treasury Department eligibility requirements for CDFIs stipulate that an approved organization must: Be a legal entity at the time of certification application; have a primary mission of promoting community development; be a financing entity; primarily serve one or more target markets; provide development services in conjunction with its financing activities; maintain accountability to its defined target market; and be a non-government entity and not be under control of any government entity (Tribal governments excluded).

[40] *See http://www.cdfifund.gov/docs/certification/cdfi/CDFI List—07–31–12.xls.*

[41] *See* 24 CFR 200.194.

[42] "Nonprofit organizations are important participants in HUD's efforts to further affordable housing opportunities for low- and moderate-income persons through the FHA single family programs. FHA's single family regulations recognize a special role for nonprofit organizations in conjunction with the * * * provision of secondary financing." *See* 67 FR 39238 (June 6, 2002).

approved nonprofits may participate in FHA single-family programs that allow them to purchase homes at a discount, finance FHA-insured mortgages with the same terms and conditions as owner-occupants, or be able to finance secondary loans for consumers obtaining FHA-insured mortgages. A DAP must be approved by HUD if it is a nonprofit or nonprofit instrumentality of government that provides downpayment assistance as a lien in conjunction with an FHA first mortgage; government entity DAPs and gift programs do not require approval.[43] As of November 2012 HUD lists 233 nonprofit agencies and nonprofit instrumentalities of government in the U.S. that are authorized to provide secondary financing.[44] HUD performs field reviews and requires annual reports of participating nonprofit agencies. Additionally, HUD's quality control plan requires periodic review for deficient policies and procedures and corrective actions. These approval and subsequent review procedures are intended to ensure that DAPs operate in compliance with HUD requirements and remain financially viable.[45] However, HUD recognizes that these nonprofits have limited resources and gives consideration to DAP viability when crafting regulations.[46]

Creditors may also be certified by HUD as Community Housing Development Organizations (CHDOs) in connection with HUD's HOME Investment Partnership Program, which provides grants to fund a wide range of activities that promote affordable homeownership.[47] HUD Participating Jurisdictions confer CHDO certification only on community-focused nonprofits that are both dedicated to furthering a community's affordable housing goals and capable of complying with the requirements of the HOME Program.[48] Creditors designated as CHDOs are eligible to receive special CHDO set-aside funds from HUD's HOME program to fund local homebuyer assistance programs.[49] Applicants seeking CHDO status must meet rigorous requirements. For example, a CHDO must be designated as a nonprofit under section 501(c)(3) or (c)(4) of the Internal Revenue Code, adhere to strict standards of financial accountability, have among its purposes the provision of decent and affordable housing for LMI consumers, maintain accountability to the community, and have a proven record of capably and effectively serving low-income communities.[50] After the CHDO designation is obtained, CHDO creditors must operate under the supervision of a Participating Jurisdiction and in accordance with the requirements of the HUD HOME Program.[51] HUD conducts annual performance reviews to determine whether funds have been used in accordance with program requirements.[52] While HUD continues to support affordable housing programs involving CHDOs, current market conditions have affected CHDO viability.[53]

Nonprofit creditors may engage in community-focused lending without obtaining one of the designations described above. Such nonprofits often rely on HFA or Federal programs for funding, lending guidelines, and other support. However, some nonprofits offer credit to LMI consumers independent of these State or Federal programs. For example, nonprofits may make mortgage loans in connection with a GSE affordable housing program. The Federal Home Loan Bank (FHLB) System, Fannie Mae (FNMA), and Freddie Mac (FHLMC) offer several programs to support affordable housing by facilitating mortgage financing for LMI consumers. For example, the FHLB Affordable Housing Program provides grants to member banks to fund programs that assist with closing costs or down payments, buy down principal amounts or interest rates, refinance an existing loan, or assist with rehabilitation or construction costs.[54] Fannie Mae and Freddie Mac also offer two programs focused on community-focused lending.[55]

Other options exist for nonprofits seeking to develop and fund community-focused lending programs. For example, a nonprofit may originate mortgage loans to LMI consumers and subsequently sell the loans to a bank, credit union, or other investor as part of a Community Reinvestment Act partnership program.[56] Other nonprofits may operate a limited affordable housing assistance fund, funded entirely by private donations, under which LMI consumers may obtain subordinate financing. Nonprofits such as these often rely on the underwriting performed by the creditor for the first-lien mortgage loan, which is often a bank or credit union, to process, underwrite, and approve the LMI consumer's application. In addition, some nonprofits are self-supporting and offer full financing to LMI consumers. These nonprofits often establish lending programs with unique guidelines, such as requirements that LMI consumers devote a minimum number of hours towards the construction of affordable housing.

[43] *See http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/sfh/np/sfhdap01.*

[44] *See https://entp.hud.gov/idapp/html/f17npdata.cfm.*

[45] ''It is vital that the Department periodically and uniformly assess the management and financial ability of participating nonprofit agencies to ensure they are not overextending their capabilities and increasing HUD's risk of loss as a mortgage insurance provider.'' 65 FR 9285, 9286 (Feb. 24, 2000).

[46] ''HUD continues to strongly encourage the participation of nonprofit organizations, including community and faith-based organizations, in its programs. This proposed rule is not designed to place particular burdens on participation by nonprofit organizations. Rather, the proposed rule is designed to ensure that nonprofit organizations have the capacity, experience, and interest to participate in HUD's housing programs.'' 69 FR 7324, 7325 (Feb. 13, 2004).

[47] *See http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/affordablehousing/programs/home.*

[48] ''The Department believes that there was specific statutory intent to create an entitlement for community based nonprofit organizations who would own, sponsor or develop HOME assisted housing. While partnerships with State and local government are critical to the development of affordable housing, these organizations are viewed as private, independent organizations separate and apart from State or local governments. One of the major objectives of the Department's technical assistance program is to increase the number of capable, successful CHDOs able and willing to use the CHDO set-aside [fund].'' 61 FR 48736, 48737 (Sept. 16, 1996).

[49] *See* 24 CFR 92.300 *et. seq.*

[50] *See* 24 CFR 92.2.

[51] For example, no more than 5 percent of a Participating Jurisdiction's fiscal year HOME allocation may be used for CHDO operating expenses. 24 CFR 92.208(a).

[52] *See* 24 CFR 92.550 *et. seq.*

[53] ''[Participating jurisdictions] have encountered new challenges in administering their programs and in managing their growing portfolios of older HOME projects. These challenges include reduced availability of states or local funding sources, reduced private lending, changes in housing property standards, and energy codes and reductions in states and local government workforces throughout the Nation. These challenges have been magnified by current housing and credit market conditions.'' 76 FR 78343, 78345 (Dec. 16, 2011).

[54] The Federal Home Loan Bank of Des Moines provides funds for member bank programs related to rural homeownership, urban first-time homebuyers, and Native American homeownership. *See http://www.fhlbdm.com/community-investment/down-payment-assistance-programs/.* The Federal Home Loan Bank of Chicago provides funds for member bank programs related to down payment and closing cost assistance or eligible rehabilitation costs for the purchase of a home. *See http://ci.fhlbc.com/Grant_Pgms/DPP.shtml.*

[55] FNMA offers first-lien mortgage loans through the My Community Mortgage program and subordinate-lien loans through the Community Seconds program. FHLMC offers both first- and subordinate-lien mortgage loans through the Home Possible program.

[56] Under the Community Reinvestment Act (12 U.S.C. 2901), depository institutions may meet community reinvestment goals by directly originating or purchasing mortgage loans provided to LMI consumers. *See* 12 CFR 228.22.

B. Homeownership Stabilization and Foreclosure Prevention Programs

During the early stages of the financial crisis the mortgage market significantly tightened mortgage loan underwriting requirements in response to uncertainty over the magnitude of potential losses due to delinquencies, defaults, and foreclosures.[57] This restriction in credit availability coincided with increasing unemployment, falling home values, and the onset of subprime ARM resets. As a result, many subprime ARM consumers could not afford their mortgage payments and were not able to obtain refinancings. This led to increases in delinquencies and foreclosures, which prompted further tightening of underwriting standards. Other subprime ARM consumers were able to remain current, but were not able to refinance because of a decrease in their loan-to-value ratio or an increase in their debt-to-income ratio.[58] However, these consumers devoted most of their disposable income to mortgage payments, thereby lowering overall consumer demand and further weakening the national economy.[59]

Policymakers became concerned that the losses incurred from foreclosures on subprime mortgage loans would destabilize the entire mortgage market.[60] There was a particular concern that the uncertainty surrounding exposure to these losses would lead to a fear-induced downward economic spiral.[61] As the crisis worsened, industry stakeholders attempted to stop this self-reinforcing cycle through a series of measures intended to stabilize homeownership and prevent foreclosure. Beginning in late 2008, the Federal government, Federal agencies, and GSEs implemented programs designed to facilitate refinancings and loan modifications.

The Troubled Asset Relief Program. The U.S. government enacted and implemented several programs intended to promote economic recovery by stabilizing homeownership and preventing foreclosure. The Emergency Economic Stabilization Act of 2008,[62] as amended by the American Recovery and Reinvestment Act of 2009,[63] authorizes the Treasury Department to ''use loan guarantees and credit enhancements to facilitate loan modifications to prevent avoidable foreclosures.'' [64] Pursuant to this authority, the Treasury Department established the Troubled Asset Relief Program (TARP), under which two programs were created to provide financial assistance directly to homeowners in danger of losing their homes: the Making Home Affordable (MHA) program and the Hardest Hit Fund (HHF) program. The MHA program is operated by the Treasury Department and seeks to provide Federally directed assistance to consumers who are at risk of default, foreclosure, or were otherwise harmed by the financial crisis.[65] The HHF program provides funds to certain SHFAs in States where the Treasury Department has determined that locally-directed stabilization programs are required.[66]

MHA began with the introduction of the Home Affordable Modification Program (HAMP) in March 2009.[67] HAMP, which is intended to assist employed homeowners by replacing the consumer's current mortgage loan with a more affordable mortgage loan, was immediately successful; nearly 500,000 trial modifications were begun during the first six months of the program.[68] MHA offerings expanded with the creation of the Second Lien Modification Program in August 2009 and the Home Affordable Foreclosure Alternatives Program in November 2009.[69] The Treasury Department subsequently modified these programs several times in response to the changing needs of distressed consumers and the mortgage market.[70]

MHA programs are currently scheduled to expire on December 31, 2013, although there is continuing debate about whether to extend them.[71] As of December 2012, ten programs have been established under MHA. The Treasury Department operates five MHA programs.[72] The remaining five MHA programs are operated in conjunction with FHA, VA, or USDA programs.[73] Many consumers facing default or foreclosure have received assistance under these programs. For example, from the beginning of the HAMP program to October 2012, over 1.1 million permanent HAMP modifications have been completed, saving distressed consumers an estimated $16.2 billion.[74]

In March 2010 the Treasury Department established the HHF program to enable the States most affected by the financial crisis to develop innovative assistance programs.[75] Nineteen programs have been established under the HHF fund, which is currently scheduled to expire on December 31, 2017. These programs

[57] A 2011 OCC survey shows that 56 percent of banks tightened residential real estate underwriting requirements between 2007 and 2008, and 73 percent tightened underwriting requirements between 2008 and 2009. *See* Office of the Comptroller of the Currency, *Survey of Credit Underwriting Practices 2011,* p. 11.

[58] ''[W]ith house prices becoming flat or declining in many parts of the country during 2007, it has become increasingly difficult for many subprime ARM borrowers to refinance. While many such borrowers remain current on their loans or are still able to refinance at market rates or into FHA products, an increasing number have either fallen behind on their existing payments or face the prospect of falling behind when rates reset and they are unable to refinance.'' *Accelerating Loan Modifications, Improving Foreclosure Prevention and Enhancing Enforcement,* 110th Cong. (Dec. 6, 2007) (testimony of John C. Dugan, Comptroller, Office of the Comptroller of the Currency).

[59] By the third quarter of 2007, the ratio of mortgage-related financial obligations (which is comprised of mortgage debt, homeowners' insurance, and property tax) to disposable personal income reached an all-time high of 11.3 percent. *See http://www.federalreserve.gov/releases/housedebt/.*

[60] ''[A]nalysts are concerned that mortgage foreclosures will climb significantly higher and, along with falling housing prices, overwhelm the ability of mortgage markets to restructure or refinance loans for creditworthy borrowers.'' Congressional Budget Office, Options for Responding to Short-Term Economic Weakness, p. 21 (January 2008).

[61] ''[A] breakdown of mortgage markets could put the economy on a self-reinforcing downward spiral of less lending, weaker economic activity, lower house prices, more foreclosures, even less lending, and so on, either causing or significantly worsening a recession.'' *Id.* p. 21–22.

[62] 12 U.S.C. 5201 *et. seq.;* Pub. L. 110–343 (Oct. 3, 2008).

[63] *See* Sec. 7002 of Public Law 111–5 (January 6, 2009).

[64] 12 U.S.C. 5219(a)(1).

[65] *See www.makinghomeaffordable.gov.*

[66] *See http://www.treasury.gov/initiatives/financial-stability/TARP-Programs/housing/hhf/Pages/default.aspx.*

[67] *See* Press Release, Treasury Department, *Relief for Responsible Homeowners* (March 4, 2009), available at: *http://www.treasury.gov/press-center/press-releases/Pages/200934145912322.aspx.*

[68] *See* Troubled Asset Relief Program (TARP) Monthly Report to Congress—September 2009.

[69] *See* United States Department of the Treasury Office of Financial Stability, ''Troubled Asset Relief Program: Two Year Retrospective'' (October 2010).

[70] *See e.g.,* Supplemental Directive 10–02 (March 24, 2010), modifying HAMP, Supplemental Directive 11–07 (July 25, 2011), expanding eligibility for the Home Affordable Unemployment Program, and Supplemental Directive 12–02 (March 9, 2012), expanding HAMP eligibility.

[71] Press Release, Treasury Department, *Expanding Our Efforts to Help More Homeowners and Strengthen Hard-hit Communities* (Jan. 27, 2012), available at *http://www.treasury.gov/connect/blog/Pages/Expanding-our-efforts-to-help-more-homeowners-and-strengthen-hard-hit-communities.aspx.*

[72] In addition to HAMP, the Second Lien Modification Program, and the Home Affordable Foreclosure Alternatives Program, the Treasury Department also operates the Principal Reduction Alternative Program and the Home Affordable Unemployment Program.

[73] These programs are the FHA Home Affordable Modification Program, USDA Special Loan Servicing, Veterans Affairs Home Affordable Modification, FHA Second Lien Modification Program, and the FHA Short Refinance Program.

[74] *See* October 2012 Making Home Affordable Report.

[75] *See* Hardest Hit Fund Program Guidelines Round 1, available at: *http://www.treasury.gov/initiatives/financial-stability/TARP-Programs/housing/Documents/HFA_Proposal_Guidelines_-_1st_Rd.pdf.*

provide assistance to homeowners in the District of Columbia and the 18 states most affected by the economic crisis.[76] The HHF provides funds directly to HFAs in these States, which are used to create foreclosure-avoidance programs. As of November 2012, $1.7 billion has been allocated to support the 57 programs established to assist distressed consumers in these localities.[77] In California alone, nearly 17,000 consumers have received over $166 million in assistance since the beginning of the program.[78]

As with the MHA programs discussed above, these HHF programs have evolved over time. The Treasury Department originally encouraged SHFAs to establish programs for mortgage modifications, principal forbearance, short sales, principal reduction for consumers with high loan-to-value ratios, unemployment assistance, and second-lien mortgage loan reduction or modification.[79] No SHFAs were able to establish all of these programs in the early stages of the HHF. However, through 2011 and 2012 State HHF programs were significantly modified and expanded.[80] The 19 SHFAs continue to modify these programs to develop more effective and efficient methods of providing assistance to at-risk consumers. For example, in September 2012 the Nevada HHF program was amended for the tenth time.[81]

Federal agency programs. In response to the financial crisis, the FHA, the VA, and the USDA expanded existing programs and implemented new programs intended to facilitate refinancings for consumers at risk of delinquency or default. Some of these programs operate in conjunction with the Treasury Department's MHA program, while others are run solely by the particular Federal agency. In 2008 Congress expanded access to refinancings under the VA's Interest Rate Reduction Refinancing Loan program by raising the maximum loan-to-value ratio to 100 percent and increasing the maximum loan amount of loans eligible to be guaranteed under the program.[82] In February 2009 HUD increased the maximum loan amount for FHA-insured mortgages.[83] This change expanded access to refinancings available under the FHA's Streamline Refinance Program.[84] Several months later, the FHA created the Short Refinance Option program to assist consumers with non-FHA mortgage loans.[85] This program, which operates in conjunction with TARP, permits underwater consumers to refinance if the current creditor agrees to write down 10 percent of the outstanding principal balance. Similarly, in August 2010 the Rural Housing Service of the USDA (RHS) adopted rules intended to facilitate loan modifications for consumers struggling to make payments on USDA Guaranteed Loans.[86] The USDA subsequently created the Single Family Housing Guaranteed Rural Refinance Pilot Program, which was intended to refinance USDA borrowers into more stable and affordable mortgage loans.[87]

These efforts have enabled many consumers to receive refinancings under these programs. In 2011, the FHA accounted for 5.6 percent of the mortgage refinance market, with originations totaling $59 billion.[88] However, the number of consumers receiving assistance under these programs varies. For example, between April 2009 and December 2011, the FHA started 5.6 million mortgage loan modifications.[89] During a similar time period, nearly 997,000 FHA Streamline Refinances were consummated.[90] In contrast, between February 2010 and September 2012, only 1,772 mortgage loans were refinanced under the Short Refinance Option program.[91] Efforts continue to develop and enhance these programs to assist distressed homeowners while improving the performance of existing mortgage loans owned, insured, or guaranteed by these agencies.

HARP and other GSE refinancing programs. After the GSEs were placed into conservatorship in late 2008, the Federal Housing Finance Agency (FHFA) took immediate steps to reduce GSE losses by mitigating foreclosures.[92] In November 2008 FHFA and the GSEs, in coordination with the Treasury Department and other stakeholders, announced the Streamlined Modification Program, which was intended to help delinquent consumers avoid foreclosure by affordably restructuring mortgage payments.[93] This program was the precursor to the Home Affordable Refinance Program (HARP) that was announced in March 2009.[94] The HARP program was originally set to expire in June 2010 and limited to consumers with a loan-to-value ratio that did not exceed 105 percent. However, HARP was modified over time to account for the deteriorating mortgage market. In July 2010 the maximum loan-to-value ratio was increased from 105 percent to 125 percent.[95] Nine months

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[76] The HHF provides funds to SHFAs located in Alabama, Arizona, California, Florida, Georgia, Illinois, Indiana, Kentucky, Michigan, Mississippi, Nevada, New Jersey, North Carolina, Ohio, Oregon, Rhode Island, South Carolina, Tennessee, and Washington, DC.

[77] *See* Troubled Asset Relief Program (TARP) Monthly Report to Congress—November 2012.

[78] *See* Keep Your Home California 2012 Fourth Quarterly Report.

[79] *See* Hardest Hit Fund Program Guidelines Round 1, available at: *http://www.treasury.gov/initiatives/financial-stability/TARP-Programs/housing/Documents/HFA_Proposal_Guidelines_-_1st_Rd.pdf.*

[80] From 2011–2012, the program agreements between the 19 SHFAs and the Treasury Department were modified 55 times. *See http://www.treasury.gov/initiatives/financial-stability/TARP-Programs/housing/hhf/Pages/Archival-information.aspx.*

[81] *See* Tenth Amendment to Commitment to Purchase Financial Instrument and HFA Participation Agreement, available at *http://www.treasury.gov/initiatives/financial-stability/TARP-Programs/housing/Pages/Program-Documents.aspx.*

[82] *See* Sec. 504 of the Veterans' Benefits Improvement Act of 2008, Public Law 110–389 (Oct. 10, 2008).

[83] *See* HUD Mortgagee Letter 2009–07. Section 1202(b) of the American Recovery and Reinvestment Act of 2009, Pub. L. 111–5 (January 6, 2009), authorized the Secretary of Housing and Urban Development to increase the loan limit.

[84] The FHA Streamline Refinance Program contains reduced underwriting requirements for consumers with FHA mortgage loans seeking to refinance into a new FHA mortgage loan with a reduced interest rate. The FHA has offered streamline refinances for over thirty years. *See* HUD Mortgagee Letter 1982–23.

[85] *See* HUD Mortgagee Letter 2010–23.

[86] *See* 75 FR 52429 (Aug. 26, 2010).

[87] *See* Rural Dev. Admin. Notice No. 4615 (1980–D) (Feb. 1, 2012).

[88] This number represents FHA's market share by dollar volume. By number of originations, the FHA controlled 6.5 percent of the refinance market, with 312,385 refinances originated. *See* FHA-Insured Single-Family Mortgage Originations and Market Share Report 2012—Q2, available at *http://portal.hud.gov/hudportal/documents/huddoc?id=fhamktq2_2012.pdf.*

[89] *See* Hearing on FY13 Federal Housing Administration's Budget Request, 112th Cong. (Mar. 8, 2012) (testimony of Carol Galante, Acting Assistant Secretary for Housing/Federal Housing Administration Commissioner for the U.S. Department of Housing and Urban Development).

[90] A total of 996,871 mortgage loans were endorsed under the FHA Streamline Refinance program from Fiscal Year 2009 through 2012. See FHA Outlook Reports for Fiscal Years 2009, 2010, 2011, and 2012, available at *http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/rmra/oe/rpts/ooe/olmenu.*

[91] *See* Office of the Special Inspector General for the Troubled Asset Relief Program, Quarterly Report to Congress, p. 64 (Oct. 25, 2012).

[92] *See* Press Release, FHFA, *Statement of FHFA Director James B. Lockhart* (September 7, 2008), available at: *http://www.fhfa.gov/webfiles/23/FHFAStatement9708final.pdf.*

[93] *See* Press Release, FHFA, *FHFA Announces Implementation Plans for Streamlined Loan Modification Program,* (Dec. 18, 2008), available at *http://www.fhfa.gov/webfiles/267/SMPimplementation121808.pdf.*

[94] *See* Press Release, Treasury Department, *Relief for Responsible Homeowners* (March 4, 2009), available at: *http://www.treasury.gov/press-center/press-releases/Pages/200934145912322.aspx.*

[95] *See* Press Release, FHFA, *FHFA Authorized Fannie Mae and Freddie Mac to Expand Home*

Continued

later FHFA extended the HARP expiration date by one year, to June 30, 2011.[96]

Many of the nearly five million eligible consumers were expected to receive refinancings under HARP.[97] However, by mid-2011 fewer than one million consumers had received HARP refinances. Fannie Mae, Freddie Mac, and FHFA responded by significantly altering the HARP program.[98] Perhaps most significantly, the maximum loan-to-value ratio was removed, facilitating refinances for all underwater consumers who otherwise fit HARP's criteria. These changes were immediately successful. More HARP refinances were completed during the first six months of 2012 than in all of 2011.[99] These changes were especially effective in assisting consumers with high loan-to-value ratios. In September 2012, consumers with loan-to-value ratios in excess of 125 percent received 26 percent of all HARP refinances.[100]

The GSEs have implemented other streamline refinance programs intended to facilitate the refinancing of existing GSE consumers into more affordable mortgage loans. These programs are available for consumers who are not eligible for a refinancing under HARP. For example, a consumer with a loan-to-value ratio of less than 80 percent is eligible for a streamline refinancing through Fannie Mae's Refi Plus program or Freddie Mac's Relief Refinance program. These programs comprise a significant share of GSE refinancing activity. From January through September 2012, 45 percent of GSE streamline refinances were non-HARP refinances.[101] FHFA and the GSEs remain committed to continue modifying these programs to enhance access to refinancing credit for distressed consumers.[102]

C. The Mortgage Loan Market for Small Portfolio Creditors

Securitization fundamentally altered mortgage lending practices. Traditionally, underwriting standards were determined at the branch or local bank level. These practices heavily emphasized the relationship between the bank and the consumer.[103] Starting in the mid-1990s, much of the mortgage market began to move toward standardized underwriting practices based on quantifiable and verifiable data points, such as a consumer's credit score.[104] The shift toward standardized, electronic underwriting lowered costs for creditors and consumers, thereby increasing access to mortgage credit. Standardized loan-level data made it easier to analyze individual loans for compliance with underwriting requirements, which facilitated the expansion of private mortgage securitizations. This shift from portfolio-focused to securitization-focused mortgage lending also altered the traditional risk calculations undertaken by creditors, as creditors no longer retained the risks associated with poorly underwritten loans.[105] Additionally, in another departure from the traditional mortgage lending model, these creditors increasingly relied on the fees earned by originating and selling mortgage loans, as opposed to the interest revenue derived from the loan itself.

Small community creditor access to the secondary mortgage market was limited. Many small creditors originated ''non-conforming'' loans which could not be purchased by the GSEs. Also, many community creditors chose to retain the relationship model of underwriting, rather than fully adopting standardized data models popular with larger banks. Retaining these traditional business methods had important consequences during the subprime crisis. While large lending institutions generally depended on the secondary market for liquidity, small community banks and credit unions generally remained reliant on interest income derived from mortgage loans held in portfolio. As a result, community creditors were less affected by the contraction in the secondary mortgage market during the financial crisis.[106] For example, the percentage of mortgage-backed securities in relation to the total assets of credit unions actually declined by more than 1.5 percent as subprime lending expanded.[107]

The magnitude of portfolio lending within this market remains an important influence on the underwriting practices of community banks and credit unions. These institutions generally rely on long-term relationships with a small group of consumers. Therefore, the reputation of these community banks and credit unions is largely dependent on serving their community in ways that cause no harm. Furthermore, by retaining mortgage loans in portfolio community creditors also retain the risk of delinquency or default on those loans. Thus, community creditors have an added incentive to engage in thorough underwriting to protect their balance sheet as well as their reputation. To minimize portfolio performance risk, small community creditors have developed underwriting standards that are different than those employed by larger institutions. Small creditors generally engage in ''relationship banking,'' in which underwriting decisions rely on qualitative information gained from personal relationships between creditors and consumers.[108] This qualitative information, often referred to as ''soft'' information, focuses on subjective factors such as consumer character and reliability, which ''may be difficult to quantify, verify, and communicate

Affordable Refinance Program to 125 Percent Loan-to-Value (July 1, 2009), available at: *http://www.fhfa.gov/webfiles/13495/125_LTV_release_and_fact_sheet_7_01_09%5B1%5D.pdf.*

[96] *See* Press Release, FHFA, *FHFA Extends Refinance Program By One Year* (March 1, 2010), available at: *http://www.fhfa.gov/webfiles/15466/HARPEXTENDED3110%5B1%5D.pdf.*

[97] *See* Treasury Department Press Release *supra* note 94.

[98] *See* Press Release, FHFA, *FHFA, Fannie Mae and Freddie Mac Announce HARP Changes to Reach More Borrowers* (Oct. 24, 2011), available at: *http://www.fhfa.gov/webfiles/22721/HARP_release_102411_Final.pdf.*

[99] *See* Federal Housing Finance Agency Refinance Report (June 2012).

[100] *See* Federal Housing Finance Agency Refinance Report (September 2012).

[101] *Id.*

[102] ''Today, we continue to meet with lenders to ensure HARP is helping underwater borrowers refinance at today's historical low interest rates. As we continue to gain insight from the program we will make additional operational adjustments as needed to enhance access to this program.'' Edward J. DeMarco, Acting Director Federal Housing Finance Agency, Remarks at the American Mortgage Conference (Sept. 10, 2012), available at *http://www.fhfa.gov/webfiles/24365/2012DeMarcoNCSpeechFinal.pdf.*

[103] ''[C]ommunity banks tend to base credit decisions on local knowledge and nonstandard data obtained through long-term relationships and are less likely to rely on the models-based underwriting used by larger banks.'' Federal Deposit Insurance Corporation, *FDIC Community Banking Study,* p. 1–1 (December 2012) (*FDIC Community Banking Study*).

[104] *See FCIC Report* at 72.

[105] *See FCIC Report* at 89.

[106] Between 2005 and 2008, while loan originations at banks with assets in excess of $10 billion fell by 51 percent, loan originations at banks with assets between $1 and $10 billion declined by 31 percent, and loan originations at banks with less than $1 billion in assets declined by only 10 percent. *See* Federal Reserve Bank of Kansas City, *Financial Industry Perspectives* (December 2009).

[107] In December 2003, the ratio of mortgage-backed securities to total assets at credit unions was 4.67 percent. By December 2006, this ratio had decreased to 3.21 percent. *See Accelerating Loan Modifications, Improving Foreclosure Prevention and Enhancing Enforcement,* 110th Cong. (Dec. 6, 2007) (testimony of Gigi Hyland, Board Member of the National Credit Union Administration).

[108] ''Many customers * * * value the intimate knowledge their banker has of their business and/or total relationship and prefer dealing consistently with the same individuals whom they do not have to frequently reeducate about their own unique financial and business situations. Such customers are consequently willing to pay relatively more for such service. Relationship lending thus provides a niche for community institutions that many large banks find less attractive or are less capable of providing.'' *See* Federal Reserve Bank of Atlanta, *On the Uniqueness of Community Banks* (October 2005).

through the normal transmission channels of a banking organisation.'' [109] Evidence suggests that underwriting based on such ''soft'' information yields loan portfolios that perform better than those underwritten according to ''hard'' information, such as credit score and consumer income levels.[110] For example, one recent study found that delinquency and default rates were significantly lower for consumers receiving mortgage loans from institutions relying on soft information for underwriting decisions.[111] This is consistent with market-wide data demonstrating that mortgage loan delinquency and charge-off rates are significantly lower at smaller banks than larger ones.[112] Current data also suggests that that these relationship-based lending practices lead to more accurate underwriting decisions during cycles of both lending expansion and contraction.[113]

Although the number of community banks has declined in recent years, these institutions remain an important source of nonconforming credit in areas commonly considered ''rural'' or ''underserved.'' In 2011, community banks held over 50 percent of all deposits in micropolitan areas and over 70 percent of all deposits held in rural areas.[114] Similarly, in 2011, there were more than 600 counties where community banks operated offices but where no noncommunity bank offices were present, and more than 600 additional counties where community banks operated offices but where fewer than three noncommunity bank offices were present.[115] These counties have a combined population of more than 16 million people and include both rural and metropolitan areas.[116] It is important to note that the cost of credit offered by these community institutions is generally higher than the cost of similar products offered by larger institutions. One reason for this increased expense stems from the nature of relationship-based underwriting decisions. Such qualitative evaluations of creditworthiness tend to take more time, and therefore are more expensive, than underwriting decisions based on standardized points of data.[117] Also, the cost of funds for community banks tends to be higher than the cost for larger institutions.[118]

IV. Legal Authority

The Bureau is issuing this proposed rule pursuant to its authority under TILA and the Dodd-Frank Act. *See* 15 U.S.C. 1604(a), 12 U.S.C. 5511(a) and (b), 5512(b)(1) and (2). On July 21, 2011, section 1061 of the Dodd-Frank Act transferred to the Bureau the ''consumer financial protection functions'' previously vested in certain other Federal agencies, including the Board. The term ''consumer financial protection function'' is defined to include ''all authority to prescribe rules or issue orders or guidelines pursuant to any Federal consumer financial law, including performing appropriate functions to promulgate and review such rules, orders, and guidelines.'' [119] TILA is defined as a Federal consumer financial law.[120] Accordingly, the Bureau has authority to issue regulations pursuant to TILA.

A. TILA Ability-to-Repay and Qualified Mortgage Provisions

As discussed above, the Dodd-Frank Act amended TILA to provide that, in accordance with regulations prescribed by the Bureau, no creditor may make a residential mortgage loan unless the creditor makes a reasonable and good faith determination based on verified and documented information that, at the time the loan is consummated, the consumer has a reasonable ability to repay the loan, according to its terms, and all applicable taxes, insurance (including mortgage guarantee insurance), and assessments. TILA section 129C(a)(1); 15 U.S.C. 1639c(a)(1). As described below in part IV.B, the Bureau has authority to prescribe regulations to carry out the purposes of TILA pursuant to TILA section 105(a). 15 U.S.C. 1604(a). In particular, it is the purpose of TILA section 129C, as amended by the Dodd-Frank Act, to assure that consumers are offered and receive residential mortgage loans on terms that reasonably reflect their ability to repay the loans and that are understandable and not unfair, deceptive, or abusive. TILA section 129B(a)(2); 15 U.S.C. 1639b(a)(2).

The Dodd-Frank Act also provides creditors originating ''qualified mortgages'' special protection from liability under the ability-to-repay requirements. TILA section 129C(b), 15 U.S.C. 1639c(b). TILA generally defines a ''qualified mortgage'' as a residential mortgage loan for which: The loan does not contain negative amortization, interest-only payments, or balloon payments; the term does not exceed 30 years; the points and fees generally do not exceed 3 percent of the loan amount; the income or assets are considered and verified; and the underwriting is based on the maximum rate during the first five years, uses a payment schedule that fully amortizes the loan over the loan term, and takes into account all mortgage-related obligations. TILA section 129C(b)(2), 15 U.S.C. 1639c(b)(2). In addition, to constitute a qualified mortgage a loan must meet ''any guidelines or regulations established by the Bureau relating to ratios of total monthly debt to monthly income or alternative measures of ability to pay regular expenses after payment of total monthly debt, taking into account the income levels of the borrower and such other factors as the Bureau may determine are relevant and consistent with the purposes described in [TILA section 129C(b)(3)(B)(i)].''

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[109] *See* Allen N. Berger and Gregory F. Udell, *Small Business Credit Availability and Relationship Lending: The Importance of Bank Organisational Structure,* Economic Journal (2002).

[110] ''Moreover, a comparison of loss rates on individual loan categories suggests that community banks may also do a better job of underwriting loans than noncommunity institutions (see Table 4.4).'' *FDIC Community Banking Study,* p. 4–6. *See also* Sumit Agarwal, Brent W. Ambrose, Souphala Chomsisengphet, and Chunlin Liu, *The Role of Soft Information in a Dynamic Contract Setting: Evidence from the Home Equity Market,* 43 Journal of Money, Credit and Banking 633, 649 (Oct. 2011) (analyzing home equity lending, the authors ''find that the lender's use of soft information can successfully reduce the risks associated with *ex post* credit losses.'').

[111] ''In particular, we find evidence that selection and soft information prior to purchase are significantly associated with reduced delinquency and default. And, in line with relationship lending, we find that this effect is most pronounced for borrowers with compromised credit (credit scores below 660), who likely benefit the most from soft information in the lending relationship. This suggests that for higher risk borrowers, relationship with a bank may be about more than the mortgage transaction.'' O. Emre Ergungor and Stephanie Moulton, *Beyond the Transaction: Depository Institutions and Reduced Mortgage Default for Low-Income Homebuyers,* Federal Reserve Bank of Cleveland Working Paper 11–15 (August 2011).

[112] Federal Reserve Board, *Charge-Off and Delinquency Rates on Loans and Leases at Commercial Banks* (Nov. 2012), available at *http://www.federalreserve.gov/releases/chargeoff/default.htm.* These data show that residential real estate charge-offs were higher at large banks than small ones for 12 of the previous 87 quarters, dating to the start of the small bank survey in 1991. For example, in the fourth quarter of 2009 large banks had a 3.16 percent charge-off rate, while the rate at small banks was 1.2 percent. Delinquency rates demonstrate a similar effect.

[113] ''In two retail loan categories—residential real estate loans and loans to individuals—community banks consistently reported lower average loss rates from 1991 through 2011, the period for which these data are available.'' *FDIC Community Banking Study,* p. 4–6.

[114] *FDIC Community Banking Study,* p. 3–6.

[115] *FDIC Community Banking Study,* p. 3–5.

[116] *Id.*

[117] *FCIC Report* at 72.

[118] *FDIC Community Banking Study,* p. 4–5.

[119] 12 U.S.C. 5581(a)(1).

[120] Dodd-Frank Act section 1002(14), 12 U.S.C. 5481(14) (defining ''Federal consumer financial law'' to include the ''enumerated consumer laws'' and the provisions of title X of the Dodd-Frank Act); Dodd-Frank Act section 1002(12), 12 U.S.C. 5481(12) (defining ''enumerated consumer laws'' to include TILA).

TILA also provides the Bureau with authority to prescribe regulations that revise, add to, or subtract from the criteria that define a qualified mortgage upon a finding that such regulations are necessary or proper to ensure that responsible, affordable mortgage credit remains available to consumers in a manner consistent with the purposes of the ability-to-repay requirements; or are necessary and appropriate to effectuate the purposes of the ability-to-repay requirements, to prevent circumvention or evasion thereof, or to facilitate compliance with TILA sections 129B and 129C. TILA section 129C(b)(3)(B)(i), 15 U.S.C. 1639c(b)(3)(B)(i). In addition, TILA section 129C(b)(3)(A) provides the Bureau with authority to prescribe regulations to carry out the purposes of the qualified mortgage provisions, namely, to ensure that responsible, affordable mortgage credit remains available to consumers in a manner consistent with the purposes of TILA section 129C. TILA section 129C(b)(3)(A), 15 U.S.C. 1939c(b)(3)(A). As discussed in the section-by-section analysis below, the Bureau is issuing certain provisions of this rule pursuant to its authority under TILA section 129C(b)(3)(B)(i).

With respect to the qualified mortgage provisions, the Dodd-Frank Act contains several specific grants of regulatory authority. First, for purposes of defining ''qualified mortgage,'' TILA section 129C(b)(2)(A)(vi) provides the Bureau with authority to establish guidelines or regulations relating to monthly debt-to-income ratios or alternative measures of ability to pay. Second, TILA section 129C(b)(2)(D) provides that the Bureau shall prescribe rules adjusting the qualified mortgage points and fees limits described above to permit creditors that extend smaller loans to meet the requirements of the qualified mortgage provisions. 15 U.S.C. 1639c(b)(2)(D)(ii). In prescribing such rules, the Bureau must consider their potential impact on rural areas and other areas where home values are lower. *Id.* Third, TILA section 129C(b)(2)(E) provides the Bureau with authority to include in the definition of ''qualified mortgage'' loans with balloon payment features, if those loans meet certain underwriting criteria and are originated by creditors that operate predominantly in rural or underserved areas, have total annual residential mortgage originations that do not exceed a limit set by the Bureau, and meet any asset size threshold and any other criteria as the Bureau may establish, consistent with the purposes of TILA. 15 U.S.C. 1639c(b)(2)(E). As discussed in the section-by-section analysis below, the Bureau is issuing certain provisions of this rule pursuant to its authority under TILA sections 129C(a)(6)(D), (b)(2)(A)(vi), (b)(2)(D), and (b)(2)(E).

B. Other Rulemaking and Exception Authorities

This proposed rule also relies on the rulemaking and exception authorities specifically granted to the Bureau by TILA and the Dodd-Frank Act, including the authorities discussed below.[121]

TILA

TILA section 105(a). As amended by the Dodd-Frank Act, TILA section 105(a), 15 U.S.C. 1604(a), directs the Bureau to prescribe regulations to carry out the purposes of TILA, and provides that such regulations may contain additional requirements, classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for all or any class of transactions, that the Bureau judges are necessary or proper to effectuate the purposes of TILA, to prevent circumvention or evasion thereof, or to facilitate compliance therewith. A purpose of TILA is ''to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit.'' TILA section 102(a), 15 U.S.C. 1601(a). This stated purpose is tied to Congress's finding that ''economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit[.]'' TILA section 102(a). Thus, strengthened competition among financial institutions is a goal of TILA, achieved through the effectuation of TILA's purposes.

As amended by section 1402 of the Dodd-Frank Act, section 129B(a)(2) of TILA provides that the purpose of section 129C of TILA is ''to assure that consumers are offered and receive residential mortgage loans on terms that reasonably reflect their ability to repay the loans.'' This stated purpose is tied to Congress's finding that ''economic stabilization would be enhanced by the protection, limitation, and regulation of the terms of residential mortgage credit and the practices related to such credit, while ensuring that responsible, affordable mortgage credit remains available to consumers.'' Thus, ensuring that responsible, affordable mortgage credit remains available to consumers is a goal of TILA, achieved through the effectuation of TILA's purposes.

Historically, TILA section 105(a) has served as a broad source of authority for rules that promote the informed use of credit through required disclosures and substantive regulation of certain practices. However, Dodd-Frank Act section 1100A clarified the Bureau's section 105(a) authority by amending that section to provide express authority to prescribe regulations that contain ''additional requirements'' that the Bureau finds are necessary or proper to effectuate the purposes of TILA, to prevent circumvention or evasion thereof, or to facilitate compliance. This amendment clarified the authority to exercise TILA section 105(a) to prescribe requirements beyond those specifically listed in the statute that meet the standards outlined in section 105(a). The Dodd-Frank Act also clarified the Bureau's rulemaking authority over certain high-cost mortgages pursuant to section 105(a). As amended by the Dodd-Frank Act, TILA section 105(a) authority to make adjustments and exceptions to the requirements of TILA applies to all transactions subject to TILA, except with respect to the provisions of TILA section 129, 15 U.S.C. 1639, that apply to the high-cost mortgages defined in TILA section 103(bb), 15 U.S.C. 1602(bb).

As discussed in the section-by-section analysis below, the Bureau is proposing regulations to carry out TILA's purposes, including such additional requirements, adjustments, and exceptions as, in the Bureau's judgment, are necessary and proper to carry out the purposes of TILA, prevent circumvention or evasion thereof, or to facilitate compliance. In developing these aspects of the proposed rule pursuant to its authority under TILA section 105(a), the Bureau has considered the purposes of TILA, including ensuring that consumers are offered and receive residential mortgage loans on terms that reasonably reflect their ability to repay the loans, ensuring meaningful disclosures, facilitating consumers' ability to compare credit terms, and helping consumers avoid the uninformed use of credit, and the purposes of TILA, including regulating the terms of residential mortgage credit and the practices related to such credit to ensure that responsible, affordable

[121] As discussed in the introductory material to part IV above, prior to the Dodd-Frank Act, rulemaking authority over TILA was vested in the Board. The Dodd-Frank Act transferred rulemaking authority for TILA to the Bureau, effective July 21, 2011. *See* Dodd-Frank Act sections 1061, 1098, and 1100A. Thus, the Bureau proposes these amendments pursuant to its authorities in section 1061 of the Dodd-Frank Act.

mortgage credit remains available to consumers, strengthening competition among financial institutions, and promoting economic stabilization.

TILA section 105(f). Section 105(f) of TILA, 15 U.S.C. 1604(f), authorizes the Bureau to exempt from all or part of TILA any class of transactions if the Bureau determines that TILA coverage does not provide a meaningful benefit to consumers in the form of useful information or protection. In exercising this authority, the Bureau must consider the factors identified in section 105(f) of TILA and publish its rationale at the time it proposes an exemption for public comment. Specifically, the Bureau must consider:

(a) The amount of the loan and whether the disclosures, right of rescission, and other provisions provide a benefit to the consumers who are parties to such transactions, as determined by the Bureau;

(b) The extent to which the requirements of this subchapter complicate, hinder, or make more expensive the credit process for the class of transactions;

(c) The status of the borrower, including—

(1) Any related financial arrangements of the borrower, as determined by the Bureau;

(2) The financial sophistication of the borrower relative to the type of transaction; and

(3) The importance to the borrower of the credit, related supporting property, and coverage under this subchapter, as determined by the Bureau;

(d) Whether the loan is secured by the principal residence of the consumer; and

(e) Whether the goal of consumer protection would be undermined by such an exemption.

As discussed in the section-by-section analysis below, the Bureau is proposing to exempt certain transactions from the requirements of TILA pursuant to its authority under TILA section 105(f). In developing this proposal under TILA section 105(f), the Bureau has considered the relevant factors and determined that the proposed exemptions may be appropriate.

The Dodd-Frank Act

Dodd-Frank Act section 1022(b). Section 1022(b)(1) of the Dodd-Frank Act authorizes the Bureau to prescribe rules ''as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof[.]'' 12 U.S.C. 5512(b)(1). Section 1022(b)(1) of the Dodd-Frank Act authorizes the Bureau to prescribe rules ''as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof.'' 12 U.S.C. 5512(b)(1). TILA and title X of the Dodd-Frank Act are Federal consumer financial laws. Accordingly, the Bureau is exercising its authority under Dodd-Frank Act section 1022(b) to prescribe rules that carry out the purposes and objectives of TILA and title X and prevent evasion of those laws.

V. Section-by-Section Analysis

Section 1026.32 Requirements for High-Cost Mortgages

32(b) Definitions

32(b)(1)

32(b)(1)(ii)

Background

TILA section 129C(b)(2)(A)(vii), as added by Section 1412 of the Dodd-Frank Act, defines a ''qualified mortgage'' as a loan for which, among other things, the total ''points and fees'' payable in connection with the transaction generally do not exceed 3 percent of the total loan amount. Section 1431(a) of the Dodd-Frank Act amended HOEPA's points and fees coverage test to provide in TILA section 103(bb)(1)(A)(ii) that a mortgage is a high-cost mortgage if the total points and fees payable in connection with the transaction exceed 5 percent of the total loan amount (for transactions of $20,000 or more), or the lesser of 8 percent of the total loan amount or $1,000 (for transactions of less than $20,000). The Bureau finalized the Dodd-Frank Act's amendments to TILA concerning points and fees limits for qualified mortgages and high-cost mortgages in the 2013 ATR and 2013 HOEPA Final Rules, respectively.

Those rulemakings also adopted the Dodd-Frank Act's amendments to TILA concerning the exclusion of certain bona fide third-party charges and up to two bona fide discount points from the points and fees calculation for both qualified mortgages and high-cost mortgages. With respect to bona fide discount points in particular, TILA sections 129C(b)(2)(C)(ii)(I) and 103(dd)(1) provide for the exclusion of up to and including two bona fide discount points from points and fees for qualified mortgages and high-cost mortgages, respectively, but only if the interest rate for the transaction before the discount does not exceed by more than one percentage point the average prime offer rate, as defined in § 1026.35(a)(2). Similarly, TILA sections 129C(b)(2)(C)(ii)(II) and 103(dd)(2) provide for the exclusion of up to and including one bona fide discount point from points and fees, but only if the interest rate for the transaction before the discount does not exceed the average prime offer rate by more than two percentage points.[122] The Bureau's 2013 ATR and HOEPA Final Rules implemented the bona fide discount point exclusions from points and fees in § 1026.32(b)(1)(i)(E) and (F) (closed-end credit) and (b)(2)(i)(E) and (F) (open-end credit), respectively.

TILA section 129C(b)(2)(C) defines ''points and fees'' for qualified mortgages and high-cost mortgages to have the same meaning, as set forth in TILA section 103(aa)(4) (renumbered as section 103(bb)(4)).[123] Points and fees for the high-cost mortgage threshold are defined in § 1026.32(b)(1) (closed-end credit) and (2) (open-end credit), and § 1026.43(b)(9) provides that, for a qualified mortgage, ''points and fees'' has the same meaning as in § 1026.32(b)(1).

Section 1431 of the Dodd-Frank Act amended TILA to require that ''all compensation paid *directly or indirectly* by a consumer *or creditor* to a mortgage originator from any source, including a mortgage originator that is also the creditor in a table-funded transaction,'' be included in points and fees. TILA section 103(bb)(4)(B) (emphases added). Prior to the amendment, HOEPA had provided that only compensation paid by a consumer to a mortgage broker at or before closing should count toward the points and fees threshold. Under amended TILA section 103(bb)(4)(B), however, compensation paid to anyone that qualifies as a ''mortgage originator'' is to be included in points and fees.[124]

[122] The 2013 ATR and HOEPA Final Rules also adopted the special calculation, prescribed under TILA for high-cost mortgages, for completing the bona fide discount point calculation for loans secured by personal property.

[123] The Dodd-Frank Act renumbered existing TILA section 103(aa), which contains the definition of ''points and fees,'' for the high-cost mortgage points and fees threshold, as section 103(bb). *See* § 1100A(1)(A) of the Dodd-Frank Act. However, in defining points and fees for the qualified mortgage points and fees limits, TILA section 129C(b)(2)(C) refers to TILA section 103(aa)(4) rather than TILA section 103(bb)(4). To give meaning to this provision, the Bureau concludes that the reference to TILA section in 103(aa)(4) in TILA section 129C(b)(2)(C) is mistaken and therefore interprets TILA section 129C(b)(2)(C) as referring to the points and fees definition in renumbered TILA section 103(bb)(4).

[124] ''Mortgage originator'' is generally defined to include ''any person who, for direct or indirect compensation or gain, or in the expectation of direct or indirect compensation or gain—(i) takes a

Continued

Thus, in addition to compensation paid to mortgage brokerage firms, points and fees also includes compensation paid to other mortgage originators, including employees of a creditor (*i.e.,* loan officers) or of a brokerage firm (*i.e.,* individual brokers). In addition, the Dodd-Frank Act removed the phrase ''payable at or before closing'' from the high-cost mortgage points and fees test and did not apply the ''payable at or before closing'' limitation to the points and fees cap for qualified mortgages. *See* TILA sections 103(bb)(1)(A)(ii) and 129C(b)(2)(A)(vii) and (C).

The Bureau's 2013 ATR Final Rule amended § 1026.32(b)(1) to implement revisions to the definition of ''points and fees'' under section 1431 of the Dodd-Frank Act, both for the purposes of HOEPA and qualified mortgages. Among other things, the Dodd-Frank Act added loan originator compensation to the definition of ''points and fees'' that had previously applied to high-cost mortgages under HOEPA. Section 1431 of the Dodd-Frank Act also amended TILA to provide that open-end credit plans (*i.e.,* HELOCs) are covered by HOEPA. The Bureau's 2013 HOEPA Final Rule thus separately amended § 1026.32(b)(2) to provide for the inclusion of loan originator compensation in points and fees for HELOCs, to the same extent as such compensation is required to be counted for closed-end credit transactions. Under § 1026.32(b)(1)(ii) (for closed-end credit) and § 1026.32(b)(2)(ii) (for open-end credit), all compensation paid directly or indirectly by a consumer or creditor to a loan originator, as defined in § 1026.36(a)(1), that can be attributed to that transaction at the time the interest rate is set, is required to be included in points and fees. The commentary to § 1026.32(b)(1)(ii) as adopted in the 2013 ATR Final Rule provides details for applying this requirement for closed-end credit transactions (*e.g.,* by clarifying when compensation must be known to be counted). The commentary to § 1026.32(b)(2)(ii) as adopted in the 2013 HOEPA Final Rule cross-references the commentary adopted in § 1026.32(b)(1)(ii) for interpretive guidance.

Discussion

In response to the Board's 2011 ATR Proposal and the Bureau's 2012 HOEPA Proposal, the Bureau received feedback regarding the inclusion of loan originator compensation in the qualified mortgage and high-cost mortgage points and fees calculation. In the context of both rulemakings, several industry commenters argued that including loan originator compensation in points and fees would result in ''double-counting'' because creditors often compensate loan originators with funds collected from consumers at consummation. The commenters argued that money collected in up-front charges to consumers should not be counted a second time toward the points and fees thresholds if it is passed on to a loan originator. In outreach, consumer advocates urged the Bureau not to assume that up-front consumer payments to creditors are applied to loan originator compensation, particularly in the wholesale channel where consumers can pay mortgage brokers directly.

The Bureau's 2013 ATR and HOEPA Final Rules implemented as written the statutory provision including loan originator compensation in points and fees. As the Bureau noted, the underlying statutory provisions as amended by the Dodd-Frank Act do not express any limitation on the requirement to count loan originator compensation toward the points and fees test. Rather, the literal language of TILA section 103(bb)(4) as amended by the Dodd-Frank Act defines points and fees to include all items included in the finance charge (except interest rate), all compensation paid directly or indirectly by a consumer or creditor to a loan originator, ''and'' various other enumerated items. Both the use of ''and'' and the reference to ''all'' compensation paid ''directly or indirectly'' and ''from any source'' suggest that compensation should be counted as it flows downstream from one party to another so that it is counted each time that it reaches a loan originator, whatever the previous source.

The Bureau believes the statute would be read to require that loan originator compensation be treated as additive to the other elements of points and fees. The Bureau did not believe that an automatic literal reading of the statute in all cases would be in the best interest of either consumers or industry, but it did not believe that it yet had sufficient information with which to choose definitively between the additive approach provided for in the statutory language and other potential methods of accounting for payments in all circumstances, given multiple practical and complex policy considerations involved. Accordingly, the Bureau decided to finalize the rule without a qualifying interpretation on this issue and to include in this proposal several comments to clarify interpretation of the statute as it applies to particular payment streams between particular parties. The Bureau is also seeking comment on whether additional guidance regarding treatment of loan originator compensation under the points and fees thresholds would be useful to facilitate compliance, as described further below.

In approaching the interpretive issue, the Bureau is cognizant of the broader purposes of the statute. As discussed in the 2013 ATR Final Rule, the Dodd-Frank Act contains a number of provisions that focus on loan originator compensation and regulation, in apparent response to concerns that industry compensation practices contributed to the mortgage market crisis by creating strong incentives for brokers and retail loan officers to steer consumers into higher-priced loans. Specifically, loan originators were often paid a commission by creditors that increased with the interest rate on a transaction. These commissions were funded by creditors through the increased revenue received by the creditor as a result of the higher rate paid by the consumer and were closely tied to the price the creditor expected to receive for the loan on the secondary market as a result of that higher rate.[125] In addition, many mortgage brokers charged consumers up-front fees to cover some of their costs at the same time that they accepted backend payments from creditors out of the rate. This may have contributed to consumer confusion about where the brokers' loyalties lay.

Although other provisions of the Dodd-Frank Act prohibit specific compensation practices that created particularly strong incentives for loan originators to ''upcharge'' consumers on a loan-by-loan basis and particular confusion about loan originators' loyalties, the Bureau believes that the inclusion of loan originator compensation in points and fees has

residential mortgage loan application; (ii) assists a consumer in obtaining or applying to obtain a residential mortgage loan; or (iii) offers or negotiates terms of a residential mortgage loan.'' TILA section 103(cc)(2)(A). The statute excludes certain persons from the definition, including a person who performs purely administrative or clerical tasks; an employee of a retailer of manufactured homes who does not take a residential mortgage application or offer or negotiate terms of a residential mortgage loan; and, subject to certain conditions, real estate brokers, sellers who finance three or fewer properties in a 12-month period, and servicers. TILA section 103(cc)(2)(C) through (F).

[125] For more detailed discussions, see the Bureau's 2012 proposed rule regarding loan originator compensation at 77 FR 55272, 55276, 55290 (Sept. 7, 2012) (2012 Loan Originator Proposal) and the final rule issued by the Board in 2010 at 75 FR 58509, 5815–16, 58519–20 (Sept. 24, 2010) (2010 Loan Originator Final Rule).

distinct purposes. In addition to discouraging more generalized rent-seeking and excessive loan originator compensation, the Bureau believes that Congress may have been focused on particular risks to consumers. Thus, with respect to qualified mortgages, including loan originator compensation in points and fees helps to ensure that, in cases in which high up-front compensation might otherwise cause the creditor and/or loan originator to be less concerned about long-term sustainability, the creditor is not able to invoke a presumption of compliance if challenged to demonstrate that it made a reasonable and good faith determination of the consumer's ability to repay the loan. Similarly in HOEPA, the threshold triggers additional consumer protections, such as enhanced disclosures and housing counseling, for the loans with the highest up-front pricing.

The Bureau believes that a strict additive rule that would automatically require that loan originator compensation be counted against the points and fees thresholds even if it is already counted against the thresholds for another reason under the statute would not serve the broader purposes of the statute. For instance, the Bureau does not believe that it is necessary or appropriate to count the same payment between a consumer and a mortgage broker firm twice, simply because it is both part of the finance charge and loan originator compensation. Similarly, the Bureau does not believe that where a payment from either a consumer or a creditor to a mortgage broker is counted toward points and fees, it is necessary or appropriate to count separately funds that the broker then passes on to its individual employees. In each case, any costs and risks to the consumer from high loan originator compensation are adequately captured by counting the funds a single time against the points and fees cap; thus, the Bureau does not believe the purposes of the statute would be served by counting some or all of the funds a second time, and is concerned that doing so could have negative impacts on the price and availability of credit.

Determining the appropriate accounting method is significantly more complicated, however, when a consumer pays some up-front charges to the creditor and the creditor pays loan originator compensation to either its own employee or to a mortgage broker firm. As described in the 2013 ATR Final Rule, a creditor can fund compensation to a loan originator (or a creditor's own loan officer) two different ways. First, as discussed above, the payment could be funded by origination charges paid by the consumer. Second, the payment could be funded through the interest rate, in which case the creditor forwards funds to the loan originator at consummation which the creditor recovers through profit realized on the subsequent sale of the mortgage or, for portfolio loans, through payments by the consumer over time. Because money is fungible, tracking how a creditor spends money it collects in up-front charges versus amounts collected through the rate to cover both loan originator compensation and its other overhead expenses would be extraordinarily complex and cumbersome. To facilitate compliance, the Bureau believes it is appropriate and necessary to adopt one or more generalized rules regarding the accounting of various payments, but did not have sufficient information to make those choices in the 2013 ATR Final Rule.

The potential downstream effects of different accounting methods are significant. Under the additive approach where no offsetting of consumer payments against creditor-paid loan originator compensation is allowed, some loans might be precluded from being qualified mortgages given the other charges that are included in points and fees, such as fees paid to affiliates for settlement services. In other cases, creditors whose combined loan originator compensation and up-front charges would otherwise exceed the points and fees limits would have strong incentives to cap their up-front charges for other overhead expenses under the threshold and instead recover those expenses by increasing interest rates to generate higher gains on sale. This would adversely affect consumers who prefer a lower interest rate and higher up-front costs and, at the margins, could result in some consumers being unable to qualify for credit. Additionally, to the extent creditors responded to a ''no offsetting'' rule by increasing interest rates, this could increase the number of qualified mortgages that receive a rebuttable rather than conclusive presumption of compliance.

One alternative would be to allow all consumer payments to offset creditor-paid loan originator compensation. However, a ''full offsetting'' approach would allow creditors to offset much higher levels of up-front points and fees against expenses paid through rate before the heightened consumer protections required by the Dodd-Frank Act would apply. For example, a consumer could pay 3 percentage points in originating charges and be charged an interest rate sufficient to generate a 3 percent loan originator commission, and the loan could still fall within the 3 percent cap for qualified mortgages even though the up-front payments may be so high as to cause the creditor to be undemanding in underwriting the loan. The consumer could be charged 5 percent in originating charges and an interest rate sufficient to generate a five percentage loan originator commission and still stay under the HOEPA points and fees trigger, thereby denying consumers the special protections afforded to loans with high up-front costs. In markets that are less competitive, this would create an opportunity for creditors or brokerage firms to take advantage of their market power to harm consumers. Particularly under HOEPA, this may raise tensions with Congress's apparent intent. Other alternatives might use a hybrid approach depending on the type of expense, type of loan, or other factors, but would involve more compliance complexity.

In light of these complexities, the Bureau has proposed three comments (one with two alternative versions) to specify accounting methods where loan originator compensation could otherwise be counted twice under the statutory scheme. As discussed below, the Bureau believes that, consistent with TILA section 105(a), these comments would facilitate compliance by clarifying the requirements of § 1026.32(b)(1)(ii). The Bureau is proposing comment 32(b)(1)(ii)–5.i to provide that a payment from a consumer to a mortgage broker need not be counted toward points and fees twice because it is both part of the finance charge under § 1026.32(b)(1)(i) and loan originator compensation under § 1026.32(b)(1)(ii). Similarly, proposed comment 32(b)(1)(ii)–5.ii would clarify that § 1026.32(b)(1)(ii) does not require a creditor to include payments by a mortgage broker to its individual loan originator employee in the calculation of points and fees. For example, assume a consumer pays a $3,000 fee to a mortgage broker, and the mortgage broker pays a $1,500 commission to its individual loan originator employee for that transaction. The $3,000 mortgage broker fee is included in points and fees, but the $1,500 commission is not included in points and fees because it has already been included in points and fees as part of the $3,000 mortgage broker fee. As discussed above, the Bureau believes that this clarification may ensure that any costs to the consumer from loan originator compensation are adequately captured by counting the funds a single time against the points and fees cap. The Bureau seeks comment regarding these proposed comments.

Finally, the Bureau is seeking comment on two alternative versions of proposed comment 32(b)(1)(ii)–5.iii. The first would explicitly preclude offsetting, in accordance with the statute's additive language, by specifying that § 1026.32(b)(1)(ii) requires a creditor to include compensation paid by a consumer or creditor to a loan originator in the calculation of points and fees in addition to any fees or charges paid by the consumer to the creditor. This proposed comment also contains an illustrative example which applies to both retail and wholesale transactions. For example, assume that a consumer pays to the creditor a $3,000 origination fee and that the creditor pays to its loan officer employee $1,500 in compensation attributed to the transaction. Assume further that the consumer pays no other charges to the creditor that are included in points and fees under § 1026.32(b)(1)(i) and the loan officer receives no other compensation that is included in points and fees under § 1026.32(b)(1)(ii). For purposes of calculating points and fees, the $3,000 origination fee is included in points and fees under § 1026.32(b)(1)(i) and the $1,500 in loan officer compensation is included in points and fees under § 1026.32(b)(1)(ii), equaling $4,500 in total points and fees, provided that no other points and fees are paid or compensation received.

The second alternative would allow all consumer payments of up-front fees and points to offset creditor payments to the loan originator. Specifically, it would provide that § 1026.32(b)(1)(ii) requires a creditor to reduce the amount of loan originator compensation included in the points and fees calculation under § 1026.32(b)(1)(ii) by any amount paid by the consumer to the creditor and included in the points and fees calculation under § 1026.32(b)(1)(i). This proposed comment also contains an illustrative example which applies to both retail and wholesale transactions. For example, assume that a consumer pays to the creditor a $3,000 origination fee and that the creditor pays to the loan originator $1,500 in compensation attributed to the transaction. Assume further that the consumer pays no other charges to the creditor that are included in points and fees under § 1026.32(b)(1)(i) and the loan originator receives no other compensation that is included in points and fees under § 1026.32(b)(1)(ii). For purposes of calculating points and fees, the $3,000 origination fee is included in points and fees under § 1026.32(b)(1)(i), but the $1,500 in loan originator compensation need not be included in points and fees. If, however, the consumer pays to the creditor a $1,000 origination fee and the creditor pays to the loan originator $1,500 in compensation, then the $1,000 origination fee is included in points and fees under § 1026.32(b)(1)(i), and $500 of the loan originator compensation is included in points and fees under § 1026.32(b)(1)(ii), equaling $1,500 in total points and fees, provided that no other points and fees are paid or compensation received. This example illustrates the requirements of § 1026.32(b)(1)(ii) for both retail and wholesale transactions.

The Bureau solicits feedback regarding all aspects of both alternatives. In addition, the Bureau specifically requests feedback regarding whether there are differences in various types of loans, consumers, loan origination channels, or market segments which would justify applying different interpretations regarding offsetting to such categories. For example, are the risks to consumers from applying either the first or the second interpretation greater in the subprime market (*i.e.,* with respect to higher-priced mortgages) than in the prime market? If so, should the Bureau use its authority under TILA to adopt different interpretations or regulatory approaches for these different markets or in adopting either approach in general? The Bureau also seeks feedback as to whether, if it were to adopt the first alternative in some or all instances, the creditor should be permitted to reduce the loan originator compensation by the full amount of points and fees included in finance charges or whether the reduction should be limited to that portion of points and fees denominated as general origination charges, rather than specific fees that are passed through to affiliates.

Furthermore, the Bureau seeks comment on the implications of each alternative on protecting consumers pursuant to the ability-to-repay requirements, qualified mortgage provisions, and the high-cost mortgage provisions of HOEPA. The Bureau also seeks comment on the likely market reactions and impacts on the pricing of and access to credit of each alternative, particularly as to how such reactions might affect interest rate levels, the safe harbor and rebuttable presumption afforded to particular qualified mortgages, and application of the separate rate threshold for high-cost mortgages under HOEPA and whether adjustment to the final rule would be appropriate. The Bureau further seeks comment on the implications of both of the above proposed alternatives in light of the fact that both the qualified mortgage and HOEPA provisions allow certain ''bona fide discount points'' and bona fide third party charges to be excluded from the calculation of points and fees, but do not do so for affiliate charges.

As discussed above, the Bureau adopted in the 2013 HOEPA Final Rule a requirement that creditors include compensation paid to originators of open-end credit plans in points and fees, to the same extent that such compensation is required to be included for closed-end credit transactions. The Bureau did not receive comments in response to the 2012 HOEPA Proposal indicating that additional or different guidance would be needed to calculate loan originator compensation in the open-end credit context. The Bureau believes that it would be useful to provide the public with an additional opportunity to comment. Thus, the Bureau solicits input on what guidance, if any, beyond that provided for closed-end credit transactions, would be helpful for creditors in calculating loan originator compensation in the open-end credit context.

Finally, the Bureau seeks comment on whether additional guidance or regulatory approaches regarding the final rule on inclusion of loan originator compensation in points and fees would be useful to protect consumers and facilitate compliance. In particular, the Bureau seeks comment on whether it would be helpful to provide for additional adjustment of the rules or additional commentary to clarify any overlaps in definitions between the points and fees provisions in the ability-to-repay and HOEPA rulemakings and the provisions that the Bureau is separately finalizing in connection with the Bureau's 2012 Loan Originator Proposal. For example, the Bureau seeks comment on whether additional guidance would be useful with regard to treatment of compensation by persons who are ''loan originators'' but are not employed by a creditor or mortgage broker, given that the loan originator compensation rulemaking is implementing provisions of the Dodd-Frank Act that specify when employees of retailers of manufactured homes, servicers, and other parties are loan originators for Dodd-Frank Act purposes.

Section 1026.35 Prohibited Acts or Practices in Connection With Higher-Priced Mortgage Loans

35(b) Escrow Accounts

35(b)(2) Exemptions

Section 1026.35(b)(2)(iii) provides that an escrow account need not be established in connection with a mortgage if the creditor operates predominantly in rural or underserved areas, originates 500 or fewer first-lien mortgages per year, and has total assets less than $2 billion (adjusted annually for inflation). As discussed below in the section-by-section analysis of § 1026.43(e)(5), the Bureau believes that it may be important to preserve consistency among § 1026.35(b)(2) and § 1026.43(e)(5) and (f). The Bureau is not proposing specific amendments to § 1026.35(b)(2) because § 1026.43(e)(5) as proposed is consistent with existing § 1026.35(b)(2). However, if § 1026.43(e)(5) is adopted with significant changes, the Bureau will consider and may adopt parallel amendments to § 1026.35(b)(2) and § 1026.43(f) in its final rule.

The Bureau solicits comment on the advantages and disadvantages of maintaining consistency between § 1026.35(b)(2) and § 1026.43(e)(5) and (f) generally and on whether the Bureau should make conforming changes to § 1026.35(b)(2) if necessary to maintain consistency with specific provisions of § 1026.43(e)(5).

Section 1026.43 Minimum Standards for Transactions Secured by a Dwelling

43(a) Scope

43(a)(3)

Applicability of the Ability-to-Repay Requirements

Section 129C(a)(1) of TILA, as added by section 1411 of the Dodd-Frank Act, states that, in accordance with regulations prescribed by the Bureau, no creditor may make a residential mortgage loan unless the creditor makes a reasonable and good faith determination based on verified and documented information that, at the time the loan is consummated, the consumer has a reasonable ability to repay the loan, according to its terms, and all applicable taxes, insurance (including mortgage guarantee insurance), and assessments. TILA section 129C(a)(6)(E) provides certain special rules to govern determinations of consumers' ability to repay where a ''hybrid'' loan is being refinanced by the same creditor into a ''standard'' product in anticipation of a significant risk of default after a reset in rates. The statute otherwise applies the same general ability-to-repay standards to all residential mortgage loans.

Section 1401 of the Dodd-Frank Act adds new TILA section 103(cc)(5), which defines ''residential mortgage loan'' to mean, with some exceptions, any consumer credit transaction secured by a mortgage, deed of trust, or other equivalent consensual security interest on ''a dwelling or on residential real property that includes a dwelling.'' TILA section 103(v) defines ''dwelling'' to mean a residential structure or mobile home which contains one- to four-family housing units, or individual units of condominiums or cooperatives. Thus, a ''residential mortgage loan'' generally includes all mortgage loans, except mortgage loans secured by a structure with more than four residential units. However, TILA section 103(cc)(5) specifically excludes from the term ''residential mortgage loan'' an open-end credit plan or an extension of credit secured by an interest in a timeshare plan, for purposes of the ability-to-repay requirements under TILA section 129C as well as provisions concerning prepayment penalties and other restrictions. In addition, TILA section 129C(a)(8) exempts reverse mortgages and temporary or ''bridge'' loans with a term of 12 months or less from the ability-to-repay requirements.[126] Thus, taken together, the ability-to-repay requirements of TILA section 129C(a) apply to all closed-end mortgage loans secured by a one- to four-unit dwelling, except loans secured by a consumer's interest in a timeshare plan, reverse mortgages, or temporary or ''bridge'' loans with a term of 12 months or less.

The Board's 2011 ATR Proposal included language to implement these statutory exemptions and solicited comment on whether any additional exemptions were appropriate and consistent with the authority under TILA section 129C(b)(3)(B)(i) to modify the provisions related to the definition of qualified mortgage.[127] However, the Board did not propose any specific additional exemptions. The Bureau's 2013 ATR Final Rule adopted § 1026.43 to implement the provisions of section 129C of TILA concerning consideration of consumers' ability to repay, limitations on prepayment penalties, and anti-evasion restrictions. The final rule's provisions on scope are substantially similar to the statute, with modifications to conform to the usage of Regulation Z. Section 1026.43(a) provides that § 1026.43 applies to any consumer credit transaction that is secured by a dwelling, as defined in § 1026.2(a)(19), other than: (1) A home equity line of credit subject to § 1026.40; or (2) a mortgage transaction secured by a consumer's interest in a timeshare plan, as defined in 11 U.S.C. 101(53(D)). Further, § 1026.43(a)(3)(i) and (ii) provides that a reverse mortgage subject to § 1026.33, or a temporary or ''bridge'' loan with a term of 12 months or less, such as a loan to finance the purchase of a new dwelling where the consumer plans to sell a current dwelling within 12 months or a loan to finance the initial construction of a dwelling, are exempt from the ability-to-repay requirements in § 1026.43(c) through (f).[128] Section 1026.43(a)(3)(iii) contains a related exemption for the construction phase of a construction-to-permanent loan.

Concerns Raised in Response to the Board's 2011 ATR Proposal

In the response to the Board's requests for feedback, many commenters requested exemptions from, or modifications to, the ability-to-repay requirements. Several commenters identified two categories of credit that are of particular concern to the Bureau: community-focused lending programs and programs intended to stabilize homeownership and prevent foreclosure.

Community-focused lending programs. One industry commenter requested that credit extended pursuant to a community-focused lending program be excluded from the ability-to-repay requirements. This commenter explained that creditors participating in these programs do so to benefit the community as a whole and knowingly assume any additional risks inherent in such lending. Another industry commenter requested broad flexibility for community-focused lending programs, noting that mortgage loans financed by State housing finance agencies (SHFAs) had lower long-term delinquency and foreclosure rates than mortgage loans financed by non-SHFA creditors. Other commenters requested a variety of accommodations for community-focused lending programs,

[126] In addition, section 129C(i) of TILA also exempts credit secured by a consumer's interest in a timeshare from the ability-to-repay requirements.

[127] *See* 76 FR 27390, 27448, 27456.

[128] Section 1026.43(c) contains the ability-to-repay requirements, § 1026.43(d) contains special ability-to-repay requirements for certain types of refinancings, § 1026.43(e) contains the qualified mortgage provisions, and § 1026.43(f) sets forth the provisions regarding balloon payment qualified mortgage loans made by certain creditors. Reverse mortgage loans and temporary or ''bridge'' loans with a term of 12 months or less remain subject to the prepayment penalty provisions in § 1026.43(g) and the anti-evasion provisions in § 1026.43(h).

ranging from a request to provide loans originated by SHFAs with qualified mortgage status to a request that the Bureau explicitly adopt the underwriting standards of SHFAs in the ability-to-repay standards. Both industry and consumer advocate commenters argued that community-focused lending programs provide low- to moderate-income (LMI) consumers with responsible and affordable mortgage credit.

Homeownership stabilization and foreclosure prevention programs. Many commenters requested that the Bureau accommodate programs designed to stabilize homeownership or mitigate the risks of foreclosure in the 2013 ATR Final Rule. One industry commenter argued that programs developed in response to the financial crisis, such as the Home Affordable Refinance Program, should be exempt from the ability-to-repay requirements. This commenter noted that a complete exemption was necessary because many of these programs' requirements conflicted with the proposed ability-to-repay requirements. Additional analysis conducted by the Bureau confirmed arguments made by commenters that programs such as these contain complex and comprehensive underwriting requirements.

The Bureau's proposal. This feedback prompted the Bureau to analyze the effects of the ability-to-repay requirements on community-focused lending programs and homeownership stabilization and foreclosure prevention programs. As explained further below, the Bureau believes that several narrowly tailored exemptions from the ability-to-repay requirements may be warranted. Specifically, the Bureau is concerned that the ability-to-repay requirements could have significant unintended consequences on certain community-focused lending programs designed to assist LMI consumers to access mortgage credit and certain housing stabilization and foreclosure assistance programs designed to assist consumers who have been harmed by the aftermath of the financial crisis. Because these programs already have carefully calibrated underwriting standards and are generally subject to significant government monitoring, the Bureau is concerned that overlaying an additional set of underwriting requirements and private liabilities could divert resources and reduce the effectiveness and availability of such programs. Accordingly, to preserve access to credit and promote stabilization of the housing market, the Bureau is therefore proposing to exempt loans made by certain community-focused creditors and under certain housing stabilization programs from the ability-to-repay requirements, rather than simply designating these extensions of credit as qualified mortgages. However, given the unique underwriting characteristics of these extensions of credit and the importance of ensuring access to mortgage credit for consumers seeking assistance under these programs, the Bureau believes it is important to seek additional public comment in crafting these exemptions.

As detailed below the proposed exemptions are narrowly targeted to apply only to certain types of creditors and extensions of credit. For example, the exemptions proposed below do not apply to credit extended in connection with a proprietary community-lending or foreclosure prevention program. The Bureau recognizes that such proprietary programs are a critical component of efforts to support housing affordability and homeownership stabilization. However, the Bureau believes that creditors offering these proprietary programs have the resources and flexibility to incorporate the ability-to-repay requirements into the programs' existing underwriting requirements. In contrast, the Bureau believes that, for certain extensions of credit, creditors do not have the resources or flexibility to implement the ability-to-repay requirements. The exemptions proposed below are intended to address these narrow circumstances to prevent consumers from being harmed by unintended consequences caused by application of the ability-to-repay requirements.

As detailed below under each specific proposed provision, the Bureau seeks comment on every aspect of this approach. In particular, the Bureau seeks comment on the premise that the ability-to-repay requirements could impose significant implementation and compliance burdens on the designated creditors and programs even if credit extended by the designated creditors or under the designated programs were granted some protection from liability as qualified mortgages. The Bureau also seeks comment on whether the creditors and programs identified have sufficiently rigorous underwriting standards and monitoring processes to protect the interests of consumers in the absence of TILA's ability-to-repay requirements. The Bureau solicits feedback specifically regarding the particular requirements of these creditors and these programs, how these requirements account for a consumer's ability to repay, and whether these requirements duplicate or render unnecessary the ability-to-repay provisions of § 1026.43(c) through (f). The Bureau also requests data related to the delinquency, default, and foreclosure rates of consumers participating in these programs. Finally, the Bureau requests feedback regarding whether such an exemption could harm consumers, such as by denying consumers the ability to pursue claims arising under violations of § 1026.43(c) through (f) against creditors extending credit in connection with these programs. Should the Bureau determine that a full exemption is not warranted, the Bureau seeks detailed comment on what modifications to the general ability-to-repay standards are warranted, or whether qualified mortgage status should be granted instead and, if so, under what conditions. The Bureau also solicits feedback on any alternative approaches that would preserve the availability of credit under HFA programs while ensuring that consumers receive mortgage loans that reasonably reflect consumers' ability to repay. Finally, the Bureau seeks comment on whether any exemptions or qualified mortgage status should be extended to additional programs or creditors, and, if so, under what conditions.

43(a)(3)(iv)

As discussed above, neither TILA nor Regulation Z provide an exemption to the ability-to-repay requirements for credit extended pursuant to a program administered by a housing finance agency (HFA). HFAs are supported by taxpayers, often through tax-exempt bonds but occasionally through direct government funding, and conduct diverse housing finance activities. For example, an HFA may extend credit directly to LMI consumers, insure or purchase mortgage loans originated by private creditors in accordance with the requirements of an HFA program, or provide other assistance to LMI consumers, such as mortgage loan payment subsidies or assistance with the up-front costs of a mortgage loan. HFAs are quasi-governmental, nonprofit, entities, chartered by either a State or a municipality, that promote affordable housing and community development. To achieve these goals, HFA underwriting requirements are tailored to the credit characteristics of LMI consumers. Credit offered in connection with these programs is similarly customized to the meet the unique needs of these consumers while ensuring the ongoing financial stability of the HFA. As HFAs extend credit to promote long-term housing stability, rather than for profit, HFAs generally extend credit after performing a complex and lengthy analysis of a consumer's ability to repay which, given the unique underwriting characteristics of LMI consumers, often gives significant weight to nontraditional underwriting elements, extenuating circumstances, and other subjective factors that are indicative of responsible homeownership.

The Bureau is concerned that the ability-to-repay requirements may undermine the underwriting requirements of these programs. For example, the ability-to-repay provisions may require consideration of underwriting factors that are not required under HFA programs, such as the consumer's credit history. The Bureau is also concerned that the ability-to-repay requirements may affect the ability of HFAs to offer extensions of credit customized to meet the needs of LMI consumers while promoting long-term housing stability. For example, the Bureau is aware of several HFA programs offering mortgage loans that defer the repayment of principal until the consumer sells the home or refinances the mortgage, unless the consumer maintains the home as the consumer's principal residence for 30 years, in which case the deferred principal balance is forgiven. This mortgage loan would not be eligible for qualified mortgage status under § 1026.43(e) because it provides for deferred repayment of principal. Thus, a creditor extending such a mortgage loan is required to comply with the ability-to-repay requirements of § 1026.43(c).

Based on these considerations, the Bureau believes that it may be appropriate to exempt credit extended pursuant to an HFA program from the ability-to-repay requirements. In addition to the issues addressed above, the Bureau is especially concerned that the costs of implementing and complying with the requirements of § 1026.43(c) through (f) would endanger the viability and effectiveness of these programs. Nonprofit, taxpayer-supported HFAs may not have sufficient resources to implement and comply with the ability-to-repay requirements. Some HFAs may respond to the burden by severely curtailing the credit offered under these programs. Others may divert resources from lending to compliance, which may also result in the denial of mortgage credit to low- to moderate-income consumers. Private creditors offering credit in connection with HFA programs may determine that complying with both the ability-to-repay requirements and the specialized HFA program requirements is too burdensome, which also may result in the denial of mortgage credit to LMI consumers. These private creditors may also determine that the potential liability risk involved with applying the ability-to-repay requirements to the unique characteristics of HFA consumers is too great, thereby reducing the availability of mortgage credit. Further, these programs may employ underwriting requirements that are uniquely tailored to meet the needs of low- to moderate-income consumers, such that applying the more generalized statutory ability-to-repay requirements would be unnecessarily burdensome and provide no net benefit to consumers. Accordingly, the Bureau is proposing § 1026.43(a)(3)(iv), which provides that an extension of credit made pursuant to a program administered by a housing finance agency, as defined under 24 CFR 266.5, is exempt from § 1026.43(c) through (f).

Section 1026.43(a)(3)(iv) is proposed pursuant to the Bureau's authority under section 105(a) and (f) of TILA. Pursuant to section 105(a) of TILA, the Bureau believes that this exemption is necessary and proper to effectuate the purposes of TILA. This exemption would ensure that consumers are offered and receive residential mortgage loans on terms that reasonably reflect their ability to repay. The Bureau believes that mortgage loans originated in connection with programs administered by State housing finance agencies sufficiently account for a consumer's ability to repay, and the exemption ensures that consumers are able to receive assistance under these programs. Furthermore, without the exemption the Bureau believes that consumers in this demographic would be denied access to the responsible, affordable credit offered under these programs, which is contrary to the purposes of TILA.

The Bureau has considered the factors in TILA section 105(f) and believes that, for the reasons discussed above, an exemption is appropriate under that provision. Specifically, the Bureau believes that the proposed exemption is appropriate for all affected consumers, regardless of their other financial arrangements and financial sophistication and the importance of the loan to them. Similarly, the Bureau believes that the proposed exemption is appropriate for all affected loans, regardless of the amount of the loan and whether the loan is secured by the principal residence of the consumer. Furthermore, the Bureau believes that, on balance, the proposed exemption will simplify the credit process without undermining the goal of consumer protection or denying important benefits to consumers. Based on these considerations and the analysis discussed elsewhere in this proposal, the Bureau believes that the proposed exemptions are appropriate. The Bureau recognizes that its exemption and exception authorities apply to a class of transactions, and proposes to apply these authorities to the loans covered under the proposal of the entities proposed for potential exemption.

43(a)(v)

As discussed above, neither TILA nor Regulation Z provide an exemption to the ability-to-repay requirements for nonprofit creditors. Feedback provided in response to solicitations for comment in the Board's 2011 ATR Proposal alerted the Bureau to the possibility that many charitable organizations that provide credit to low- to moderate-income consumers would be negatively affected by the requirements of § 1026.43(c) through (f). The Bureau is concerned that the ability-to-repay requirements may result in consumers being denied access to the affordable mortgage credit offered by many of these charitable organizations. The costs of implementing and complying with the requirements of § 1026.43(c) through (f) may be significantly more burdensome on creditors that are charitable organizations than other creditors. These nonprofit creditors may not have the resources to implement and comply with the ability-to-repay requirements, and may cease or severely limit extending credit to low- to moderate-income consumers, which would result in the denial of responsible, affordable mortgage credit.

Credit Extended by CDFIs, CHDOs, and DAPs

The Bureau has identified several types of creditors that focus on extending credit to these consumers. Nonprofit creditors seeking designation as a Community Development Financial Institutions (CDFIs) by the Treasury Department must undergo a thorough screening process to obtain this designation and then must engage in community-focused lending to maintain the designation. Creditors designated as Downpayment Assistance through Secondary Financing Providers (DAPs) or Community Housing Development Organizations (CHDOs) must meet similar requirements imposed by the U.S. Department of Housing and Urban Development (HUD). The Bureau is concerned that the ability-to-repay requirements will negatively affect these creditors, while providing little additional protection to consumers.

Accordingly, the Bureau proposes § 1026.43(a)(3)(v), which provides that an extension of credit made by one of the four types of creditors specified in proposed § 1026.43(a)(3)(v)(A) through (D) is exempt from § 1026.43(c) through (f). Proposed § 1026.43(a)(3)(v)(A) exempts an extension of credit made by a creditor designated as a Community Development Financial Institution, as defined under 12 CFR 1805.104(h). Proposed § 1026.43(a)(3)(v)(B) exempts an extension of credit made by a creditor designated as a Downpayment Assistance Provider operating in accordance with regulations prescribed by the U.S. Department of Housing and Urban Development applicable to such persons. Proposed § 1026.43(a)(3)(v)(C) exempts an extension of credit made by a creditor designated as a Community Housing Development Organization, as defined under 24 CFR 92.2, operating in accordance with regulations prescribed by the U.S. Department of Housing and Urban Development applicable to such persons. Research conducted by the Bureau suggests that these organizations only extend credit after determining that an applicant has the ability to repay the loan, as part of these organizations' broader purpose of extending credit to promote community development. Furthermore, the Bureau believes that the requirements imposed in connection with obtaining and maintaining the designations identified in proposed § 1026.43(a)(3)(v)(A) through (C) may be sufficient to ensure that such creditors provide consumers with responsible and affordable credit, and that unscrupulous or irresponsible creditors would not be able to use these designations to evade the requirements of TILA, extend credit without regard to the consumer's ability to repay, or otherwise harm consumers. However, the Bureau requests feedback regarding this exemption and the analysis that supports it.

Credit Extended by Other Nonprofits

The Bureau believes that charitable organizations other than those addressed above also may be negatively affected by the ability-to-repay requirements, which may impair the availability of mortgage credit for low- to moderate-income consumers. However, the Bureau is concerned that an exemption for all charitable organizations would allow irresponsible creditors to harm consumers. For example, IRS regulations regarding nonprofit status do not incorporate consumer financial protection regulations, such as the ability-to-repay requirements. Thus, a creditor could operate in accordance with applicable IRS regulations while extending credit without regard to a consumer's ability to repay, therefore causing the harm that the ability-to-repay requirements are intended to prevent. The Bureau is also concerned that an exemption for all charitable organizations would allow unscrupulous creditors to intentionally circumvent TILA's ability-to-repay requirements and harm consumers. For example, IRS regulations require nonprofit organizations to file annual financial reports by the 15th day of the 5th month after the end of the organization's fiscal year.[129] Thus, an unscrupulous creditor could operate a for-profit lending operation, in violation of IRS requirements, and extend credit without determining a consumer's ability to repay for 17 months before filing the required financial report, which would lead to the loss of the creditor's nonprofit designation. Therefore, the Bureau believes that an exemption for charitable organizations may be appropriate, if the exemption is limited to those charitable organizations that focus on low- to moderate-income consumers and will be disproportionately affected by the costs associated with the ability-to-repay requirements. These nonprofit creditors may not have the resources to implement and comply with the ability-to-repay requirements, and may cease or severely limit extending credit to LMI consumers, which would result in the denial of mortgage credit. Accordingly, proposed § 1026.43(a)(3)(v)(D) exempts an extension of credit made by a creditor with a tax exemption ruling or determination letter from the Internal Revenue Service under section 501(c)(3) of the Internal Revenue Code of 1986 (26 CFR 1.501(c)(3)–1), provided that certain other limitations apply.

Specifically, the exemption is available only if the creditor extended credit secured by a dwelling no more than 100 times in the calendar year preceding receipt of the consumer's application. The Bureau believes that this limit of 100 transactions per year may be appropriate because nonprofit creditors that extend credit secured by a dwelling fewer than 100 times a year do not have the resources to implement and monitor compliance with the ability-to-repay requirements. In addition, small creditors such as these may devote more time to determining whether a consumer has the ability to repay a mortgage loan than a creditor that extends credit more than 100 times a year. However, the Bureau solicits feedback on whether this condition is appropriate, on the costs of implementing and complying with the ability-to-repay requirements that will be incurred by creditors that extend credit secured by a dwelling more than 100 times a year, the extent to which this proposed condition would affect access to responsible, affordable credit, and whether the limit of 100 transactions per year should be increased or decreased.

The exemption in proposed § 1026.43(a)(3)(v)(D) is further conditioned on the creditor, in the calendar year preceding receipt of the consumer's application, extending credit secured by a dwelling only to consumers with income that did not exceed the qualifying limit for moderate-income families, as established pursuant to section 8 of the United States Housing Act of 1937 and amended from time to time by the U.S. Department of Housing and Urban Development. Also, the proposed exemption is available only if the extension of credit is to a consumer with income that does not exceed this qualifying limit.

The Bureau solicits feedback on whether this exemption, and the conditions under which the exemption applies, are appropriate. The Bureau also specifically requests comment regarding the costs that nonprofit creditors will incur in connection with the ability-to-repay requirements, the extent to which these additional costs will affect the ability of nonprofit creditors to extend credit to low- to moderate-income consumers, and whether consumers could be harmed by providing an exemption to the ability-to-repay requirements to the creditors described above.

The proposed exemption under § 1026.43(a)(3)(v)(D) is limited to creditors designated as nonprofits under the Internal Revenue Code of 1986, and is not available for creditors operating on a for-profit basis. The Bureau believes that this distinction may be appropriate and necessary. It may be appropriate because of the difference in lending practices between nonprofit and other creditors. For-profit creditors price and extend credit based on several considerations, including the assumption that certain consumers will default and must be foreclosed upon. In contrast, the nonprofit creditors identified in § 1026.43(a)(3)(v)(D) appear to elevate long-term community stability over the creditor's economic considerations. Thus, these nonprofits appear to have a stronger incentive to determine that an LMI consumer has the ability to repay a mortgage loan than for-profit creditors. Furthermore, this distinction may be necessary to preserve

[129] 26 CFR 1.6033–6(f).

access to responsible and affordable credit. This proposed exemption is premised on the belief that the additional costs imposed by the ability-to-repay requirements will force certain nonprofit creditors to cease extending credit, or substantially limit credit activities, thereby harming low- to moderate-income consumers. By definition, for-profit creditors derive more revenue from mortgage lending activity than nonprofit creditors, and therefore presumably have the resources to comply with the ability-to-repay requirements. Thus, expanding the proposed exemption to apply to for-profit creditors may not be necessary to preserve access to responsible, affordable credit. However, the Bureau solicits comment regarding this analysis.

This proposed exemption applies to creditors designated as nonprofits under section 501(c)(3), but not 501(c)(4), of the Internal Revenue Code of 1986. The Bureau recognizes that these creditors also may be affected by the ability-to-repay requirements. However, the Bureau believes that this distinction may be appropriate. As explained above, the Bureau's proposed exemption is premised on the belief that the additional costs imposed by the ability-to-repay requirements will force certain nonprofit creditors to cease extending credit, or substantially limit credit activities, thereby harming low- to moderate-income consumers.

IRS regulations permit 501(c)(4) nonprofits to engage in lobbying and certain political activities. Nonprofit creditors with the resources to engage in lobbying or other political activities are presumably more likely to have the resources to comply with the ability-to-repay requirements. Furthermore, tax-exempt status under section 501(c)(3) requires a rigorous application to the government and a formal determination by the Internal Revenue Service that an organization is ''exclusively'' charitable.[130] Tax-exempt status under other provisions of section 501(c), by contrast, can be merely self-proclaimed, without any formal determination by the government.[131] The heightened scrutiny placed on wholly charitable organizations by the IRS would help ensure that scrupulous and responsible creditors that seek to provide responsible and affordable credit qualify for the exemption.

However, the Bureau solicits comment regarding whether the proposed exemption should be extended to creditors designated as nonprofits under section 501(c)(4) of the Internal Revenue Code of 1986. In addition, the Bureau requests financial reports and mortgage lending activity data supporting the argument that the marginal cost of implementing and complying with the ability-to-repay requirements would cause 501(c)(4) nonprofit creditors to cease, or severely limit, extending credit to low- to moderate-income consumers.

Proposed comment 43(a)(3)(v)(D)–1 clarifies that an extension of credit is exempt from the requirements of § 1026.43(c) through (f) if the credit is extended by a creditor described in § 1026.43(a)(3)(v)(D), provided the conditions specified in § 1026.43(a)(3)(v)(D)(*1*), (*2*), and (*3*) are satisfied. The conditions specified in § 1026.43(a)(3)(v)(D)(*1*) and (*2*) are determined according to activity that occurred in the calendar year preceding the calendar year in which the consumer's application was received. Section 1026.43(a)(3)(v)(D)(*2*) provides that during the preceding calendar year, the entity must have extended credit only to consumers with income that did not exceed the qualifying limit then in effect for moderate-income families, as specified in regulations prescribed by the U.S. Department of Housing and Urban Development pursuant to section 8 of the United States Housing Act of 1937. For example, a creditor has satisfied the requirements of § 1026.43(a)(3)(v)(D)(*2*) if the creditor demonstrates that the creditor extended credit only to consumers with income that did not exceed the qualifying limit in effect on the dates the creditor received each consumer's individual application. The condition specified in § 1026.43(a)(3)(v)(D)(*3*), which relates to the current extension of credit, provides that the extension of credit must be to a consumer with income that does not exceed the qualifying limit specified in § 1026.43(a)(3)(v)(D)(*2*) in effect on the date the creditor received the consumer's application. For example, assume that a creditor with a tax exemption ruling under section 501(c)(3) of the Internal Revenue Code of 1986 has satisfied the conditions identified in § 1026.43(a)(3)(v)(D)(*1*) and (*2*). If, on May 21, 2014, the creditor in this example extends credit secured by a dwelling to a consumer whose application reflected income in excess of the qualifying limit identified in § 1026.43(a)(3)(v)(D)(*2*), the creditor has not satisfied the condition in § 1026.43(a)(3)(v)(D)(*3*) and this extension of credit is not exempt from the requirements of § 1026.43(c) through (f).

Legal Authority

Section 1026.43(a)(3)(v) is proposed pursuant to the Bureau's authority under section 105(a) and (f) of TILA. Pursuant to section 105(a) of TILA, the Bureau believes that this exemption is necessary and proper to effectuate the purposes of TILA. By ensuring the viability of the low- to moderate-income mortgage market, this exemption would ensure that consumers are offered and receive residential mortgage loans on terms that reasonably reflect their ability to repay. Without the exemption the Bureau believes that low- to moderate-income consumers would be denied access to the responsible and affordable credit offered by these creditors, which is contrary to the purposes of TILA. This exemption is consistent with the goals of TILA section 129C by ensuring that consumers are able to obtain responsible, affordable credit from the nonprofit creditors discussed above.

The Bureau has considered the factors in TILA section 105(f) and believes that, for the reasons discussed above, an exemption is appropriate under that provision. Specifically, the Bureau believes that the proposed exemption is appropriate for all affected consumers, regardless of their other financial arrangements and financial sophistication and the importance of the loan to them. Similarly, the Bureau believes that the proposed exemption is appropriate for all affected loans, regardless of the amount of the loan and whether the loan is secured by the principal residence of the consumer. Furthermore, the Bureau believes that, on balance, the proposed exemption will simplify the credit process without undermining the goal of consumer protection or denying important benefits to consumers. Based on these considerations and the analysis discussed elsewhere in this proposal, the Bureau believes that the proposed exemptions are appropriate. The Bureau recognizes that its exemption and exception authorities apply to a class of transactions, and proposes to apply these authorities to the loans covered under the proposal of the entities proposed for potential exemption.

43(a)(3)(vi)

Background

Several commenters requested that the Bureau modify the ability-to-repay requirements to accommodate extensions of credit made pursuant to a

[130] 26 U.S.C. 501(c)(3), 508(a); 26 CFR 1.508–1.

[131] *Id. See, e.g.,* U.S. Gov't Accountability Office, GAO–07–563, *Thousands of Organizations Exempt from Federal Income Tax Owe Nearly $1 Billion in Payroll and Other Taxes* (2007) 5–6.

homeownership stabilization or foreclosure prevention program from the ability-to-repay requirements. The Bureau is concerned that the ability-to-repay requirements are not sufficiently flexible, or may be unduly burdensome, with respect to extensions of credit made pursuant to these programs, which are intended to assist consumers at risk of default, foreclosure, or who were otherwise harmed by the financial crisis. Generally, consumers are able to obtain new extensions of credit, refinancings of existing mortgage loans, or loan modification agreements in connection with these programs. As a threshold matter, determining the applicability of these programs to the ability-to-repay requirements implicates the refinancing provisions under § 1026.20 of Regulation Z as well as the payment shock refinancing provisions under TILA section 129C(a)(6)(E), as implemented by § 1026.43(d).

Refinancings generally. Regulation Z contains several provisions regarding when a transaction is considered a ''refinancing,'' and therefore subject to the requirements of TILA. Section 1026.20(a) currently provides that ''a refinancing occurs when an existing obligation that was subject to this subpart is satisfied and replaced by a new obligation undertaken by the same consumer. A refinancing is a new transaction requiring new disclosures to the consumer.'' Comment 20(a)–1, which clarifies this general definition, provides that a refinancing is a new transaction requiring a complete new set of disclosures. Whether a refinancing has occurred is determined by reference to whether the original obligation has been satisfied or extinguished and replaced by a new obligation, based on the parties' contract and applicable law. Comment 20(a)–1 further explains that the refinancing may involve the consolidation of several existing obligations, disbursement of new money to the consumer or on the consumer's behalf, or the rescheduling of payments under an existing obligation. In any form, the new obligation must completely replace the prior one. However, changes in the terms of an existing obligation, such as the deferral of individual installments, will not constitute a refinancing unless accomplished by the cancellation of that obligation and the substitution of a new obligation. Furthermore, a substitution of agreements that meets the refinancing definition will require new disclosures, even if the substitution does not substantially alter the prior credit terms. Comment 20(a)–5 explains that § 1026.20(a) applies only to refinancings undertaken by the original creditor or a holder or servicer of the original obligation. A ''refinancing'' by any other person is a new transaction under the regulation, not a refinancing under § 1026.20(a).

There are five types of transactions, identified in § 1026.20(a)(1) through (5), that are not considered refinances, three of which are relevant for purposes of these proposed exemptions. First, § 1026.20(a)(1) provides that a renewal of a single payment obligation with no change in the original terms shall not be treated as a refinancing. Comment 20(a)(1)–1 clarifies that this exception applies both to obligations with a single payment of principal and interest and to obligations with periodic payments of interest and a final payment of principal. In determining whether a new obligation replacing an old one is a renewal of the original terms or a refinancing, the creditor may consider it a renewal even if: (1) Accrued unpaid interest is added to the principal balance; (2) changes are made in the terms of renewal resulting from the factors listed in § 1026.17(c)(3); [132] and (3) the principal at renewal is reduced by a curtailment of the obligation.

Second, § 1026.20(a)(2) provides that a reduction in the APR with a corresponding change in the payment schedule shall not be considered a refinancing. Comment 20(a)(2)–1 explains that ''a reduction in the annual percentage rate with a corresponding change in the payment schedule is not a refinancing. If the annual percentage rate is subsequently increased (even though it remains below its original level) and the increase is effected in such a way that the old obligation is satisfied and replaced, new disclosures must then be made.'' Comment 20(a)(2)–2 further clarifies that a corresponding change in the payment schedule to implement a lower APR would be a shortening of the maturity, or a reduction in the payment amount or the number of payments of an obligation. Additionally, the exemption in § 1026.20(a)(2) does not apply if the maturity is lengthened, or if the payment amount or number of payments is increased beyond that remaining on the existing transaction.

Third, § 1026.20(a)(4) provides that a change in the payment schedule or a change in collateral requirements as a result of the consumer's default or delinquency, unless the rate is increased, or the new amount financed exceeds the unpaid balance plus earned finance charge and premiums for continuation of insurance of the types described in § 1026.4(d) shall not be considered a refinancing. Comment 20(a)(4)–1, which refers to the agreements described in § 1026.20(a)(4) as ''workout agreements,'' explains that a workout agreement is not a refinancing unless the APR is increased or additional credit is advanced beyond amounts already accrued plus insurance premiums.

TILA section 129C(a)(6)(E). As discussed further in the Bureau's 2013 ATR Final Rule, two provisions of section 1411 of the Dodd-Frank Act address refinancing of existing mortgage loans under the ability-to-repay requirements. As amended by the Dodd-Frank Act, TILA section 129C(a)(5) provides that Federal agencies may create an exemption from the income and verification requirements for certain streamlined refinancings of loans made, guaranteed, or insured by various federal agencies. 15 U.S.C. 1639(a)(5). In addition, TILA section 129C(a)(6)(E) provides special ability-to-repay requirements to encourage applications to refinance existing ''hybrid loans'' into ''standard loans'' with the same creditor, where the consumer has not been delinquent on any payments on the existing loan and the monthly payments would be reduced under the refinanced loan. 15 U.S.C. 1639c(a)(6)(E). The statute allows creditors to give special weight to the mortgagor's good standing and to whether the refinancing would prevent a likely default after the interest rate on the existing loan resets, as well as other potentially favorable treatment to the consumer. However, it does not expressly exempt applications for such ''payment shock refinancings'' from TILA's general ability-to-repay requirements.

The Bureau implemented TILA section 129C(a)(6)(E) in § 1026.43(d). Although the Bureau used its authority to interpret and implement TILA to modify the payment shock refinancing provisions, § 1026.43(d) still applies to only a narrow category of refinancings. Specifically, § 1026.43(d) applies only if:

- The refinancing is conducted in response to an application to refinance a non-standard mortgage into a standard mortgage;
- The creditor for the standard mortgage is the current holder of the existing non-standard mortgage or the

[132] Section 1026.17(c)(3) provides that the creditor may disregard the effects of the following in making calculations and disclosures: (i) That payments must be collected in whole cents; (ii) that dates of scheduled payments and advances may be changed because the scheduled date is not a business day; (iii) that months have different numbers of days; and (iv) the occurrence of leap year.

servicer acting on behalf of the current holder;

• The creditor receives the consumer's written application for the standard mortgage before the non-standard mortgage is recast;

• The creditor considers whether the standard mortgage likely will prevent a default by the consumer on the non-standard mortgage once the loan is recast;

• The creditor determines that the monthly payment for the standard mortgage is materially lower than the monthly payment for the non-standard mortgage, as calculated under § 1026.43(d)(5);

• The consumer has made no more than one payment more than 30 days late on the non-standard mortgage during the 12 months immediately preceding the application for refinancing;

• The consumer has made no payments more than 30 days late during the six months immediately preceding the creditor's receipt of the consumer's written application for the standard mortgage; and

• If the non-standard mortgage was consummated on or after January 10, 2014, the non-standard mortgage was made in accordance with § 1026.43(c) or (e), as applicable.

With the exception of the last requirement, which the Bureau added using discretionary authority to prevent potential evasion of the statutory scheme, all of these requirements are based on statutory text. The definition of ''standard mortgage'' also constrains application of the provision; while it does not require that the non-standard loan be replaced by a qualified mortgage, it does incorporate some of the product feature protections from the qualified mortgage framework.[133] Thus, while § 1026.43(d) may facilitate refinancings for some consumers at risk of default, § 1026.43(d) would not apply to many extensions of credit made in connection with homeownership stabilization or foreclosure prevention programs. These extensions of credit remain subject to the ability-to-repay requirements.

Concerns raised in response to the Board's 2011 ATR Proposal. In response to the Board's request for feedback, many commenters requested that the Bureau accommodate programs designed to stabilize homeownership or mitigate the risks of foreclosure in the 2013 ATR Final Rule. One industry commenter argued that programs developed in response to the financial crisis, such as the Home Affordable Refinance Program, should be exempt from the ability-to-repay requirements. This commenter noted that a complete exemption was necessary because many of these programs' requirements conflicted with the proposed ability-to-repay requirements.

Discussion

Prompted by the feedback provided, the Bureau has conducted a thorough review of homeownership stabilization programs under sections 101 and 109 of the Emergency Economic Stabilization Act of 2008 (12 U.S.C. 5211, 5219) (EESA), such as the Making Home Affordable program administered by the Treasury Department. Based on this analysis, the Bureau believes it may be appropriate to exempt any extension of credit under these programs from the ability-to-repay requirements.

At the outset the Bureau notes that some of the activities conducted under these EESA programs (as well as a wide variety of proprietary loan modification programs by private creditors) would not trigger ability-to-repay requirements because such transactions involve modifications of existing loans by the holder or servicer of the original loan obligation rather than a new extension of credit through a refinancing. As discussed above, Regulation Z distinguishes between refinancing of an existing credit obligation by a creditor that is not the holder or servicer of the existing obligation, which trigger generally TILA's requirements, and refinancings by the existing holder or servicer, which trigger TILA's requirements under certain circumstances. Specifically, with regard to activities by the holder or servicer of the existing obligation, § 1026.20(a) and related commentary state that a refinancing that triggers TILA disclosures only occurs where there is a new extension of credit that entirely replaces an existing obligation with a new obligation undertaken by the same consumer. As discussed above, the regulation and commentary distinguish lesser modifications that do not completely extinguish the original obligation and further provide various exceptions stating that certain activities by the holder or servicer of the original obligation do not constitute refinancings that trigger disclosure requirements even if the activities involve replacement of the original obligation. The list of such exceptions includes certain credit renewals (including those with principal reductions), reductions in APR with corresponding changes in the payment schedule, and certain ''workout agreements'' in response to a consumer's default or delinquency.

Although many activities conducted under these EESA programs do not implicate TILA, the Bureau is concerned that the ability-to-repay requirements may deter creditors from participating in these programs. The Bureau is concerned that where refinancings and other new extensions of credit are involved, application of the ability-to-repay requirements and liabilities in addition to existing EESA program requirements could significantly chill creditor participation. The requirements of these programs appear to be comprehensive and tailored to the specific needs of consumers who are at risk of default or foreclosure. The Bureau also is concerned that requiring credit extended pursuant to these programs to comply with the ability-to-repay provisions may unnecessarily interfere with these unique underwriting requirements, which would make it more difficult for many consumers to qualify for assistance and increase the cost of credit for those who do, thereby impacting the availability of credit for these at-risk consumers. Further, participation in the programs is entirely voluntary, and already involves substantial compliance burdens in order to satisfy Federal requirements. If those burdens are exacerbated by the addition of the ability-to-repay requirements, the Bureau is concerned that creditors may elect not to participate in these programs, rather than investing resources complying with the requirements of both homeownership stabilization programs and the ability-to-repay provisions. A response such as this would frustrate efforts to ameliorate the effects of the financial crisis and disrupt the financial market for consumers at risk of foreclosure or default, thereby harming those in need of the assistance provided under these programs.

Due to these factors, the Bureau has considered whether it would be practical to address potential chilling effects with only a narrow exemption from or modification to the ability-to-repay requirements. An exemption from

[133] Specifically, § 1026.43(d)(1)(ii) also defines ''standard mortgage'' as an extension of credit subject to the ability-to-repay requirements: (1) that provides for regular periodic payments that do not cause the principal balance to increase, allow the consumer to defer repayment of principal, or result in a balloon payment, as defined in § 1026.18(s)(5)(i); (2) for which the total points and fees payable in connection with the transaction do not exceed the amounts specified for qualified mortgages in § 1026.43(e)(3); (3) for which the term does not exceed 40 years; (4) for which the interest rate is fixed for at least the first five years after the date on which the first regular periodic payment will be due; and (5) for which the proceeds from the loan are used solely to pay off the outstanding principal balance on the non-standard mortgage, or to pay closing or settlement charges required to be disclosed under the Real Estate Settlement Procedures Act, 12 U.S.C. 2601 *et seq.*

only the requirement to consider the consumer's debt-to-income ratio under § 1026.43(c)(2)(7), or a modification to the refinancing provisions in § 1026.43(d), for instance, may address only partially the inconsistencies between the requirements of these programs and the ability-to-repay requirements. Also, if redundancies or inconsistencies such as these exist, the ability-to-repay requirements may not provide additional, meaningful protection to consumers.

Accordingly, proposed § 1026.43(a)(3)(vi) provides that an extension of credit made pursuant to a program authorized by sections 101 and 109 of the Emergency Economic Stabilization Act of 2008 (12 U.S.C. 5211; 5219) is exempt from § 1026.43(c) through (f). Although this proposed exemption may help consumers who are at risk of default or foreclosure and are likely to need responsible and affordable credit, the Bureau wishes to obtain additional information regarding whether consumers seeking assistance under these Federal programs may need the protection afforded by the ability-to-repay requirements. Therefore, in addition to soliciting general feedback regarding whether this proposed exemption is appropriate, the Bureau solicits feedback regarding whether applicability of the ability-to-repay requirements would constrict the availability of credit offered under these programs, whether consumers have suffered financial loss or other harm by creditors participating in these programs, and the extent to which the requirements of these Federal programs account for a consumer's ability to repay.

Proposed comment 43(a)(3)(vi)–1 explains that creditors need not determine whether an activity under EESA constitutes a loan modification or workout, a refinancing that is subject to new disclosures under § 1026.20(a), or an independent extension of new credit that would trigger TILA requirements in any event. Under any of these scenarios, § 1026.43(c) through (f) would not apply. In this respect, the exemption proposed under § 1026.43(a)(3)(vi) is broader than the proposed exemptions for other housing stabilization programs. Creditors participating in the other housing stabilization programs identified in proposed § 1026.43(a)(3)(vii) and (viii) would not be subject to ability-to-repay requirements when providing loan modifications and workouts, and would be exempt when conducting refinancings under § 1026.20(a) as the holder or servicer of the original obligation. However, independent refinancings as third-party creditors would be subject to ability-to-repay requirements under the narrower exemptions provided for housing stabilization programs offered by the Federal Housing Administration, Department of Veterans Affairs, Department of Agriculture, or Fannie Mae or Freddie Mac while they are under conservatorship.

Section 1026.43(a)(3)(vi) is proposed pursuant to the Bureau's authority under section 105(a) and (f) of TILA. Pursuant to section 105(a) of TILA, the Bureau finds that this exemption is necessary and proper to effectuate the purposes of TILA. This exemption would ensure that consumers are offered and receive residential mortgage loans on terms that reasonably reflect their ability to repay. In the Bureau's judgment extensions of credit made pursuant to a program authorized by sections 101 and 109 of the Emergency Economic Stabilization Act of 2008 sufficiently account for a consumer's ability to repay, and the exemption ensures that consumers are able to receive assistance under these programs. Furthermore, without the exemption the Bureau believes that consumers at risk of default or foreclosure would be denied access to the responsible, affordable credit offered under these programs, which is contrary to the purposes of TILA.

The Bureau has considered the factors in TILA section 105(f) and believes that, for the reasons discussed above, an exemption is appropriate under that provision. Specifically, the Bureau believes that the proposed exemption is appropriate for all affected consumers, regardless of their other financial arrangements and financial sophistication and the importance of the loan to them. Similarly, the Bureau believes that the proposed exemption is appropriate for all affected loans, regardless of the amount of the loan and whether the loan is secured by the principal residence of the consumer. Furthermore, the Bureau believes that, on balance, the proposed exemption will simplify the credit process without undermining the goal of consumer protection or denying important benefits to consumers. Based on these considerations and the analysis discussed elsewhere in this proposal, the Bureau believes that the proposed exemptions are appropriate. The Bureau recognizes that its exemption and exception authorities apply to a class of transactions, and proposes to apply these authorities to the loans covered under the proposal of the entities proposed for potential exemption.

43(a)(3)(vii)

As discussed under § 1026.43(a)(3)(vi) above, a transaction is subject to the ability-to-repay requirements if, pursuant to the definition of refinancing under § 1026.20(a), the existing obligation is satisfied and replaced by the new obligation, provided that the transaction is not otherwise exempt under § 1026.20(a)(1) through (5).

Section 129C(a)(5) of TILA, as added by section 1411 of the Dodd-Frank Act, provides that the Department of Housing and Urban Development, the Department of Veterans Affairs, the Department of Agriculture, and the Rural Housing Service may modify certain ability-to-repay requirements, with respect to certain loans made, guaranteed, or insured by such agencies. These agencies may exempt refinancings from the income verification requirements in TILA section 129C(a)(4) provided that the conditions identified in TILA section 129C(a)(5)(A) through (G) are met. Specifically, the consumer must not be 30 days or more past due on the prior existing residential mortgage loan, the refinancing may not increase the principal balance outstanding on the prior existing residential mortgage loan, except to the extent of fees and charges allowed by the department or agency making, guaranteeing, or insuring the refinancing, and the total points and fees (as defined in TILA section 103(aa)(4), other than bona fide third party charges not retained by the mortgage originator, creditor, or an affiliate of either) payable in connection with the refinancing do not exceed 3 percent of the total new loan amount. Further, the interest rate on the refinancing must be lower than the interest rate of the original loan, unless the consumer is replacing an adjustable-rate loan with a fixed-rate loan, under guidelines that the department or agency shall establish for loans they make, guarantee, or issue. The refinancing must also be subject to a payment schedule that will fully amortize the refinancing and does not result in a balloon payment, as defined in TILA section 129C(b)(2)(A)(ii), in accordance with the regulations prescribed by the department or agency making, guaranteeing, or insuring the refinancing. The final condition provides that both the residential mortgage loan being replaced and the new refinancing must satisfy all requirements of the department or agency making, guaranteeing, or insuring the refinancing.

The Board solicited feedback in its 2011 ATR Proposal regarding the impact of certain proposed provisions related to refinancings. The Board requested comment regarding whether exemptions from the ability-to-repay requirements, other than those proposed, were appropriate.[134] The Board specifically solicited comment on whether there were any appropriate exemptions consistent with the Board's authority in TILA section 129C(b)(3)(B)(i).[135] Several commenters argued that the ability-to-repay requirements adopted by the Bureau should account for the requirements of Federal agency programs. Some commenters stated that Federal agency loans, such as loans made under a program administered by the U.S. Department of Housing and Urban Development, should be exempt from several of the ability-to-repay requirements.

The Federal agencies described above have not yet prescribed rules related to the ability-to-repay requirements for refinances, pursuant to TILA section 129C(a)(5), or the definition of qualified mortgage, pursuant to TILA section 129C(b)(3)(B)(ii). An exemption to the ability-to-repay requirements may be necessary until these Federal agencies have prescribed such rules. Without such an exemption, the Bureau is concerned that the ability-to-repay provisions would unnecessarily interfere with requirements of these Federal agency refinance programs, which would make it more difficult for many consumers to qualify for these programs and increase the cost of credit for those who do, thereby constraining the availability of responsible, affordable credit for consumers.

Accordingly, the Bureau is proposing § 1026.43(a)(3)(vii), which provides that an extension of credit that is a refinancing, as defined under § 1026.20(a) but without regard for whether the creditor is the creditor, holder, or servicer of the original obligation, that is eligible to be insured, guaranteed, or made pursuant to a program administered by the Federal Housing Administration, U.S. Department of Veterans Affairs, or the U.S. Department of Agriculture is exempt from § 1026.43(c) through (f), provided that the agency administering the program under which the extension of credit is eligible to be insured, guaranteed, or made has not prescribed rules pursuant to section 129C(a)(5) or 129C(b)(3)(B)(ii) of TILA. The Bureau solicits comment regarding whether this exemption is appropriate, whether there are any additional conditions that should be required, whether the ability-to-repay requirements would negatively affect the availability of credit offered under Federal agency programs, and whether consumers could be harmed by exempting these extensions of credit from the ability-to-repay requirements.

As explained above, TILA section 129C(a)(5) permits the Department of Housing and Urban Development, the Department of Veterans Affairs, the Department of Agriculture, and the Rural Housing Service to exempt certain refinancings from the income verification requirements in TILA section 129C(a)(4) provided that the conditions identified in TILA section 129C(a)(5)(A) through (G) are met. For the reasons discussed in this section the Bureau believes that this temporary exemption may be necessary to preserve access to affordable and responsible credit by maintaining the status quo in the Federal agency refinancing market until the Federal agencies exercise the authority granted under TILA section 129C(a)(5) or issue rules implementing TILA section 129C(b)(3)(B)(ii). The temporary nature of this exemption ensures that these Federal agencies retain their discretionary authority under TILA section 129C(a)(5).

Proposed comment 43(a)(3)(vii)–1 clarifies that the requirements of § 1026.43(c) through (f) do not apply to an extension of credit that is a refinancing, as defined by § 1026.20(a) but without regard for whether the creditor is the creditor, holder, or servicer of the original obligation, that is eligible to be insured, guaranteed, or made pursuant to programs administered by the Federal agencies identified in § 1026.43(a)(3)(vii), provided that rules issued by such agencies pursuant to TILA section 129C(a)(5) or 129C(b)(3)(B)(ii) have not become effective on or before the date the refinancing is consummated. This proposed comment also provides three illustrative examples. The first example clarifies that, if a consumer applies for a refinancing that is eligible to be insured, guaranteed, or made pursuant to a program administered by the U.S. Department of Veterans Affairs, and the U.S. Department of Veterans Affairs has issued rules pursuant to section 129C(a)(5) or 129C(b)(3)(B)(ii) of TILA that have become effective, the exemption in § 1026.43(a)(3)(vii) does not apply because those rules will separately govern the status of U.S. Department of Veterans Affairs loans.

The second illustrative example in proposed comment 43(a)(3)(vii)–1 rests on two assumptions: first, that a consumer applies for a refinancing of a subordinate-lien mortgage loan that is eligible to be insured, guaranteed, or made pursuant to a program administered by the U.S. Department of Veterans Affairs and the U.S. Department of Veterans Affairs has issued rules pursuant to TILA section 129C(b)(3)(B)(ii) or 129C(a)(5) that have become effective; second, that such effective rules apply to refinancings of first-lien mortgage loans, but not subordinate-lien mortgage loans. Based on these assumptions the exemption in § 1026.43(a)(3)(vii) does not apply, regardless of the status of the particular loans under the rules issued, because the U.S. Department of Veterans Affairs has issued rules pursuant to TILA section 129C(b)(3)(B)(ii) or 129C(a)(5) that have become effective. The exemption does not apply even if the applicability of such Federal agency rules is determined based on program type instead of loan type. Thus, the exemption in § 1026.43(a)(3)(vii) does not apply even if the U.S. Department of Veterans Affairs rules do not apply to the particular U.S. Department of Veterans Affairs program under which the refinancing is eligible to be insured, guaranteed, or made.

The third illustrative example under proposed comment 43(a)(3)(vii)–1 is also predicated on two assumptions: First, that a consumer applies for a refinancing that is eligible to be insured, guaranteed, or made pursuant to a program administered by the Federal Housing Administration and the Federal Housing Administration has issued rules pursuant to TILA section 129C(b)(3)(B)(ii) or 129C(a)(5) that have become effective; second, that the refinancing for which the consumer applies is also eligible to be insured, guaranteed, or made pursuant to a program administered by the U.S. Department of Agriculture, but the U.S. Department of Agriculture has not issued rules pursuant to TILA section 129C(b)(3)(B)(ii) or 129C(a)(5), or the U.S. Department of Agriculture has issued rules implementing TILA section 129C(b)(3)(B)(ii) or 129C(a)(5) that have not yet taken effect at the time the refinancing is consummated. Based on these assumptions the exemption applies to that refinancing because the refinancing is eligible to be insured, guaranteed, or made pursuant to a program administered by a Federal agency identified in § 1026.43(a)(3)(vii), and such Federal agency has not issued rules pursuant to section 129C(b)(3)(B)(ii) or 129C(a)(5) of TILA that have become effective.

Section 1026.43(a)(3)(vii) is proposed pursuant to the Bureau's authority under section 105(a) and (f) of TILA. Pursuant to section 105(a) of TILA, the Bureau finds that this exemption is

[134] 76 FR 27390, 27448.

[135] 76 FR 27390, 27456.

necessary and proper to effectuate the purposes of TILA. This exemption would ensure that consumers are offered and receive residential mortgage loans on terms that reasonably reflect their ability to repay. In the Bureau's judgment refinancings made pursuant to the Federal agency refinancing programs discussed above sufficiently account for a consumer's ability to repay, and the exemption ensures that consumers are able to obtain refinancing credit under these programs. Furthermore, without the exemption the Bureau believes that consumers seeking Federal agency refinancings would be denied access to the responsible, affordable credit offered under these programs, which is contrary to the purposes of TILA.

The Bureau has considered the factors in TILA section 105(f) and believes that, for the reasons discussed above, an exemption is appropriate under that provision. Specifically, the Bureau believes that the proposed exemption is appropriate for all affected consumers, regardless of their other financial arrangements and financial sophistication and the importance of the loan to them. Similarly, the Bureau believes that the proposed exemption is appropriate for all affected loans, regardless of the amount of the loan and whether the loan is secured by the principal residence of the consumer. Furthermore, the Bureau believes that, on balance, the proposed exemption will simplify the credit process without undermining the goal of consumer protection or denying important benefits to consumers. Based on these considerations and the analysis discussed elsewhere in this proposal, the Bureau believes that the proposed exemptions are appropriate. The Bureau recognizes that its exemption and exception authorities apply to a class of transactions, and proposes to apply these authorities to the loans covered under the proposal of the entities proposed for potential exemption.

43(a)(3)(viii)

As discussed under § 1026.43(a) above, § 1026.43(c), which implements section 129C(a)(1) of TILA, requires a creditor to make a reasonable and good faith determination based on verified and documented information that, at the time the mortgage loan is consummated, the consumer has a reasonable ability to repay the loan according to its terms, including all applicable taxes, insurance (including mortgage guarantee insurance), and assessments. Section 1026.43(a)(1) through (3), which implements TILA sections 103(cc)(5) and 129C(a)(8), applies these ability-to-repay requirements to all closed-end mortgage loans secured by a one- to four-unit dwelling, except loans secured by a consumer's interest in a timeshare plan, reverse mortgages, temporary or ''bridge'' loans with a term of 12 months or less, and the construction phrase of a construction-to-permanent loan. As discussed under § 1026.43(a)(3)(vi) above, a transaction is subject to the ability-to-repay requirements if, pursuant to the definition of refinancing under § 1026.20(a), the existing obligation is satisfied and replaced by the new obligation, provided that the transaction is not otherwise exempt under § 1026.20(a)(1) through (5).

The Board did not include an exemption related to refinancing programs administered by Fannie Mae or Freddie Mac in its 2011 ATR Proposal. However, the Board solicited feedback regarding the impact of certain proposed provisions related to refinancings. The Board requested comment regarding whether exemptions from the ability-to-repay requirements, other than those proposed, were appropriate.[136] The Board specifically solicited comment on whether there were any appropriate exemptions consistent with the Board's authority in TILA section 129C(b)(3)(B)(i).[137] In response, industry commenters, industry trade organization commenters, GSE commenters, and consumer advocate commenters argued that the ability-to-repay requirements should accommodate loans held by Fannie Mae and Freddie Mac while in conservatorship.

As with the Federal homeownership stabilization and Federal agency refinance programs discussed above, the Bureau is concerned that application of the ability-to-repay requirements may constrict certain types of credit, thereby harming certain consumers. The risk of impairing credit availability is of particular concern with respect to programs offered by Fannie Mae and Freddie Mac intended to provide affordable refinancings to consumers harmed by the financial crisis. As discussed in part III above, programs such as HARP enable consumers with high loan-to-value ratios to obtain affordable refinancings. The GSEs implemented these programs while under the conservatorship of FHFA, which has defined these programs as ''eligible targeted refinancing programs.''[138] These programs are intended to assist consumers with loan-to-value ratios that are high enough to make obtaining a refinancing difficult, if not impossible. Programs such as HARP employ underwriting requirements tailored to the unique characteristics of these consumers. The GSEs have modified these programs over time to increase the number of distressed consumers eligible for an affordable refinancing. As the GSEs have expanded access to these programs, FHFA has ensured that these programs require careful underwriting. These carefully calibrated underwriting requirements promote GSE stability by ensuring that consumers who receive these refinancings are able to repay the loan.

Given the complexity of underwriting requirements for programs such as HARP, the Bureau is concerned that the ability-to-repay requirements may add unnecessary additional costs and may cause needless delays for consumers who seek refinancings pursuant to an eligible targeted refinancing program offered by one of these entities. While HARP, which is the most well-known eligible targeted refinancing program, is scheduled to expire prior to the effective date of the Bureau's 2013 ATR Final Rule, FHFA may decide to extend this program, or design a similar program intended to preserve credit for distressed homeowners. Furthermore, the risk of harm to consumers may be insignificant while these entities remain in conservatorship. The current GSE underwriting requirements for targeted eligible refinancing programs appear to sufficiently account for the consumer's ability to repay the mortgage loan, and FHFA supervision may be sufficient to ensure that consumers are extended only affordable and responsible refinancings by these entities.

Accordingly, the Bureau is proposing § 1026.43(a)(3)(viii), which provides that an extension of credit that is a refinancing, as defined under § 1026.20(a) but without regard for whether the creditor is the creditor, holder, or servicer of the original obligation, that is eligible for purchase or guarantee by Fannie Mae or Freddie Mac is exempt from § 1026.43(c) through (f), provided that the refinancing is made pursuant to an eligible targeted refinancing program, as defined under 12 CFR 1291.1, that such entities are operating under the conservatorship or receivership of the Federal Housing Finance Agency pursuant to section 1367 of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (12 U.S.C. 4617(i)) on the date the refinancing is consummated, that the existing obligation satisfied and replaced by the refinancing is owned by Fannie Mae or Freddie Mac, that the existing obligation

[136] 76 FR 27390, 27448.

[137] 76 FR 27390, 27456.

[138] *See, e.g.,* 12 CFR 1291.1; 74 FR 38514, 38516 (Aug. 4, 2009).

satisfied and replaced by the refinancing was not consummated on or after January 10, 2014, and that the refinancing was not consummated on or after January 10, 2021. Although this proposed exemption may be appropriate, the Bureau is concerned that unscrupulous creditors may use the exemption to engage in loan-flipping or other harmful practices. Therefore, the Bureau believes that this exemption should be limited to transactions where the existing obligation satisfied and replaced by the refinancing was not consummated on or after January 10, 2014, the effective date of the Bureau's 2013 ATR Final Rule. The Bureau requests feedback on whether this exemption is appropriate, whether this exemption will ensure access to responsible and affordable refinancing credit, and whether consumers could be harmed by this exemption.

The proposed exemption refers to eligible targeted refinancing programs, as defined pursuant to regulations prescribed by FHFA. As discussed above, the Bureau believes that FHFA oversight is important to ensure that distressed consumers receive refinancing credit extended in a responsible manner. Further, the Bureau believes that referring to FHFA regulations will ensure that any modifications to the definition will be made after notice and comment, thereby affording the public and the Bureau the opportunity to address potential changes. However, the Bureau requests comment regarding whether it would be more appropriate to refer to another public method of identifying these programs, and, if so, what method of public identification would be appropriate. The Bureau also solicits feedback regarding whether reference to a notice published by FHFA pursuant to 12 CFR 1253.3 or 1253.4 would facilitate compliance more effectively than the proposed reference to 12 CFR 1291.1.

Proposed comment 43(a)(3)(viii)–1 explains that § 1026.43(a)(3)(viii) provides an exemption from the requirements of § 1026.43(c) through (f) for certain extensions of credit that are considered refinancings, as defined in § 1026.20(a) but without regard for whether the creditor is the creditor, holder, or servicer of the original obligation, that are eligible for purchase or guarantee by Fannie Mae or Freddie Mac. The comment further explains that the exemption provided by § 1026.43(a)(3)(viii) is available only while these entities remain in conservatorship. For example, if Fannie Mae remains in conservatorship, but Freddie Mac exits conservatorship, the exemption continues to apply to refinancings that are eligible for purchase by Fannie Mae, provided the other conditions specified in § 1026.43(a)(3)(viii) are met. Further, as noted above, the exemption is available only if the existing obligation that will be satisfied and replaced by the refinancing was consummated prior to January 10, 2014. For example, if a consumer applies for an extension of credit that is a refinancing, as defined by § 1026.20(a), that is eligible to be purchased by Fannie Mae or Freddie Mac, but the consumer's current mortgage loan was consummated on or after January 10, 2014, the exemption provided by § 1026.43(a)(3)(viii) does not apply.

Section 1026.43(a)(3)(viii) is proposed pursuant to the Bureau's authority under section 105(a) and (f) of TILA. Pursuant to section 105(a) of TILA, the Bureau finds that this exemption is necessary and proper to effectuate the purposes of TILA. This exemption would ensure that consumers are offered and receive residential mortgage loans on terms that reasonably reflect their ability to repay. In the Bureau's judgment the exemption ensures that consumers are able to obtain credit under refinancing programs administered by Fannie Mae and Freddie Mac. Furthermore, without the exemption the Bureau believes that consumers seeking a refinancing would be denied access to the responsible, affordable credit offered by these entities, which is contrary to the purposes of TILA.

The Bureau has considered the factors in TILA section 105(f) and believes that, for the reasons discussed above, an exemption is appropriate under that provision. Specifically, the Bureau believes that the proposed exemption is appropriate for all affected consumers, regardless of their other financial arrangements and financial sophistication and the importance of the loan to them. Similarly, the Bureau believes that the proposed exemption is appropriate for all affected loans, regardless of the amount of the loan and whether the loan is secured by the principal residence of the consumer. Furthermore, the Bureau believes that, on balance, the proposed exemption will simplify the credit process without undermining the goal of consumer protection or denying important benefits to consumers. Based on these considerations and the analysis discussed elsewhere in this proposal, the Bureau believes that the proposed exemptions are appropriate. The Bureau recognizes that its exemption and exception authorities apply to a class of transactions, and proposes to apply these authorities to the loans covered under the proposal of the entities proposed for potential exemption.

43(b) Definitions

43(b)(4)

Background

TILA section 129C(a)(1) through (4) and the Bureau's rules thereunder, § 1026.43(c), prohibit a creditor from making a residential mortgage loan unless the creditor makes a reasonable, good faith determination, based on verified and documented information, that the consumer has a reasonable ability to repay the loan. TILA section 129C(b) provides a safe harbor or rebuttable presumption of compliance with regard to these ability-to-repay requirements if a loan is a qualified mortgage. In general, a loan with a balloon payment cannot be a qualified mortgage. However, TILA section 129C(b)(2)(E) provides that certain balloon loans originated and held in portfolio by small creditors operating predominantly in rural or underserved areas can be qualified mortgages. Creditors may view qualified mortgage status as important at least in part because TILA section 130(a) and (k) provides that, if a creditor fails to comply with the ability-to-repay requirements, a consumer may be able to recover special statutory damages equal to the sum of all finance charges and fees paid within the first three years after consummation and may be able to assert the creditor's failure to comply to obtain recoupment or setoff in a foreclosure action even after the statute of limitations for affirmative claims has passed. TILA section 129C(b)(3)(B)(i) authorizes the Bureau to prescribe regulations that revise, add to, or subtract from the criteria that define a qualified mortgage upon a finding that such regulations are, among other things, necessary or proper to ensure that responsible, affordable credit remains available to consumers in a manner consistent with the purposes of TILA section 129C.

Section 1026.43(e) and (f) defines three categories of qualified mortgages. First, § 1026.43(e)(2) provides a general definition of a qualified mortgage. Second, § 1026.43(e)(4) provides that certain loans that are eligible to be purchased, guaranteed, or insured by certain governmental entities or Fannie Mae or Freddie Mac while operating under conservatorship are qualified mortgages. Section 1026.43(e)(4) expires after seven years and may expire sooner with respect to some loans if other governmental entities exercise their rulemaking authority under TILA section 129C. Third, § 1026.43(f) provides that certain balloon loans are qualified mortgages if they are made by a small creditor that:

- Had total assets less than $2 billion (adjusted for inflation) as of the end of the preceding calendar year;
- Together with all affiliates, extended 500 or fewer first-lien covered transactions during the preceding calendar year; and
- Extended more than 50 percent of its total covered transactions secured by properties that are in rural or underserved areas during the preceding calendar year.

Section 1026.43(f) includes only loans held in portfolio by these small creditors. Therefore, it includes only loans that were not subject, at consummation, to a commitment to be acquired by any other person. In addition, to prevent evasion, § 1026.43(f) includes only loans that are held in portfolio by the originating creditor for at least three years, subject to certain exceptions.

Section 1026.43(e)(1) provides that a qualified mortgage, regardless of which regulatory definition it falls under, may be subject to one of two different levels of protection from liability based on whether or not it is a higher-priced covered transaction as defined in § 1026.43(b)(4). Under § 1026.43(e)(1)(i), a qualified mortgage that is not a higher-priced covered transaction is subject to a conclusive presumption of compliance, or safe harbor. In contrast, under § 1026.43(e)(1)(ii) a qualified mortgage that is a higher-priced covered transaction is subject to a rebuttable presumption of compliance.

Section 1026.43(b)(4) defines a higher-priced covered transaction to mean a transaction within the scope of § 1026.43 with an annual percentage rate that exceeds the average prime offer rate for a comparable transaction as of the date the interest rate is set by 1.5 or more percentage points for a first-lien covered transaction or by 3.5 or more percentage points for a subordinate-lien covered transaction. These thresholds generally conform to the thresholds for ''higher-priced mortgage loans'' under § 1026.35.

The Bureau's Proposal Regarding Small Creditor Portfolio Loans

As discussed in the section-by-section analysis of § 1026.43(e)(5) below, the Bureau is proposing to create an additional category of qualified mortgages that would include certain loans originated and held in portfolio by small creditors. The Bureau proposes to amend § 1026.43(b)(4) to provide that a first-lien loan that is a qualified mortgage under proposed § 1026.43(e)(5) would be a higher-priced covered transaction if the annual percentage rate exceeds the average prime offer rate for a comparable transaction by 3.5 or more percentage points. This would have the effect of extending the qualified mortgage safe harbor to first-lien qualified mortgages made and held in portfolio by certain small creditors, as described in proposed § 1026.43(e)(5), that have an annual percentage rate between 1.5 and 3.5 percentage points higher than the average prime offer rate. Without the proposed change to § 1026.43(b)(4), these loans would be considered higher-priced covered transactions and would fall under the rebuttable presumption of compliance described in § 1026.43(e)(1)(ii).

The Bureau believes that the proposed change may be warranted to preserve access to credit for some consumers. As discussed above in part III, the Bureau understands that small creditors are a significant source of loans that do not conform to the requirements for government guarantee and insurance programs or purchase by entities such as Fannie Mae and Freddie Mac. The Bureau understands that larger creditors may be unwilling to make at least some of these loans because the consumers or properties involved do not conform to the standardized underwriting criteria used by larger creditors or are illiquid because they are non-conforming and therefore entail greater risk. For similar reasons, the Bureau understands that larger creditors may be unwilling to purchase such loans. Small creditors often are willing to evaluate the merits of unique consumers and properties using flexible underwriting criteria and make highly individualized underwriting decisions. Small creditors often hold these loans on their balance sheets, retaining the associated credit, liquidity, and other risks.

The Bureau also understands that small creditors are a significant source of credit in rural areas. As discussed above in part III, small creditors are significantly more likely than larger creditors to operate offices in rural areas, and there are hundreds of counties nationwide where the only creditors are small creditors and hundreds more where larger creditors have only a limited presence.

The Bureau also understands that small creditors may charge consumers higher interest rates and fees than larger creditors for several legitimate business reasons. As discussed above in part III, small creditors may pay more for funds than larger creditors. Small creditors generally rely heavily on deposits to fund lending activities and therefore pay more in expenses per dollar of revenue as interest rates fall and the spread between loan yields and deposit costs narrow. Small creditors also may rely more on interest income than larger creditors, as larger creditors obtain higher percentages of their income from noninterest sources such as trading, investment banking, and fiduciary services.

In addition, small creditors may find it more difficult to limit their exposure to interest rate risk than larger creditors and therefore may charge higher rates to compensate for that exposure. Similarly, any individual loan poses a proportionally more significant credit risk to a smaller creditor than to a larger creditor, and small creditors may charge higher rates or fees to compensate for that risk. Consumers obtaining loans that cannot readily be sold into the securitization markets also may pay higher interest rates and fees to compensate for the risk associated with the illiquidity of such loans.

Small creditors have repeatedly asserted to the Bureau and to other regulators that they are unable or unwilling to assume the risk of litigation associated with the ability-to-repay requirements and therefore are unwilling to make loans outside the scope of the qualified mortgage safe harbor. The Bureau does not believe that the regulatory requirement to make a reasonable and good faith determination based on verified and documented evidence that a consumer has a reasonable ability to repay would entail significant litigation risk for small creditors. As discussed in part III above, small creditors as a group have consistently experienced lower credit losses for residential mortgage loans than larger creditors. The Bureau believes this is strong evidence that small creditors have historically engaged in responsible mortgage underwriting that includes considered determinations of consumers' ability to repay, at least in part because they bear the risk of default associated with loans held in their portfolios. The Bureau also believes that because many small creditors use a lending model based on maintaining ongoing relationships with their customers and have specialized knowledge of the community in which they operate, they therefore may have a more comprehensive understanding of their customers' financial circumstances and may be better able to assess ability to repay than larger creditors. In addition, the Bureau believes that small creditors operating in limited geographical areas may face significant risk of harm to their reputation within their community if they make loans that consumers cannot repay.

However, the Bureau acknowledges that small creditors may be particularly burdened by the time, effort, and cost of ability-to-repay litigation and that it may be particularly difficult for small creditors to absorb the cost of adverse judgments. The Bureau therefore believes that small creditors may have a particular need for the protection from liability the qualified mortgage safe harbor provides.

The Bureau notes that the Board's proposed § 1026.43 did not include special provisions for portfolio loans made by small creditors and the Board's proposal did not address such an accommodation. However, several commenters on the Board's proposal urged the Bureau to adopt less stringent regulatory requirements for small creditors or for loans held in portfolio by small creditors. For example, at least two commenters on the Board's proposal, a credit union and a state trade group for small banks, urged the Bureau to exempt small portfolio creditors from the ability to repay and qualified mortgage rule. Two other trade group commenters urged the Bureau to adopt less stringent regulatory requirements for small creditors than for larger creditors at least in part because mortgage loans made by small creditors often are held in portfolio and therefore historically have been conservatively underwritten. A number of other commenters expressed concerns that the availability of portfolio mortgage loans from small creditors would be severely limited because the proposed exception for rural balloon loans was too restrictive. In addition, small creditors' concerns about compliance with the ability-to-repay rule and their perceived litigation risk have been repeatedly expressed to the Bureau by their trade associations and prudential regulators.

The existing qualified mortgage safe harbor applies only to loans for which the annual percentage rate is less than 1.5 percentage points above the average prime offer rate for comparable transactions. For the reasons stated above, the Bureau believes that many loans made by small creditors would exceed the current annual percentage rate threshold. The Bureau therefore is concerned that small creditors may reduce the number of mortgage loans they make or cease making mortgage loans altogether if subjected to the current ability-to-repay and qualified mortgage rules. The availability of mortgage credit for some consumers therefore could be limited. The Bureau believes that raising the interest rate threshold as proposed will preserve access to responsible, affordable credit for consumers that are unable to obtain less costly loans from other creditors because they do not qualify for conforming loans or because they live in rural or underserved areas.

Accordingly, the Bureau is proposing to use its authority under TILA sections 105(a) and 129C(b)(3)(B)(i) to permit certain small creditors to make first-lien portfolio loans at a higher annual percentage rate and still benefit from the qualified mortgage safe harbor. For the reasons stated above, the Bureau believes the proposed amendments are consistent with the purposes of TILA generally and TILA section 129C specifically. The Bureau solicits comment regarding whether the proposed amendment to § 1026.43(b)(4) is needed to preserve access to responsible, affordable mortgage credit and regarding any adverse effects the proposed amendment would have on consumers. The Bureau also solicits comment on the proposed 3.5 percentage point threshold and whether another threshold would be more appropriate. Finally, the Bureau solicits comment on whether, in order to preserve access to mortgage credit, the Bureau also should raise the threshold for subordinate-lien covered transactions that are qualified mortgages under § 1026.43(e)(5), and, if so, what threshold would be appropriate for those loans.

As discussed above, the Bureau is aware that certain small creditors originate balloon loans to hedge against interest rate risk. These small creditors usually offer consumers refinancings before the balloon payment becomes due. The Bureau believes that most small creditors that follow this practice will be eligible for either the balloon loan qualified mortgage provision in § 1026.43(f) or the small creditor portfolio exemption in proposed § 1026.43(e)(5). However, the Bureau solicits feedback regarding whether there are small creditors that would not be covered by these provisions. If such small creditors exist, the Bureau requests feedback regarding whether these creditors need additional time, beyond the January 10, 2014 effective date of the Bureau's 2013 ATR Final Rule, to comply with the ability-to-repay requirements, or if such creditors require any additional accommodations, modifications, or exemptions.

The Bureau's Proposal Regarding Balloon Loans

The Bureau also is proposing to amend the definition of higher-priced covered transaction in § 1026.43(b)(4) with respect to qualified mortgages that are balloon loans originated and held in portfolio by small creditors operating predominantly in rural or underserved areas as described in § 1026.43(f). The Board proposes to amend § 1026.43(b)(4) to provide that a first-lien loan that is a qualified mortgage under § 1026.43(f) is a higher-priced covered transaction if the annual percentage rate exceeds the average prime offer rate for a comparable transaction by 3.5 or more percentage points. This would have the effect of extending the qualified mortgage safe harbor described in § 1026.43(e)(1)(i) to first-lien balloon loans made and held in portfolio by small creditors operating predominantly in rural or underserved areas, as described in § 1026.43(f), that have an annual percentage rate between 1.5 and 3.5 percentage points above the average prime offer rate. Without the proposed change to § 1026.43(b)(4), these loans would be considered higher-priced covered transactions and would fall under the rebuttable presumption of compliance described in § 1026.43(e)(1)(ii).

The Bureau believes that the proposed change may be necessary to preserve access to responsible, affordable mortgage credit for consumers in rural and underserved areas. As discussed in part III above, the Bureau understands that larger creditors often are not present in rural and underserved areas and that the only sources of mortgage credit available to consumers in these areas therefore may be small creditors. The Bureau also understands that many of the small creditors lending in these areas depend on balloon payment features to limit their interest rate risk. These creditors rely on the fact that consumers will be forced to refinance before the balloon payment becomes due, giving the creditor an opportunity to impose a higher interest rate if, for example, market interest rates have risen.

These small creditors have repeatedly asserted to the Bureau and other regulators that they will not continue to extend mortgage credit unless they can make balloon loans that are covered by the qualified mortgage safe harbor. Section 1026.43(f), which implements TILA section 129C(b)(2)(E), provides that certain balloon loans made and held in portfolio by small creditors operating predominantly in rural or underserved areas are qualified mortgages. However, the Bureau believes that many of these qualified mortgages will have annual percentage rates higher than the safe harbor threshold.

As discussed above with regard to the Bureau's proposal regarding small creditor portfolio loans and in part III, small creditors, including small creditors operating in rural and underserved areas, may charge consumers higher interest rates and fees for several legitimate business reasons. Small creditors may pay more for funds than larger creditors. Small creditors generally rely heavily on deposits to fund lending activities and therefore pay more in expenses per dollar of revenue as interest rates fall and the spread between loan yields and deposit costs narrow. Small creditors also may rely more on interest income than larger creditors, as larger creditors obtain a higher percentage of their income from noninterest sources such as trading, investment banking, and fiduciary services.

In addition, small creditors may find it more difficult to limit their exposure to interest rate risk than larger creditors and therefore may charge higher rates to compensate for that exposure. Similarly, any individual loan poses a proportionally more significant credit risk to a smaller creditor than to a larger creditor, and small creditors may charge higher rates or fees to compensate for that risk. Consumers obtaining loans that cannot readily be sold into the securitization markets may also pay higher interest rates and fees to compensate for the risk associated with the illiquidity of such loans.

As also discussed above, the Bureau does not believe that small creditors, including those operating in rural and underserved areas, face significant litigation risk from the ability-to-repay requirements. Small creditors as a group have consistently experienced lower credit losses for residential mortgages than larger creditors. The Bureau believes this is strong evidence that small creditors have historically engaged in responsible mortgage underwriting that includes considered determinations of consumers' ability to repay, at least in part because they bear the risk of default associated with loans held in their portfolios. The Bureau also believes that because many small creditors use a lending model based on maintaining ongoing relationships with their customers and have specialized knowledge of the communities in which they operate, they therefore may have a more comprehensive understanding of their customers' financial circumstances and may be better able to assess ability to repay than larger creditors. In addition, the Bureau believes that small creditors operating in limited geographical areas may face significant risk of harm to their reputation within their community if they make loans that consumers cannot repay.

However, the Bureau acknowledges that small creditors may be particularly burdened by the time, effort, and cost of ability-to-repay litigation and that it may be particularly difficult for small creditors to absorb the cost of adverse judgments. The Bureau therefore believes that small creditors may have a particular need for the protection from liability the qualified mortgage safe harbor provides.

The existing qualified mortgage safe harbor applies to first-lien loans only if the annual percentage rate is less than 1.5 percentage points above the average prime offer rate for comparable transactions. The Bureau believes that many balloon loans made by small creditors operating in rural and underserved areas will exceed that threshold. The Bureau therefore is concerned that, unless § 1026.43(b)(4) is amended, small creditors operating in rural and underserved areas may reduce the number of mortgage loans they make or stop making mortgage loans altogether, further limiting the availability of mortgage credit in rural and underserved areas.

Accordingly, the Bureau therefore believes that it may be necessary to use its authority under TILA sections 105(a) and 129C(b)(3)(B)(i) to amend § 1026.43(b)(4) as proposed in order to ensure that § 1026.43(f) has the desired effect of preserving access to responsible, affordable mortgage credit in rural and underserved areas. For the reasons stated above, the Bureau believes the proposed amendments are consistent with the purposes of TILA generally and TILA section 129C in particular. Providing for qualified mortgages on this basis would ensure that consumers are offered and receive residential mortgage loans on terms that reasonably reflect their ability to repay and that responsible affordable mortgage credit remains available to consumers in a manner consistent with the purposes of the ability-to-repay requirements.

The Bureau is proposing this amendment rather than finalizing it as part of the 2013 ATR Final Rule in order to solicit comment on the following issues, among others. The Bureau solicits comment regarding whether the proposed amendment to § 1026.43(b)(4) is needed to preserve access to responsible, affordable mortgage credit in rural and underserved areas and regarding any adverse effects the proposed amendment would have on consumers in these or other areas. The Bureau also solicits comment on the 3.5 percentage point threshold and whether another threshold would be more appropriate. Finally, the Bureau solicits comment on whether, in order to preserve access to mortgage credit in rural and underserved areas, the Bureau also should raise the threshold for subordinate-lien covered transactions that are qualified mortgages under § 1026.43(f), and, if so, what threshold would be appropriate.

43(e) Qualified Mortgages

43(e)(1) Safe Harbor and Presumption of Compliance

TILA section 129C(a)(1) through (4) and the Bureau's rules thereunder, § 1026.43(c), generally prohibit a creditor from making a residential mortgage loan unless the creditor makes a reasonable, good faith determination that the consumer has a reasonable ability to repay the loan. TILA section 129C(b) and the Bureau's rules thereunder, § 1026.43(e), provide a safe harbor or rebuttable presumption of compliance with regard to these ability-to-repay requirements if a loan is a qualified mortgage.

As described above, § 1026.43(e)(1)(i) provides that a creditor or assignee of a qualified mortgage that is not a higher-priced covered transaction, as defined in § 1026.43(b)(4), complies with the repayment ability requirements. In contrast, § 1026.43(e)(1)(ii) provides that a creditor or assignee of a qualified mortgage that is a higher-priced covered transaction is presumed to comply with the repayment ability requirements, but that presumption can be rebutted by a consumer under certain circumstances. Section 1026.43(e)(2), (e)(4), and (f) establishes standards for three categories of qualified mortgages, as discussed further below.

The Bureau proposes to make conforming changes to § 1026.43(e)(1) to include references to a new category of qualified mortgages defined by proposed § 1026.43(e)(5). Section 1026.43(e)(5) qualified mortgages would be covered by the safe harbor described in § 1026.43(e)(1)(i) if they are not higher-priced covered transactions and would be subject to the rebuttable presumption of compliance described in § 1026.43(e)(1)(ii) if they are higher-priced covered transactions. However, the Bureau is proposing to apply a different definition of higher-priced covered transaction to first-lien qualified mortgages defined under § 1026.43(e)(5). The section-by-section analysis of § 1026.43(b)(4), above, describes the proposed alternate definition of higher-priced covered transactions. The section-by-section analysis of proposed § 1026.43(e)(5), below, describes the proposed new category of qualified mortgages.

43(e)(2) Qualified Mortgage Defined—General

The Bureau proposes to make a conforming amendment to § 1026.43(e)(2) to include a reference to § 1026.43(e)(5), as described in the section-by-section analysis of proposed § 1026.43(e)(5), below.

43(e)(5) Qualified Mortgage Defined—Small Creditor Portfolio Loans

Background

TILA section 129C(a)(1) through (4) and the Bureau's rules thereunder, § 1026.43(c), prohibit a creditor from making a residential mortgage loan unless the creditor makes a reasonable, good faith determination, based on verified and documented information, that the consumer has a reasonable ability to repay the loan. TILA section 129C(b) provides that a creditor or assignee may presume that a loan has met the ability-to-repay requirements if a loan is a qualified mortgage. Creditors may view qualified mortgage status as important at least in part because TILA section 130 provides that, if a creditor fails to comply with the ability-to-repay requirements, a consumer may be able to recover special statutory damages equal to the sum of all finance charges and fees paid within the first three years after consummation and may be able to assert the creditor's failure to comply to obtain recoupment or setoff in a foreclosure action even after the statute of limitations on affirmative claims has expired. TILA section 129C(b)(2)(A)(vi) authorizes, but does not require, the Bureau to establish limits on debt-to-income ratio or other measures of a consumer's ability to pay regular expenses after making payments on mortgage and other debts. TILA section 129C(b)(3)(B)(i) authorizes the Bureau to revise, add to, or subtract from the criteria that define a qualified mortgage upon a finding that such regulations are, among other things, necessary or proper to ensure that responsible, affordable credit remains available to consumers in a manner consistent with the purposes of TILA section 129C or necessary and appropriate to effectuate the purposes of TILA sections 129B and 129C.

Section 1026.43(e) and (f) defines three categories of qualified mortgages. First, § 1026.43(e)(2) prescribes the general definition of a qualified mortgage. Under § 1026.43(e)(2), a covered transaction is a qualified mortgage if: it does not include negative amortization, interest-only, or balloon features; it has a term not in excess of 30 years; it complies with the limits on points and fees detailed in § 1026.43(e)(3); the underwriter calculated the required payments in a specified way; the creditor considered and verified certain factors related to the consumer's ability to repay; and the consumer's monthly debt-to-income ratio, calculated according to instructions in appendix Q, does not exceed 43 percent. Second, § 1026.43(e)(4) provides that certain loans that are eligible to be purchased, guaranteed, or insured by certain governmental entities or Fannie Mae or Freddie Mac while operating under conservatorship are qualified mortgages. Section 1026.43(e)(4) expires seven years after its effective date and may expire earlier with respect to certain loans if other government entities exercise their rulemaking authority under TILA section 129C or if the GSEs exit conservatorship. Third, § 1026.43(f) provides that certain loans with a balloon payment made by small creditors operating predominantly in rural or underserved areas are qualified mortgages.

The Bureau's Proposal

Proposed § 1026.43(e)(5) would define a fourth category of qualified mortgages which would include loans originated and held in portfolio by certain small creditors. This additional category of qualified mortgages would be similar in several respects to § 1026.43(f), which provides that certain balloon loans made by small creditors operating predominantly in rural or underserved areas are qualified mortgages. As under § 1026.43(f), the additional category would include loans originated by small creditors, as defined by asset-size and transaction thresholds, and held in portfolio by those creditors. However, proposed § 1026.43(e)(5) would not be limited to small creditors operating predominantly in rural or underserved areas and would not include loans that have a balloon payment.

Specifically, the new category would include certain loans originated by creditors that:

- Have total assets that do not exceed $2 billion as of the end of the preceding calendar year (adjusted annually for inflation); and
- Together with all affiliates, extended 500 or fewer first-lien covered transactions during the preceding calendar year.

The proposed additional category would include only loans held in portfolio by these creditors. Therefore, proposed § 1026.43(e)(5) would provide that a loan must not be subject at consummation to a commitment to be acquired by any person other than a person that also meets the above asset-size and number of transactions criteria. Section 1026.43(e)(5) also would provide that a loan would lose its qualified mortgage status under § 1026.43(e)(5) if it is sold, assigned, or otherwise transferred, subject to exceptions for transfers that are made three or more years after consummation, to another qualifying institution, as required by a supervisory action, or pursuant to a merger or acquisition.

The loan also would have to conform to all of the requirements under the § 1026.43(e)(2) general definition of a qualified mortgage except with regard to monthly debt-to-income ratio. In other words, the loan could not have:

- Negative amortization, interest-only, or balloon payment features;
- A term longer than 30 years; and
- Points and fees greater than 3 percent of the total loan amount (or, for smaller loans, a specified amount).

When underwriting the loan the creditor would have to take into account the monthly payment for any mortgage-related obligations, and:

- Use the maximum interest rate that may apply during the first five years and periodic payments of principal and interest that will repay the full principal; and
- Consider and verify the consumer's current and reasonably expected income or assets other than the value of the property securing the loan.

The creditor also would be required to consider the consumer's debt-to-income ratio or residual income and to verify the underlying information generally in accordance with § 1026.43(c). In contrast, the general definition of a qualified mortgage in § 1026.43(e)(2) requires a creditor to calculate the consumer's debt-to-income ratio according to instructions in appendix Q and specifies that the consumer's debt-to-income ratio must be 43 percent or less.

As with all qualified mortgages, a qualified mortgage under § 1026.43(e)(5) would receive either a rebuttable or conclusive presumption of compliance with the ability-to-repay requirements in § 1026.43(c), depending on the annual percentage rate. However, as described above in the section-by-section analysis of § 1026.43(b)(4), the Bureau is proposing an alternate definition of higher-priced covered transaction that would apply to first-lien covered transactions that are qualified mortgages under proposed § 1026.43(e)(5). Amended as proposed, § 1026.43(b)(4) would provide that a first-lien covered transaction that is a qualified mortgage under proposed

§ 1026.43(e)(5) is a higher-priced covered transaction if the annual percentage rate exceeds the average prime offer rate for a comparable transaction by 3.5 or more percentage points. This would have the effect of extending the qualified mortgage safe harbor described in § 1026.43(e)(1)(i) to first-lien qualified mortgages defined under proposed § 1026.43(e)(5) even if those loans have annual percentage rates between 1.5 and 3.5 percentage points higher than the average prime offer rate. Without the proposed amendment to § 1026.43(b)(4), such loans would be covered by the rebuttable presumption of compliance described in § 1026.43(e)(1)(ii). This proposal and the Bureau's rationale for it are discussed in more detail in the section-by-section analysis of § 1026.43(b)(4), above.

The Bureau believes the proposed change is necessary to preserve access to responsible, affordable credit for some consumers. As discussed above in part III and the section-by-section analysis of § 1026.43(b)(4), the Bureau understands that small creditors are a significant source of non-conforming mortgage credit. The Bureau believes that many of these loans would not be made by larger creditors because the consumers or properties involved are not readily assessed using the standardized underwriting criteria used by larger creditors or because larger creditors are unwilling to make loans that cannot be sold to the securitization markets. The Bureau therefore believes that access to mortgage credit for some consumers could be restricted if small creditors stopped making non-conforming loans.

The Bureau believes that such an impact could be particularly significant in rural areas, where the Bureau understands that small creditors are a significant source of credit. Small creditors are significantly more likely than larger creditors to operate offices in rural areas, and there are hundreds of counties nationwide where the only creditors are small creditors and hundreds more where larger creditors have only a limited presence.

The Bureau believes that, as discussed above, small creditors' lower credit losses for residential mortgage loans are evidence that small creditors are particularly well suited to originating responsible, affordable mortgage credit. The Bureau believes small creditors may be better able to assess ability to repay because they are more likely to base underwriting decisions on local knowledge and nonstandard data and less likely to rely on standardized underwriting criteria. Because many small creditors use a lending model based on maintaining ongoing relationships with their customers, they may have a more comprehensive understanding of their customer's financial circumstances. Small creditors' lending activities often are limited to a single community, allowing the creditor to have an in-depth understanding of the economic and other circumstances of that community. In addition, because small creditors often consider a smaller volume of applications for mortgage credit, small creditors may be more willing to consider the unique facts and circumstances attendant to each consumer and property and senior personnel are more likely to be able to bring their judgment to bear regarding individual underwriting decisions.

Small creditors have particularly strong incentives to make careful assessments of a consumer's ability to repay because small creditors bear the risk of default associated with loans held in portfolio and because each loan represents a proportionally greater risk to a small creditor than to a larger one. In addition, small creditors operating in limited geographical areas may face significant risk of harm to their reputation within their community if they make loans that consumers cannot repay.

The Bureau does not believe that small creditors face significant litigation risk from the ability-to-repay requirements. For the reasons stated above, the Bureau believes that small creditors as a group generally are better positioned to assess ability to repay than larger creditors, have particularly strong incentives to accurately assess ability to repay independent of the threat of ability-to-repay litigation, and historically have been very successful at accurately assessing ability to repay, as demonstrated by their comparatively low credit losses. In addition, the Bureau believes that because many small creditors use a lending model based on maintaining ongoing relationships with their customers, those customers may be more likely to pursue alternatives to litigation in the event that difficulties with a loan arise. The Bureau therefore believes that it is unlikely that small creditors will face significant liability for claims of noncompliance filed by their customers or will be significantly disadvantaged by recoupment and setoff claims in foreclosure actions.

However, the Bureau understands that, because of their size, small creditors may be particularly challenged by both the burden and cost of litigation, including litigation regarding ability-to-repay determinations. The Bureau therefore gives credence to small creditors' assertions that they are unable or unwilling to assume the risk of litigation associated with the ability-to-repay requirements and therefore are unwilling to make loans outside the scope of the qualified mortgage safe harbor.

The Bureau therefore is proposing to extend the protections of the qualified mortgage safe harbor to small creditor portfolio loans. The Bureau believes that the proposed rule is necessary to preserve access to responsible, affordable mortgage credit for some consumers.

The Bureau is proposing to extend qualified mortgage status only to portfolio loans made by small creditors, rather than all portfolio loans, because, as discussed above, the Bureau believes that small creditors are a unique and important source of non-conforming mortgage credit and mortgage credit in rural areas for which there is no readily available replacement, that small creditors may be particularly burdened by the litigation risk associated with the ability-to-repay rules and are particularly likely to reduce or cease mortgage lending if subjected to these rules without accommodation, and that small creditors have both strong incentives and particular ability to make these loans in a way that ensures that consumers are able to repay that may not be present for larger creditors.

The proposed definition would include portfolio loans made by creditors that have assets of $2 billion or less and, together with all affiliates, originate 500 or fewer first-lien mortgages each year. The Bureau is proposing these specific thresholds because they are consistent with the § 1026.43(f) qualified mortgage definition, which includes certain balloon loans made and held in portfolio by small creditors operating predominantly in rural or underserved areas, and with thresholds used in the Bureau's 2013 Escrows Final Rule. The Bureau believes it is important to maintain consistent criteria, particularly between § 1026.43(e)(5) and (f), for several reasons. First, the Bureau believes the rationale for proposed § 1026.43(e)(5) is similar to the rationale for § 1026.43(f) and the relevant thresholds in § 1026.35(b). The Bureau therefore believes that its stated rationale for these criteria in those contexts also applies in the context of proposed § 1026.43(e)(5). Similarly, the Bureau also believes that if there is a convincing rationale for establishing these criteria in § 1026.43(e)(5), that rationale may apply to adjusting the other sections as well. Second, the

Bureau believes that inconsistencies between the two qualified mortgage sections could create an undesirable regulatory advantage for balloon loans. The Bureau is particularly concerned with avoiding inconsistencies between the two definitions that would create regulatory incentives to make balloon loans where a creditor has the capability of making other mortgages that better protect consumers' interests. Third, the Bureau believes that maintaining consistent criteria between the three provisions will minimize compliance burdens by minimizing the number of metrics that must be tracked in order to determine creditors' eligibility. However, the Bureau also acknowledges that there may be disadvantages to using the same thresholds in § 1026.43(e)(5) in the absence of further limitations such as the requirement that creditors operate predominantly in rural or underserved areas in order to originate balloon-payment qualified mortgages or invoke the exception to the escrows rule. The Bureau is soliciting comment on these issues.

The proposed definition would include only loans originated and held in portfolio. First, the definition would include only loans that are originated without a forward commitment other than a commitment to sell to another institution that is eligible to originate qualified mortgages under § 1026.43(e)(5). Second, the rule would provide that a loan generally loses its qualified mortgage status under § 1026.43(e)(5) if it is sold, assigned, or otherwise transferred, except: if it is transferred three years or more after consummation; if it is transferred to a creditor that also meets the asset-size and number of transaction criteria; if it is transferred pursuant to a supervisory action or by a conservator, receiver, or bankruptcy trustee; or if it is transferred as part of a merger or acquisition of the creditor.

The Bureau believes the discipline imposed when small creditors make loans that they will hold in their portfolio is important to protect consumers' interests and to prevent evasion. The Bureau is proposing that these loans generally must be held in portfolio for three years in order to retain their status as a qualified mortgage to conform to the statute of limitations for affirmative claims for violations of the ability-to-repay rules. If a small creditor holds a qualified mortgage in portfolio for three years, it retains all of the litigation risk for potential violations of the ability-to-repay rules except in the event of a subsequent foreclosure.

The Bureau acknowledges that limitations on the ability of a creditor to sell loans in its portfolio may limit the creditor's ability to manage its regulatory capital levels by adjusting the value of its assets, may affect the creditor's ability to manage interest rate risk by preventing sales of seasoned loans, and may present other safety and soundness concerns. The Bureau has consulted with prudential regulators on these issues and believes the proposed exceptions address these concerns without sacrificing the consumer protection provided by the portfolio requirement. For these reasons, the Bureau is adopting parallel exceptions in the 2013 ATR Final Rule in § 1026.43(f), which describes requirements for balloon-payment qualified mortgages. However, the Bureau is soliciting comment on whether the proposed exceptions are appropriate and on whether other exceptions should be provided, either in addition to or in lieu of those proposed.

Qualified mortgages under § 1026.43(e)(5) would differ from qualified mortgages under the § 1026.43(e)(2) general definition in two key respects. First, the Bureau is proposing to raise the annual percentage rate threshold for the qualified mortgage safe harbor for qualified mortgages under § 1026.43(e)(5), as described above in the section-by-section analysis of § 1026.43(b)(4). Second, the Bureau is proposing to require creditors to consider the consumer's debt-to-income ratio or residual income and to verify the underlying information generally in accordance with § 1026.43(c). In contrast, the general definition of a qualified mortgage in § 1026.43(e)(2) requires a creditor to calculate the consumer's debt-to-income ratio according to appendix Q and specifies that the consumer's debt-to-income ratio must be 43 percent or less.

The Bureau believes that consideration of debt-to-income ratio or residual income is fundamental to any determination of ability to repay. A consumer is able to repay a loan if he or she has sufficient funds to pay his or her other obligations and expenses and still make the payments required by the terms of the loan. Arithmetically comparing the funds to which a consumer has recourse with the amount of those funds the consumer has already committed to spend or is committing to spend in the future is necessary to determine whether sufficient funds exist.

However, for the same reasons that the Bureau declined to impose a specific 43-percent threshold for balloon-payment qualified mortgages under § 1026.43(f), the Bureau does not believe it is necessary to impose a specific debt-to-income or residual income threshold for this category of qualified mortgages. As discussed above, the Bureau believes that small creditors may be particularly able to make highly individualized determinations of ability to repay that take into consideration the unique characteristics and financial circumstances of a particular consumer. While the Bureau believes that many creditors can make mortgage loans with consumer debt-to-income ratios above 43 percent that consumers are able to repay, the Bureau also believes that portfolio loans made by small creditors are particularly likely to be made responsibly and to be affordable for the consumer even if such loans exceed the 43 percent threshold. The Bureau therefore believes that it is appropriate to presume compliance even above the 43 percent threshold for small creditors who meet the criteria set forth in § 1026.43(e)(5). The Bureau believes that the discipline imposed when small creditors make loans that they will hold in their portfolio is sufficient to protect consumers' interests in this regard. Because the Bureau is not proposing a specific limit on consumer debt-to-income ratio, the Bureau does not believe it is necessary to require creditors to calculate debt-to-income ratio in accordance with a particular standard such as that set forth in appendix Q. The Bureau is proposing to make this change to the rule pursuant to its authority under TILA section 129C(b)(2)(vi) to establish guidelines or regulations for debt-to-income ratio with which qualified mortgages must comply.

The Bureau is proposing ten comments to clarify the requirements described in proposed § 1026.43(e)(5). Proposed comment 43(e)(5)–1 would provide additional guidance regarding the requirement to comply with the general definition of a qualified mortgage under § 1026.43(e)(2). The proposed comment would restate the regulatory requirement that a covered transaction must satisfy the requirements of the § 1026.43(e)(2) general definition of qualified mortgage, except with regard to debt-to-income ratio, to be a qualified mortgage under § 1026.43(e)(5). As an example, the proposed comment would explain that a qualified mortgage under § 1026.43(e)(5) may not have a loan term in excess of 30 years because longer terms are prohibited for qualified mortgages under § 1026.43(e)(2)(ii). As another example, the proposed comment would explain that a qualified mortgage under § 1026.43(e)(5) may not result in a balloon payment because § 1026.43(e)(2)(i)(C) provides that qualified mortgages may not have balloon payments except as provided under § 1026.43(f). Finally, the proposed comment would clarify that a covered transaction may be a qualified mortgage under § 1026.43(e)(5) even though the consumer's monthly debt-to-income ratio exceeds 43 percent, § 1026.43(e)(2)(vi) notwithstanding.

Proposed comment 43(e)(5)–2 would clarify that § 1026.43(e)(5) does not prescribe a specific monthly debt-to-income ratio with which creditors must comply. Instead, creditors must consider a consumer's debt-to-income ratio or residual income calculated generally in accordance with § 1026.43(c)(7) and verify the information used to calculate the debt-to-income ratio or residual income in accordance with § 1026.43(c)(3) and (4). The proposed comment would explain that § 1026.43(c)(7) refers creditors to § 1026.43(c)(5) for instructions on calculating the payment on the covered transaction and that § 1026.43(c)(5) requires creditors to calculate the payment differently than § 1026.43(e)(2)(iv). The proposed comment would clarify that, for purposes of the qualified mortgage definition in § 1026.43(e)(5), creditors must base their calculation of the consumer's debt-to-income ratio or residual income on the payment on the covered transaction calculated according to § 1026.43(e)(2)(iv) instead of according to § 1026.43(c)(5). Finally, the proposed comment would clarify that creditors are not required to calculate the consumer's monthly debt-to-income ratio in accordance with appendix Q as is required under the general definition of qualified mortgages by § 1026.43(e)(2)(vi).

Proposed comment 43(e)(5)–3 would note that the term ''forward commitment'' is sometimes used to describe a situation where a creditor originates a mortgage loan that will be transferred or sold to a purchaser pursuant to an agreement that has been entered into at or before the time the transaction is consummated. The proposed comment would clarify that a mortgage that will be acquired by a purchaser pursuant to a forward commitment does not satisfy the requirements of § 1026.43(e)(5), whether the forward commitment provides for the purchase and sale of the specific transaction or for the purchase and sale of transactions with certain prescribed criteria that the transaction meets. However, the proposed comment also would clarify that a forward commitment to another person that also meets the requirements of § 1026.43(e)(5)(i)(D) is permitted. The proposed comment would give the following example: Assume a creditor that is eligible to make qualified mortgages under § 1026.43(e)(5) makes a mortgage. If that mortgage meets the purchase criteria of an investor with which the creditor has an agreement to sell such loans after consummation, then the loan does not meet the definition of a qualified mortgage under § 1026.43(e)(5). However, if the investor meets the requirements of § 1026.43(e)(5)(i)(D), the mortgage will be a qualified mortgage if all other applicable criteria also are satisfied.

Proposed comment 43(e)(5)–4 would reiterate that, to be eligible to make qualified mortgages under § 1026.43(e)(5), a creditor must satisfy the requirements of § 1026.35(b)(2)(iii)(B) and (C). For ease of reference, the comment would state that § 1026.35(b)(2)(iii)(B) requires that, during the preceding calendar year, the creditor and its affiliates together originated 500 or fewer first-lien covered transactions and that § 1026.35(b)(2)(iii)(C) requires that, as of the end of the preceding calendar year, the creditor had total assets of less than $2 billion, adjusted annually for inflation.

Proposed comment 43(e)(5)–5 would clarify that creditors generally must hold a loan in portfolio to maintain the transaction's status as a qualified mortgage under § 1026.43(e)(5), subject to four exceptions. The proposed comment would clarify that, unless one of these exceptions applies, a loan is no longer a qualified mortgage under § 1026.43(e)(5) once legal title to the debt obligation is sold, assigned, or otherwise transferred to another person. Accordingly, unless one of the exceptions applies, the transferee could not benefit from the presumption of compliance for qualified mortgages under § 1026.43(e)(1) unless the loan also met the requirements of another qualified mortgage definition. Proposed comment 43(e)(5)–6 would clarify that § 1026.43(e)(5)(ii) applies not only to an initial sale, assignment, or other transfer by the originating creditor but to subsequent sales, assignments, and other transfers as well. The proposed comment would give the following example: Assume Creditor A originates a qualified mortgage under § 1026.43(e)(5). Six months after consummation, Creditor A sells the qualified mortgage to Creditor B pursuant to § 1026.43(e)(5)(ii)(B) and the loan retains its qualified mortgage status because Creditor B complies with the limits on asset size and number of transactions. If Creditor B sells the qualified mortgage, it will lose its qualified mortgage status under § 1026.43(e)(5) unless the sale qualifies for one of the § 1026.43(e)(5)(ii) exceptions for sales three or more years after consummation, to another qualifying institution, as required by supervisory action, or pursuant to a merger or acquisition.

Proposed comment 43(e)(5)–7 would clarify that, under § 1026.43(e)(5)(ii)(A), if a qualified mortgage under § 1026.43(e)(5) is sold, assigned, or otherwise transferred three years or more after consummation, the loan retains its status as a qualified mortgage under § 1026.43(e)(5) following the transfer. The proposed comment would clarify that this is true even if the transferee is not itself eligible to originate qualified mortgages under § 1026.43(e)(5). The proposed comment would clarify that, once three or more years after consummation have passed, the qualified mortgage will continue to be a qualified mortgage throughout its life, and a transferee, and any subsequent transferees, may invoke the presumption of compliance for qualified mortgages under § 1026.43(e)(1).

Proposed comment 43(e)(5)–8 would clarify that, under § 1026.43(e)(5)(ii)(B), a qualified mortgage under § 1026.43(e)(5) may be sold, assigned, or otherwise transferred at any time to another creditor that meets the requirements of § 1026.43(e)(5)(v). The proposed comment would note that section § 1026.43(e)(5)(v) requires that a creditor, during the preceding calendar year, originated 500 or fewer first-lien covered transactions and had total assets less than $2 billion (adjusted for inflation) at the end of the preceding calendar year. The proposed comment would clarify that a qualified mortgage under § 1026.43(e)(5) that is transferred to a creditor that meets these criteria would retain its qualified mortgage status even if it is transferred less than three years after consummation.

Proposed comment 43(e)(5)–9 would clarify that § 1026.43(e)(5)(ii)(C) facilitates sales that are deemed necessary by supervisory agencies to revive troubled creditors and resolve failed creditors. The proposed comment would note that this section provides that a qualified mortgage under § 1026.43(e)(5) retains its qualified mortgage status if it is sold, assigned, or otherwise transferred to: another person pursuant to a capital restoration plan or other action under 12 U.S.C. 1831o; the actions or instructions of any person acting as conservator, receiver or bankruptcy trustee; an order of a State or Federal government agency with jurisdiction to examine the creditor pursuant to State or Federal law; or an agreement between the creditor and such an agency. The proposed comment would clarify that a qualified mortgage under § 1026.43(e)(5) that is sold, assigned, or otherwise transferred under these circumstances retains its qualified mortgage status regardless of how long after consummation it is sold and regardless of the size or other characteristics of the transferee. The proposed comment also would clarify that § 1026.43(e)(5)(ii)(C) does not apply to transfers done to comply with a generally applicable regulation with future effect designed to implement, interpret, or prescribe law or policy in the absence of a specific order by or a specific agreement with a governmental agency described in § 1026.43(e)(5)(ii)(C) mandating the sale of one or more qualified mortgages under § 1026.43(e)(5) held by the creditor, or one of the other circumstances listed in § 1026.43(e)(5)(ii)(C). As an example, the proposed comment would explain that a qualified mortgage under § 1026.43(e)(5) that is sold pursuant to a capital restoration plan under 12 U.S.C. 1831o would retain its status as a qualified mortgage following the sale. However, if the creditor simply chose to sell the same qualified mortgage as one way to comply with general regulatory capital requirements in the absence of supervisory action or agreement, the mortgage would lose its status as a qualified mortgage following the sale unless it qualifies under another definition of qualified mortgage.

Proposed comment 43(e)(5)–10 would clarify that a qualified mortgage under § 1026.43(e)(5) retains its qualified mortgage status if a creditor merges with, is acquired by, or acquires another person regardless of whether the creditor or its successor is eligible to originate new qualified mortgages under § 1026.43(e)(5) after the merger or acquisition. However, the proposed comment also would clarify that the creditor or its successor can originate new qualified mortgages under § 1026.43(e)(5) after the merger or acquisition only if the creditor or its successor complies with all of the requirements of § 1026.43(e)(5) at that time. The proposed comment would provide the following example: Assume a creditor that originates 250 covered transactions each year and originates qualified mortgages under § 1026.43(e)(5) is acquired by a larger creditor that originates 10,000 covered transactions each year. Following the acquisition, the small creditor would no longer be able to originate § 1026.43(e)(5) qualified mortgages because, together with its affiliates, it would originate more than 500 covered transactions each year. However, the § 1026.43(e)(5) qualified mortgages originated by the small creditor before the acquisition would retain their qualified mortgage status.

For the reasons stated above, the Bureau believes that the proposed amendments are authorized by TILA sections 105(a) and 129C(b)(3)(B)(i) because they are necessary to ensure that responsible, affordable mortgage credit remains available to consumers and because they are consistent with the purposes of TILA generally and TILA section 129C, regarding repayment ability, specifically.

The Bureau solicits comment on the proposed approach to small creditor portfolio loans generally and also on several specific issues. First, the Bureau solicits comment on whether non-conforming mortgage credit is likely to be unavailable under the current rule and whether amending the rule as proposed would ensure that such credit is made available in a responsible, affordable way.

Second, the Bureau solicits comment on the following issues relating to the criteria describing small creditors: Whether the Bureau should adopt criteria consistent with those used in § 1026.35(b) and in the § 1026.43(f) definition of qualified mortgages which applies to certain balloon loans made by small creditors operating predominantly in rural and underserved areas; whether the proposed $2 billion asset threshold is appropriate and whether the threshold should be higher or lower; and whether to include a limitation on the number of first-lien covered transactions extended by the creditor and its affiliates and, if so, whether the proposed 500 transaction limit is appropriate.

Third, the Bureau solicits comment regarding the requirement that loans be held in portfolio generally, including whether the proposed exemptions are appropriate and whether other criteria, guidance, or exemptions should be included regarding the requirement to hold loans in portfolio, either in lieu of or in addition to those included in the proposal.

Fourth, the Bureau solicits comment on the loan feature and underwriting requirements with which qualified mortgages under proposed § 1026.43(e)(5) would have to comply. The Bureau solicits comment on whether qualified mortgages under proposed § 1026.43(e)(5) should be exempt from additional provisions of § 1026.43(e)(2) and or should be subject to any other loan feature or underwriting requirements, either in lieu of or in addition to those proposed. In particular, the Bureau solicits comment on whether these qualified mortgages should be exempt from the requirement to consider debt-to-income ratio calculated according to appendix Q and the prohibition on debt-to-income ratios in excess of 43 percent and whether other requirements related to debt-to-income ratio or residual income should be provided, either in lieu of or in addition to those proposed.

Finally, the Bureau solicits comment on the following issue. The proposal would provide different legal status to loans with identical terms because the creditor is small and intends to hold the loan in portfolio. As discussed above, the Bureau believes that the size of and relationship lending model employed by small creditors may provide significant assurances that the mortgage credit they extend will be responsible and affordable. However, to the extent that consumers may have a choice of creditors, some of whom are not small, it is not clear that consumers shopping for mortgage loans would be aware that their choice of creditor could significantly impact their legal rights. The Bureau solicits comment on the extent and significance of this risk generally. Specifically, the Bureau solicits comment on whether consumers who obtain small creditor portfolio loans likely could have obtained credit from other sources and on the extent to which a consumer who obtains a portfolio loan from a small creditor would be disadvantaged by the inability to make an affirmative claim of noncompliance with the ability-to-repay rules or to assert noncompliance in a foreclosure action.

43(f) Balloon-Payment Qualified Mortgages Made by Certain Creditors

Section 1026.43(f) provides that certain balloon loans made and held in portfolio by certain small creditors are qualified mortgages. As discussed above in the section-by-section analysis of § 1026.43(e)(5), the Bureau believes that it may be important to preserve consistency among § 1026.43(e)(5) and (f) and § 1026.35(b)(2). The Bureau is not proposing specific amendments to § 1026.43(f) because § 1026.43(e)(5) as proposed is consistent with existing § 1026.43(f). However, if § 1026.43(e)(5) is adopted with significant changes, the Bureau will consider and may adopt parallel amendments to § 1026.43(f) in its final rule.

The Bureau solicits comment on the advantages and disadvantages of maintaining consistency between § 1026.35(b)(2) and § 1026.43(e)(5) and (f) generally and on whether the Bureau should make conforming changes to § 1026.43(f) if necessary to maintain consistency with specific provisions of § 1026.43(e)(5).

43(g) Prepayment Penalties

The Bureau proposes to make a conforming amendment to § 1026.43(g) to include a reference to § 1026.43(e)(5), as described in the section-by-section analysis of proposed § 1026.43(e)(5), above.

VI. Section 1022(b)(2) of the Dodd-Frank Act

In developing the final rule, the Bureau has considered potential benefits, costs, and impacts.[139] In addition, the Bureau has consulted, or offered to consult with, the prudential regulators, SEC, HUD, FHFA, the Federal Trade Commission, and the Department of the Treasury, including regarding consistency with any prudential, market, or systemic objectives administered by such agencies. The Bureau also held discussions with or solicited feedback from the United States Department of Agriculture, Rural Housing Service, the Federal Housing Administration, and the Department of Veterans Affairs regarding the potential impacts of the final rule on those entities' loan programs.

This proposal is related to a final rule published elsewhere in today's **Federal Register** (2013 ATR Final Rule). The 2013 ATR Final Rule implements sections 1411, 1412, and 1414 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act), which creates new TILA section 129C. Among other things, the Dodd-Frank Act requires creditors to make a reasonable, good faith determination of a consumer's ability to repay any consumer credit transaction secured by a dwelling (excluding an open-end credit plan, timeshare plan, reverse mortgage, or temporary loan) and establishes certain protections from liability under this requirement for ''qualified mortgages.''

The Bureau is proposing certain amendments to the final rule implementing these requirements, including exemptions for certain nonprofit creditors and certain homeownership stabilization programs and an additional definition of a qualified mortgage for certain loans made and held in portfolio by small creditors. The Bureau is also seeking feedback on whether additional clarification is needed regarding the inclusion of loan originator compensation in the points and fees calculation.

The proposed exemptions for certain nonprofit creditors and certain homeownership stabilization programs include exemptions for various extensions of credit from the ability-to-repay requirements. These exemptions include: extensions of credit made pursuant to programs administered by HFA; extensions of credit made by certain types of nonprofit creditors including creditors designated by the Treasury Department as Community Development Financial Institutions and creditors designated by the Department of Housing and Urban Development as either a Community Housing Development Organization or a Downpayment Assistance Provider of Secondary Financing; extensions of credit by certain creditors designated as nonprofit organizations under section 501(c)(3) of the Internal Revenue Code that provide credit to LMI borrowers; extensions of credit made pursuant to an Emergency Economic Stabilization Act program, such as extensions of credit made pursuant to a State HHF program; refinancings that are eligible to be insured, guaranteed, or made pursuant to a program administered by the Federal Housing Administration, U.S. Department of Veterans Affairs, or the U.S. Department of Agriculture for a limited period of time; and certain refinancings eligible to be purchased or guaranteed by Fannie Mae or Freddie Mac pursuant to an eligible targeted refinancing program.

The proposed additional definition of a qualified mortgage includes certain loans originated by creditors that have total assets of $2 billion or less at the end of the previous calendar year; and that, together with all affiliates, originated 500 or fewer first-lien covered transactions during the previous calendar year. Loans held in portfolio by these creditors that conform to all of the requirements under the general definition of a qualified mortgage except the 43 percent limit on monthly debt-to-income ratio, and that meet the documentation and verification requirements for qualified mortgages under the general standard, would be considered qualified mortgages. Qualified mortgages under this proposed definition would be provided either a conclusive or rebuttable presumption of compliance with the requirement that creditors make a reasonable, good faith determination of a consumer's ability to repay before originating a mortgage loan.

The Bureau also is proposing to allow small creditors to charge a higher annual percentage rate for first-lien qualified mortgages in the proposed new category and still benefit from a conclusive presumption of compliance or ''safe harbor.'' Under the existing rules, first-lien qualified mortgages with an annual percentage rate less than or equal to the average prime offer rate plus 1.5 percentage points and subordinate-lien qualified mortgages with an annual percentage rate less than or equal to the average prime offer rate plus 3.5 percentage points are within the safe harbor. A qualified mortgage in the proposed new category would be conclusively presumed to comply if the annual percentage rate is equal to or less than the average prime offer rate plus 3.5 percentage points for both first-lien and subordinate-lien loans.

The Bureau also is proposing to allow small creditors operating predominantly in rural or underserved areas to offer first-lien balloon loans with a higher annual percentage rate and still benefit from a conclusive presumption of compliance with the ability-to-repay rules or ''safe harbor.'' The Bureau's current rule provides that certain balloon loans made by small creditors operating predominantly in rural or underserved areas are qualified mortgages. Under the existing rules, first-lien qualified mortgages with an annual percentage rate less than or equal to the average prime offer rate plus 1.5 percentage points and subordinate-lien qualified mortgages with an annual percentage rate less than or equal to the average prime offer rate plus 3.5 percentage points are within the safe harbor. Qualified mortgages with annual percentage rates above these thresholds are presumed to comply with the ability-to-repay rules, but a consumer could rebut that presumption under certain circumstances.

The proposal also provides two alternative comments regarding the provisions of the 2013 ATR Final Rule regarding the inclusion of loan originator compensation in the

[139] Specifically, section 1022(b)(2)(A) of the Dodd-Frank Act calls for the Bureau to consider the potential benefits and costs of a regulation to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services; the impact on depository institutions and credit unions with $10 billion or less in total assets as described in section 1026 of the Dodd-Frank Act; and the impact on consumers in rural areas.

calculation of points and fees.[140] The analysis generally examines the benefits, costs and impacts of the proposed provisions against the baseline of the January 2013 ATR Rule published elsewhere in today's **Federal Register**. This baseline focuses the discussion of benefits, costs and impacts on the incremental effect of this rulemaking on the mortgage market.

The analysis in this section relies on data that the Bureau have obtained, outreach to industry and other members of the public, and the record established by the Board and Bureau during the development of the 2013 ATR Final Rule. However, the Bureau notes that for some analyses, there are limited data available with which to quantify the potential costs, benefits, and impacts of the proposal. Still, general economic principles together with the limited data that are available provide insight into the benefits, costs, and impacts and where relevant, the analysis provides a qualitative discussion of the benefits, costs, and impacts of the final rule.

The Bureau will further consider the benefits, costs and impacts of the proposed provisions and asks interested parties to provide general information, data, and research results on potential effects on the mortgage loans affected by the proposed exemptions and extensions of qualified mortgage status, the current underwriting practices of entities covered by these provisions and other information that may inform the analysis of the benefits, costs, and impacts of these proposals.

A. Potential Benefits and Costs to Consumers and Covered Persons

1. Exemptions From Ability-to-Repay Requirements

As described in the Section 1022 Analysis of the 2013 ATR rule published elsewhere in today's **Federal Register**, there are a number of situations where lenders may engage in lending with too little regard for the borrower's ability to repay. The 2013 Final ATR Rule is designed to minimize such activity by ensuring proper documentation and verification related to extensions of credit and by requiring consideration of a number of factors including the consumer's debt-to-income ratio and credit history. Lenders who fail to follow these requirements, or who extend credit without a ''reasonable and good faith determination'' of the borrower's ability to repay, are subject to liability. The proposed exemptions from the ability-to-repay requirements are designed to eliminate these requirements and thereby to limit lenders' costs and protect credit availability in carefully defined circumstances, namely programs that have been developed to serve consumers and that assess repayment ability in ways that do not necessarily comport with the requirements of the Act and the final rule.

As described earlier, mortgage lending by community-focused lending programs, State housing finance agencies, and not-for profit organizations varies widely in the form of financing, the products offered and the precise nature of underwriting. In particular, the Bureau understands that many of these lenders do not use documentation and verification procedures closely aligned with the requirements of the 2013 ATR rule or consider all of the underwriting factors specified in the rule. The benefits of the proposed rule derive from eliminating the costs of imposing these requirements on these particular extensions of credits and assuring that credit remains available through these programs without regard to the rule's underwriting factors. Access to credit may be a specific concern for the populations generally served by these lenders and programs.

As explained in the 2013 ATR Final Rule, in general, consumers and others could be harmed by this action as it removes particular consumer protections and could allow some deleterious lending to occur. However, in all of the cases discussed above, the Bureau believes, subject to public comment, that the community-focused mission of the creditor organizations and the close interaction between lenders and borrowers should mitigate any potential harms to borrowers and any costs from the rule.

Data regarding the exact scope of lending through these channels are limited as are data regarding the performance of these loans. There are 51 State Housing Finance Agencies and approximately 1,000 CDFIs, 62 percent of which are classified as Community Development (CD) Loan Funds, 22 percent as CD Credit Unions, while the rest are CD Banks, Thrifts, or CD Venture Capital Funds.[141] There are 233 nonprofit agencies and nonprofit instrumentalities of government in the U.S. that are authorized to provide secondary financing,[142] 267 creditors certified by HUD as Community Housing Development Organizations (CHDOs) in connection with HUD's HOME Investment Partnership Program,[143] and 231 organizations certified as Downpayment Assistance through Secondary Financing Providers.[144] A comprehensive list of these institutions is not available; however the Bureau believes that there may be substantial overlap among these institutions. The Bureau seeks information on the quantity and types of credit extended by each of these types of organizations.

The number or volume of loans made by these institutions is limited. There is some data suggesting that SHFA bonds funded approximately 67,000 loans in 2010 with a value of just over $8 billion. Data regarding CDFIs indicate that these institutions funded just under $4 billion in loans, however data on the type of housing supported is unavailable. Lending at CHDOs totaled $64 million in 2011 with just under 500 loans.

The exemption in the proposed rule for certain streamlined refinance programs offers benefits to consumers, creditors and others to the extent that any impediments to refinancings are removed. Some streamlined refinance programs are aimed at efficiently extending mortgage credit to enable current borrowers to obtain more affordable mortgages. Many of these borrowers cannot afford their mortgage payments and/or are underwater and unable to obtain refinancing. Programs that help with refinances can aid these borrowers, their communities and the broader recovery. To the extent that these refinance programs have documentation and underwriting requirements that do not align with the requirements of the 2013 ATR Final Rule, compliance with that rule could harm lending activity; the exemptions in the proposed rule should remove any possible impediments. The limitation of the exemption to government or GSE sponsored streamlined refinance programs limits the risk to borrowers from removal of some of the protections in the final rule.

Programs established under MHA impacted by the proposed rule appear to

[140] Section 1022 requires consideration of benefits and costs of Bureau rules issued under the Federal consumer financial laws to consumers and covered persons. Here, the Bureau discusses the benefits and costs of commentary provisions to better inform the public and its rulemaking. The Bureau reserves discretion in the case of each rule whether to discuss benefits and costs of such commentary provisions.

[141] *See http://www.cdfifund.gov/docs/certification/cdfi/CDFI List-07-31-12.xls.*

[142] *See https://entp.hud.gov/idapp/html/f17npdata.cfm.*

[143] Includes 2011 data for institutions with CHDO reservations and CHDO loans without a rental tenure type. *See http://www.hud.gov/offices/cpd/affordablehousing/reports/open/.*

[144] Includes data for institutions shown to offer secondary financing at *https://entp.hud.gov/idapp/html/f17npdata.cfm.*

have made roughly 67,000 loans between October 2011 and 2012; [145] volume was similar under the HHF program initiated by Treasury.[146] Available data indicate that roughly 312,000 loans were made in 2011 under targeted refinance programs at FHA (similar data for VA and USDA loans are not available).[147] There were just over 400,000 loans issued under HARP in 2011 and the Bureau understands that volume has risen considerably in 2012.[148] The Bureau intends to seek detailed information on each of the government programs including loan volumes, characteristics and performance.

2. Extension of qualified mortgage status

The benefits to covered persons from extending qualified mortgage status to certain loans made by smaller creditors and held on portfolio also derive from limiting the potential costs of these loans. By granting creditors that qualify under the proposed qualified mortgage category a conclusive or rebuttable presumption of compliance with the ability-to-repay provisions, the proposal would limit the legal liability of these creditors and most expected litigation costs. These creditors may also benefit from a reduction in some documentation and verification costs as explained in the 2013 ATR Final rule. These cost reductions in turn could enhance the willingness of such creditors to make these loans or reduce the amount the creditors would otherwise charge for these loans.[149] The costs to consumers of the proposed rule derive from the related reduction in consumer protection for the borrower as borrowers at these institutions will have less recourse in the instances where the creditor did, in fact, offer the mortgage without reaching a 'reasonable and good faith' belief in the borrower's ability-to-repay. There is also the potential for the broader costs that can result from additional lending made without adequate consideration of the borrower's ability to repay as discussed in the Section 1022 analysis of the 2013 Final ATR rule.

Given the lower default and delinquency rates at these smaller community focused institutions, the avoided costs related to liability and litigation are likely small. However, the lower default and delinquency rates at these institutions, the relationship lending that they engage in, and restrictions on reselling the loans on the secondary market, together imply that the risk of consumer harm (and therefore the costs of this proposal) and also very small.[150] The impacts of this proposal are generally expected to be limited.

Based on data from 2011, roughly 9,200 institutions with approximately 450,000 loans on portfolio are likely to be effected by this provision.[151] Based on the Bureau's estimates, on average, 16.7 percent of portfolio loans at these institutions are estimated to have a DTI ratio above 43%. For the subset of these loans that also do not contain any of the prohibited features for qualified mortgages, the proposed rule removes the ability-to-repay liability and grants the creditor a conclusive or rebuttable presumption of compliance. The Bureau is unable to estimate the percentage of these loans that would not qualify for the temporary expansion of the qualified mortgage definition in the final rule.

Similar tradeoffs are involved in the proposal to raise the threshold from 1.5 percentage points above APOR to 3.5 percentage points above APOR for first lien mortgages originated and held by these institutions and for the qualified balloon mortgages made by institutions predominantly operating in rural or underserved areas. For loans in this APR band, including those with a DTI ratio below 43 that are already qualified mortgages and those with a DTI ratio above 43 percent that would be defined as qualified mortgages under this proposal, the presumption of compliance with the ability-to-repay requirements would be strengthened. The Bureau estimates that roughly 8–10 percent of portfolio loans at these institutions are likely to be affected by this change. Strengthening the presumption of compliance for these loans will benefit consumers and/or covered persons to the extent doing so improves credit access or reduces costs. Strengthening the presumption will have a cost to consumers to the extent consumers who are unable to afford their mortgage and would otherwise be able to make out a claim and recover their losses would be unable to do so.

3. Proposed Comments Regarding Points and Fees Calculation

As discussed in detail above, the proposal provides two alternative comments of the provisions in the rule regarding the treatment of compensation paid to a mortgage originator in the calculation of points and fees. One would explicitly preclude offsetting, while the other would allow creditors to offset the amount of loan originator compensation by the amount of finance charges paid by the consumer. The Bureau is also seeking comment on whether other alternatives might be preferable to the ''no offsetting'' result. The Bureau has also proposed a separate clarification, explaining that mortgage brokers need not double-count payments to loan originator employees when determining points and fees.

In general, offsetting across the various sources of compensation will lower the total amount of points and fees relative to calculations without such offsetting. As a result, keeping all other provisions of a given loan fixed, calculations involving offsetting will result in a greater number of loans eligible to be qualified mortgages and less likely to be above the points and fees triggers under HOEPA. The extent to which this occurs, and the extent to which lenders may adjust pricing and compensation practices in response to these provisions will determine the net effect. At present, the Bureau has limited standardized and representative data regarding the total points and fees and mortgage originator compensation.

In general, for most prime loans, the Bureau believes that variations in these

[145] Includes loans made under Second Lien Modification Program (2MP) Activity and HAMP Principal Reduction Alternative. *See* October 2012 Making Home Affordable Report.

[146] Figures reflect differences in outstanding loans across all states from 2011Q3 to 2012Q3 for most states, or latest yearly figures where these were not available. *See http://www.treasury.gov/initiatives/financial-stability/TARP-Programs/housing/Pages/Program-Documents.aspx.*

[147] *http://portal.hud.gov/hudportal/documents/huddoc?id=fhamktq2_2012.pdf.*

[148] *http://www.fhfa.gov/webfiles/24596/Aug-12%20Refi%20Report.pdf.*

[149] To the extent that the cost advantage is material, this provision could give some smaller institutions a slight advantage over lenders not eligible to make qualified mortgages using this definition.

[150] The possibility that small creditors qualifying for this exemption can make certain mortgages as qualified mortgages, while their larger competitors can only make these loans subject to the ability-to-pay provisions, may allow them to offer these loans at lower rates. However, as discussed in the 2013 ATR Final Rule published elsewhere in today's **Federal Register**, any effects on pricing are likely to be small.

[151] The estimates in this analysis are based upon data and statistical analyses performed by the Bureau. To estimate counts and properties of mortgages for entities that do not report under HMDA, the Bureau has matched HMDA data to Call Report data and MCR data and has statistically projected estimated loan counts for those depository institutions that do not report these data either under HMDA or on the NCUA call report. The Bureau has projected originations of higher-priced mortgage loans for depositories that do not report HMDA in a similar fashion. These projections use Poisson regressions that estimate loan volumes as a function of an institution's total assets, employment, mortgage holdings and geographic presence. Neither HMDA nor the Call Report data have loan level estimates of the DTI. To estimate these figures, the Bureau has matched the HMDA data to data on the HLP dataset provided by the FHFA. This allows estimation of coefficients in a probit model to predict DTI using loan amount, income and other variables. This model is then used to estimate DTI for loans in HMDA.

calculations will not have major impacts: Current industry pricing practices and the exemption for bona fide discount points suggest that fewer of these loans will be constrained by the points and fees limits. For loans with higher APRs, where the exemption for bona-fide discount points is reduced or eliminated, the method for calculation of points and fees could limit qualified mortgage status for certain loans. Other loans that will still be qualified mortgages, but where the borrower pays for these charges through a higher interest rate may lose the presumption of compliance and instead have only the rebuttable presumption. Any impacts are most likely greater for lenders with affiliated companies where more charges must be included in the points and fees calculations.

B. Potential Specific Impacts of the Final Rule

1. Potential Impact on Consumer Access to Consumer Financial Products or Services

The Bureau does not anticipate that the proposed rule would reduce consumers' access to credit. As discussed above, the Bureau believes that the proposed rule would in fact enhance certain consumers' access to mortgage credit as compared to the January ATR final rule because it would facilitate lending under various programs and under the new qualified mortgage definition.

2. Depository Institutions and Credit Unions With $10 Billion or Less in Total Assets, As Described in Section 1026

Depository institutions and credit unions with $10 billion or less in total assets as described in Section 1026 would see differential impacts from the proposed rule. The depository institutions and credit unions that are CDFIs, and are therefore covered under the proposed exemption from the ability-to-repay requirements and the institutions covered by new definition of qualified mortgages for small creditor portfolio loans contained in the proposal are all, by definition, in this group and are therefore uniquely impacted by the rule. The provisions for streamlined refinance apply to all creditors who can utilize those programs and therefor these will not have any specific impact.

3. Impact of the Provisions on Consumers in Rural Areas

The proposed rule would have some differential impacts on consumers in rural areas. In these areas, a greater fraction of loans are made by smaller institutions and carried on portfolio and therefore the small creditor portfolio exemption would be likely to have greater impacts. The Bureau understands that mortgage loans in these areas and by these institutions are less standardized and often cannot be sold into the secondary market. As a result, interest rates may be slightly higher on average and therefore, a bigger portion of the transactions will be affected by the rule and, therefore, rural consumers will derive greater benefit from the proposed provisions than non-rural consumers.

The Bureau requests commenters to submit data and to provide suggestions for additional nationally representative data to assess the issues discussed above and other potential benefits, costs, and impacts of the proposed rule. The Bureau also seeks information or data on the potential impact of the proposed rule on depository institutions and credit unions with total assets of $10 billion or less as described in Dodd-Frank Act section 1026 as compared to depository institutions and credit unions with assets that exceed this threshold and their affiliates. Further, the Bureau seeks information or data on the proposed rule's potential impact on consumers in rural areas as compared to consumers in urban areas.

VII. Regulatory Flexibility Act Analysis

A. Overview

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct an initial regulatory flexibility analysis (IRFA) and a final regulatory flexibility analysis (FRFA) of any rule subject to notice-and-comment rulemaking requirements.[152] These analyses must "describe the impact of the proposed rule on small entities." [153] An IRFA or FRFA is not required if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.[154] The Bureau also is subject to certain additional procedures under the RFA involving the convening of a panel to consult with small business representatives prior to proposing a rule for which an IRFA is required.[155]

An IRFA is not required for this proposal because it would not have a significant economic impact on a substantial number of small entities.

The analysis below evaluates the potential economic impact of the proposed rule on small entities as defined by the RFA. The analysis generally examines the regulatory impact of the provisions of the proposed rule and additional proposed modifications against the baseline of the final rule published elsewhere in today's **Federal Register**.

B. Number and Classes of Affected Entities

The proposed rule will apply to all creditors that extend closed-end credit secured by real property or a dwelling. All small entities that extend these loans are potentially subject to at least some aspects of the proposal. This proposal may impact small businesses, small nonprofit organizations, and small government jurisdictions. A "small business" is determined by application of SBA regulations and reference to the North American Industry Classification System (NAICS) classifications and size standards.[156] Under such standards, depository institutions with $175 million or less in assets are considered small; other financial businesses are considered small if such entities have average annual receipts (*i.e.,* annual revenues) that do not exceed $7 million. Thus, commercial banks, savings institutions, and credit unions with $175 million or less in assets are small businesses, while other creditors extending credit secured by real property or a dwelling are small businesses if average annual receipts do not exceed $7 million.

The Bureau can identify through data under the Home Mortgage Disclosure Act, Reports of Condition and Income (Call Reports), and data from the National Mortgage Licensing System (NMLS) the approximate numbers of small depository institutions that will be subject to the final rue. Origination data is available for entities that report in HMDA, NMLS or the credit union call reports; for other entities, the Bureau has estimated their origination activities using statistical projection methods.

[152] 5 U.S.C. 601 *et. seq.*

[153] 5 U.S.C. 603(a). For purposes of assessing the impacts of the proposed rule on small entities, "small entities" is defined in the RFA to include small businesses, small not-for-profit organizations, and small government jurisdictions. 5 U.S.C. 601(6). A "small business" is determined by application of Small Business Administration regulations and reference to the North American Industry Classification System (NAICS) classifications and size standards. 5 U.S.C. 601(3). A "small organization" is any "not-for-profit enterprise which is independently owned and operated and is not dominant in its field." 5 U.S.C. 601(4). A "small governmental jurisdiction" is the government of a city, county, town, township, village, school district, or special district with a population of less than 50,000. 5 U.S.C. 601(5).

[154] 5 U.S.C. 605(b).

[155] 5 U.S.C. 609.

[156] 5 U.S.C. 601(3). The current SBA size standards are located on the SBA's Web site at *http://www.sba.gov/content/table-small-business-size-standards.*

The following table provides the Bureau's estimate of the number and types of entities to which the rule will apply:

Category	NAICS Code	Total Entities	Small Entities	Entities That Originate Any Mortgage Loans[b]	Small Entities that Originate Any Mortgage Loans
Commercial Banking	522110	6,505	3,601	6,307[a]	3,466[a]
Savings Institutions	522120	930	377	922[a]	373[a]
Credit Unions[c]	522130	7,240	6,296	4,178[a]	3,240[a]
Real Estate Credit[d e]	522292	2,787	2,294	2,787	2,294[a]
Total		17,462	12,568	14,194	9,373

Source: 2011 HMDA, Dec 31, 2011 Bank and Thrift Call Reports, Dec 31, 2011 NCUA Call Reports, Dec 31, 2011 NMLSR Mortgage Call Reports.

[a] For HMDA reporters, loan counts from HMDA 2011. For institutions that are not HMDA reporters, loan counts projected based on Call Report data fields and counts for HMDA reporters.

[b] Entities are characterized as originating loans if they make one or more loans.

[c] Does not include cooperativas operating in Puerto Rico. The Bureau has limited data about these institutions or their mortgage activity.

[d] NMLSR Mortgage Call Report (MCR) for 2011. All MCR reporters that originate at least one loan or that have positive loan amounts are considered to be engaged in real estate credit (instead of purely mortgage brokers). For institutions with missing revenue values, the probability that institution was a small entity is estimated based on the count and amount of originations and the count and amount of brokered loans.

[e] Data do not distinguish nonprofit from for-profit organizations, but Real Estate Credit presumptively includes nonprofit organizations.

It is difficult to determine the number of small nonprofits that would be subject to the proposed regulation. Nonprofits do not generally file Call Reports or HMDA reports. As explained in part II above, as of November 2012 there are 233 nonprofit agencies and nonprofit instrumentalities of government in the U.S. that are authorized by HUD to provide secondary financing,[157] 267 institutions designated as Community Housing Development Organizations that provided credit in 2011, and 231 institutions designated as Downpayment Assistance through Secondary Financing Providers. A comprehensive list of these institutions is not available; however the Bureau believes that there may be substantial overlap among these institutions and that most of these institutions would qualify as small entities.

Also, as of July 2012 there were 999 organizations designated by the Treasury Department as CDFIs, 356 of which are depository institutions counted above. Among the remaining, some are nonprofits and most likely small.[158]

[157] *See https://entp.hud.gov/idapp/html/f17npdata.cfm.*

[158] *See http://www.cdfifund.gov/docs/certification/cdfi/CDFI List-07-31-12.xls.*

C. Impact of Exemption for Certain Community-Focused Lending Programs

The proposed provisions related to community-focused lending programs discussed above all provide exemptions from the ability-to-repay requirements. Measured against the baseline of the burdens imposed by the Bureau's 2013 ATR Final Rule, the Bureau believes that these proposed provisions impose either no or insignificant additional burdens on small entities. The Bureau believes that these proposed provisions will reduce the burdens associated with implementation costs, additional underwriting costs, and compliance costs stemming from the ability-to-repay requirements.

Proposed 1026.43(a)(3)(iii) provides that an extension of credit made pursuant to a program administered by a housing finance agency, as defined by 24 CFR 266.5, is exempt from the requirements of § 1026.43(c) through (f). This provision would remove the burden to small government jurisdictions, and small entities extending credit pursuant to programs administered by these housing finance agencies, of having to modify the underwriting practices associated with these programs to implement the ability-to-repay requirements. This provision would also remove the burden to small entities of having to develop and maintain policies and procedures to monitor compliance with the ability-to-repay requirements.

The proposal provides that an extension of credit made by a creditor designated as a Community Development Financial Institution, a Downpayment Assistance through Secondary Financing Provider, and a Community Housing Development Organization are exempt from the ability-to-repay requirements. This provision would remove the burden to small entities of having to implement the ability-to-repay requirements. This provision would also remove the burden to small entities of having to develop and maintain policies and procedures to monitor compliance with the ability-to-repay requirements.

Regulatory burdens may be associated with obtaining and maintaining one of the designations required to qualify for the exemption. However, this decision is voluntary and the Bureau presumes that a small entity would not do so unless the burden reduction resulting from the exemption outweighed the additional burden imposed by obtaining and maintaining the designation. Thus, additional burdens would still be part of an overall burden reduction.

The proposal provides that an entity with a tax exemption ruling or determination letter from the Internal Revenue Service under section 501(c)(3) of the Internal Revenue Code of 1986 is exempt from the ability-to-repay requirements, provided that: During the calendar year preceding receipt of the consumer's application, the entity extended credit secured by a dwelling no more than 100 times; during the calendar year preceding receipt of the consumer's application, the entity extended credit secured by a dwelling only to consumers with income that did not exceed the qualifying limit for moderate income families as established pursuant to section 8 of the United States Housing Act of 1937; the extension of credit is to a consumer with income that does not exceed this qualifying limit; and that the creditor determines, in accordance with written procedures, that the consumer has a reasonable ability to repay the extension of credit.

For eligible entities, this provision would remove the burden of complying with the ability-to-repay requirements. This provision would also remove the burden to small entities of having to develop and maintain policies and procedures to monitor compliance with the ability-to-repay requirements in the 2013 ATR Final Rule. While small creditors would be required to maintain documentation of their own procedures regarding the determination of a consumer's ability to repay, the Bureau believes that such small nonprofits already have written policies and procedures.

D. Impact of Exemption for Certain Homeownership Stabilization, Foreclosure Prevention, and Refinancing Programs

The proposed provisions related to certain homeownership stabilization, foreclosure prevention, and refinancing programs discussed above all provide exemptions from the ability-to-repay requirements. Measured against the baseline of the burdens imposed by the Bureau's 2013 Final Rule, the Bureau believes that these proposed provisions impose either no or insignificant additional burdens on small entities. The Bureau believes that these proposed provisions will reduce the burdens associated with implementation costs, additional underwriting costs, and compliance costs stemming from the ability-to-repay requirements.

The proposal provides that an extension of credit made pursuant to a program authorized by sections 101 and 109 of the Emergency Economic Stabilization Act of 2008 is exempt from the ability-to-repay requirements. This provision would remove the burden to small entities of having to modify the underwriting practices associated with these programs to implement the ability-to-repay requirements. This provision would also remove the burden to small entities of having to develop and maintain policies and procedures to monitor compliance with these ability-to-repay requirements.

The proposal provides that an extension of credit that is a refinancing that is eligible to be insured, guaranteed, or made pursuant to a program administered by the Federal Housing Administration, U.S. Department of Veterans Affairs, or the U.S. Department of Agriculture is exempt from the ability-to-repay requirements, provided that the agency administering the program under which the extension of credit is eligible to be insured, guaranteed, or made has not prescribed rules pursuant to section 129C(a)(5) or 129C(b)(3)(B)(ii) of TILA. This provision would remove the burden to small entities of having to modify the underwriting practices currently used for Federal agency refinance programs to implement the ability-to-repay requirements. This provision would also remove the burden to small entities of having to develop and maintain policies and procedures to monitor compliance with these ability-to-repay requirements, with respect to extensions of credit exempt from these requirements pursuant to this proposed provision. Pursuant to the proposal, small entities need determine only whether regulations applicable to refinancings prescribed by the relevant Federal agency have taken effect. Prior to that point in time, small entities are relieved of any burden imposed by the ability-to-repay requirements with respect to refinancings eligible to be insured, guaranteed, or made pursuant to a Federal agency program.

The proposal covers certain refinancings eligible to be purchased or guaranteed by Fannie Mae or Freddie Mac pursuant to an eligible targeted refinancing program. This provision would remove the burden to small entities of having to modify the underwriting practices currently used for GSE refinance programs to implement the ability-to-repay requirements. This provision would also remove the burden to small entities of having to develop and maintain policies and procedures to monitor compliance with the ability-to-repay requirements, with respect to extensions of credit exempt from these requirements pursuant to this proposed provision. Further, by exempting creditors extending credit pursuant to one of these programs, the proposal removes any economic burdens associated with ability-to-repay litigation risk.

The proposed provision may add an additional burden on small entities by requiring a determination of whether Fannie Mae or Freddie Mac owns the existing obligation to determine if the proposed provision applies. However, in refinancings creditors generally must determine ownership of the existing obligation prior to consummation to determine the accurate amount of the outstanding obligation. Thus, the Bureau believes that the proposed provision will shift this determination to an earlier point in the refinancing process, and will likely not create a new burden on small entities. A small entity may choose not to make use of the proposed provision in the event that such burden outweighed the benefit. The Bureau requests feedback regarding whether this provision will create new or additional burdens on small entities.

E. Small Creditor Qualified Mortgages Retained in Portfolio

The proposal creates a new category of qualified mortgage for certain mortgage loans made and retained by certain small creditors. The proposed new category would apply to creditors that, at the end of the prior calendar year: (1) Had total assets of less than $2 billion; and (2) together with the creditor's affiliates, originated no more than 500 first-lien covered transactions. Each of these loans must have complied with the general requirements applicable to qualified mortgages under § 1026.43(e)(2), except for the 43 percent debt-to-income ratio limitation in § 1026.43(e)(2)(vi). The $2 billion asset threshold in the proposed definition would be adjusted annually based on the year-to-year change in the average of the Consumer Price Index for Urban Wage Earners and Clerical Workers, not seasonally adjusted.

This proposal would reduce burden on small creditors by removing the 43 percent debt-to-income limitation for qualified mortgages. The increase in the threshold from APOR plus 1.5 percentage points to APOR plus 3.5 percentage points would reduce burden for the loans at these institutions between these rates as these loans would now qualify for a conclusive, rather than a rebuttable presumption.

At the small creditors identified, 16.7 percent of mortgage loans on portfolio are estimated to have a debt to income ratios above 43 percent. For these loans, the proposal grants creditors a presumption of compliance with the ability-to-repay requirements; rough estimates indicate that three quarters of these will gain a conclusive presumption and the remaining loans will gain the rebuttable presumption.

It is difficult to estimate the reduction in potential future liability costs associated with the changes. However, the Bureau notes that lending practices at smaller institutions are reportedly based on a more personal relationship based model and historically, delinquency rates on mortgages at smaller institutions are lower than the average in the industry. As such, the expected litigation costs from the ability-to-repay provisions of the 2013 ATR Final Rule, and therefore the reduced burden from this proposal, should be small. Small creditors will benefit most from the increased certainty regarding the lower frequency of litigation.

The Bureau acknowledges that possibility that this proposal may increase small creditor burden by requiring such creditors to maintain records relating to eligibility for the exemption, but the Bureau believes that these costs are negligible, as creditor asset size and origination activity are data that all banks are likely to maintain for routine supervisory purposes. Thus, the Bureau believes that the burden reduction stemming from a reduction in liability costs would outweigh any potential recordkeeping costs, resulting in overall burden reduction. Small entities for which such cost reductions are outweighed by additional record keeping costs may choose not to utilize the proposed exemption.

F. Proposed Clarification Regarding Inclusion of Loan Originator Compensation in the Points and Fees Calculation

As discussed in detail above, the Dodd-Frank Act requires creditors to include all compensation paid directly or indirectly by a consumer or creditor to a mortgage originator from any source, including a mortgage originator that is also the creditor in a table-funded transaction, in the calculation of points and fees. The statute does not express any limitation on this requirement, and thus, the Bureau believes it would be read to require that loan originator compensation be treated as additive to up-front charges paid by the consumer and the other elements of points and fees. The Bureau was concerned that this may not be the optimal outcome, but did not believe that it had sufficient information with which to determine definitively that an alternative approach was warranted.

The proposal provides two alternative comments on the rule.[159] One would explicitly preclude offsetting, while the other would allow creditors to offset the amount of loan originator compensation by the amount of finance charges paid by the consumer. The Bureau is also seeking comment on whether other alternatives might be appropriate. The Bureau has also proposed a separate comment, explaining that mortgage brokers need not double-count payments to loan originator employees when determining points and fees.

Measured against the baseline of the statutory requirements, these proposed alternatives either reduce or have no effect on the burden on small creditors. As discussed above and in the section-by-section analysis, the Bureau believes the statute would be read to require loan originator compensation to be treated as additive to the other elements of points and fees. This places a burden on small creditors, since it makes it more likely that mortgage loans will not be eligible for a presumption of compliance as qualified mortgages under the ability-to-repay rules and will be classified as high-cost mortgages for purposes of HOEPA. One of the alternatives that the Bureau has proposed would simply state this result expressly. The other reduces the burden on small creditors imposed by the statue by providing small creditors with greater pricing flexibility. The second proposed comment, addressing double-counting of employee compensation, also would reduce burden on small entities regardless of what standard the Bureau adopts in connection with the first proposed comment.

G. Conclusion

Each element of this proposal results in an economic burden reduction for these small entities. The proposed exemptions for nonprofit creditors would lessen any economic impact resulting from the ability-to-repay requirements. The proposed exemptions for homeownership stabilization, foreclosure prevention, and refinancing programs would also soften any economic impact on small entities extending credit pursuant to those programs. The proposed new category of qualified mortgage would make it easier for small entities to originate qualified mortgages. While all of these proposed exemptions may entail additional recordkeeping costs, the Bureau believes that these costs are minimal and outweighed by the cost reductions resulting from the proposal. Small entities for which such cost reductions are outweighed by additional record keeping costs may choose not to utilize the proposed exemptions.

Certification

Accordingly, the undersigned certifies that this proposal would not have a significant economic impact on a substantial number of small entities. The Bureau requests comment on the analysis above and requests any relevant data.

VIII. Paperwork Reduction Act

Certain provisions of this notice of proposed rulemaking contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (Paperwork Reduction Act or PRA). The collection of information contained in this proposed rule, and identified as such, has been submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the PRA. Notwithstanding any other provision of law, under the PRA, the Bureau may not conduct or sponsor, and a person is not required to respond to, this information collection unless the information collection displays a currently valid control number.

This proposed rule would amend 12 CFR part 1026 (Regulation Z), which implements the Truth in Lending Act (TILA). Regulation Z currently contains collections of information approved by OMB. The Bureau's OMB control number for Regulation Z is 3170–0015. As described below, the proposed rule would amend the collections of information currently in Regulation Z.

A. Overview

This proposal is related to a final rule published elsewhere in today's **Federal Register**. That final rule implements sections 1411, 1412, and 1414 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act), which creates new TILA section 129C. Among other things, the Dodd-Frank Act requires creditors to make a reasonable, good faith determination of a consumer's ability to repay any consumer credit transaction secured by a dwelling (excluding an open-end credit plan, timeshare plan, reverse mortgage, or temporary loan) and establishes certain protections from liability under this requirement for ''qualified mortgages.''

The Bureau is proposing certain amendments to the final rule implementing these ability-to-repay requirements, including exemptions for certain nonprofit creditors and certain homeownership stabilization programs and an additional definition of a

[159] These proposed commentary provisions do not circumscribe conduct, and therefore do not in themselves present cognizable impacts for purposes of the Regulatory Flexibility Act. Nevertheless, the Bureau has considered such impacts on small entities as part of this particular rulemaking in order to better inform the public and its rulemaking.

qualified mortgage for certain loans made and held in portfolio by small creditors that have total assets less than $2 billion at the end of the previous calendar year; and, together with all affiliates, originated 500 or fewer first-lien covered transactions during the previous calendar year. The Bureau also is proposing to allow small creditors to charge a higher annual percentage rate for first-lien qualified mortgages in the proposed new category and still benefit from a conclusive presumption of compliance or ''safe harbor,'' and to allow small creditors operating predominantly in rural or underserved areas to offer first-lien balloon loans with a higher annual percentage rate and still benefit from a conclusive presumption of compliance with the ability-to-repay rules or ''safe harbor.''

The information collection in the proposed rule is required to provide benefits for consumers and would be mandatory. *See* 15 U.S.C. 1601 *et seq.;* 12 U.S.C. 2601 *et seq.* Because the Bureau does not collect any information under the final rule, no issue of confidentiality arises. The likely respondents would be depository institutions (*i.e.,* commercial banks, savings institutions and credit unions) and non-depository institutions (*i.e.,* mortgage companies or other non-bank lenders) subject to Regulation Z.[160]

Under the proposal, the Bureau generally accounts for the paperwork burden associated with Regulation Z for the following respondents pursuant to its administrative enforcement authority: insured depository institutions with more than $10 billion in total assets, their depository institution affiliates, and certain nondepository lenders. The Bureau and the FTC generally both have enforcement authority over non-depository institutions for Regulation Z. Accordingly, the Bureau has allocated to itself half of the estimated burden to non-depository institutions. Other Federal agencies are responsible for estimating and reporting to OMB the total paperwork burden for the institutions for which they have administrative enforcement authority. They may, but are not required to, use the Bureau's burden estimation methodology.

[160] For purposes of this PRA analysis, references to ''creditors'' or ''lenders'' shall be deemed to refer collectively to commercial banks, savings institutions, credit unions, and mortgage companies (*i.e.,* non-depository lenders), unless otherwise stated. Moreover, reference to ''respondents'' shall generally mean all categories of entities identified in the sentence to which this footnote is appended, except as otherwise stated or if the context indicates otherwise.

Using the Bureau's burden estimation methodology, there is no change to the total estimated burden under Regulation Z as a result of the proposed rule.

B. Information Collection Requirements

1. Ability-To-Repay Verification and Documentation Requirements

As discussed above, the final rule published elsewhere in today's **Federal Register** contains specific criteria that a creditor must consider in assessing a consumer's repayment ability while different verification requirements apply to qualified mortgages. As described in the relevant sections of the final rule, the Bureau does not believe that the verification and documentation requirements of the proposed rule result in additional ongoing costs for most covered persons. However, for some creditors, notably the community-focused lending programs, State housing finance agencies, and not-for profit organizations exempted in the proposed rule, lending can vary widely, in the form of financing, the products offered and the precise nature of underwriting. These processes may not involve the more traditional products covered by the qualified mortgage definition nor do these lenders use documentation and verification procedures closely aligned with the requirements of the 2013 ATR rule.

For these lenders, the proposed rule should eliminate any costs from imposing these requirements on these particular extensions of credits. The Bureau estimates one-time and ongoing costs to respondents of complying with the proposed rule as follows.

One-time costs. The Bureau estimates that covered persons will incur one-time costs associated with reviewing the relevant sections of the **Federal Register** and training relevant employees. In general, the Bureau estimates these costs to include, for each covered person, the costs for one attorney and one compliance officer to read and review the sections of the proposed rule that describe the verification and documentation requirements for loans in addition to the costs for each loan officer or other loan originator to receive training concerning the requirements. However, the Bureau believes that respondents will review the relevant sections of this proposal along with the 2013 ATR Final Rule to best understand any new regulatory requirements and their coverage. As such, there is no additional one-time burden attributed to the proposed rule.

Ongoing costs. The exemption of the covered institutions should reduce any burden related to these provisions. However, in the final rule, the Bureau did not attribute any paperwork burden to these provisions on the assumption that the verification and documentation requirements of the final rule will not result in additional ongoing costs for most covered persons. As such, it would be inappropriate to credit any reduction in burden to the proposed rule.

C. Summary of Burden Hours

As noted, the Bureau does not believe the proposed rule results in any changes in the burdens under Regulation Z associated with information collections for Bureau respondents under the PRA.

D. Comments

The Bureau has a continuing interest in the public's opinions of our collections of information. Comments are specifically requested concerning: (i) Whether the proposed collections of information are necessary for the proper performance of the functions of the Bureau, including whether the information will have practical utility; (ii) the accuracy of the estimated burden associated with the proposed collections of information; (iii) how to enhance the quality, utility, and clarity of the information to be collected; and (iv) how to minimize the burden of complying with the proposed collections of information, including the application of automated collection techniques or other forms of information technology. Comments regarding the burden estimate, or any other aspect of this collection of information, including suggestions for reducing the burden, should be sent to: The Office of Management and Budget (OMB), Attention: Desk Officer for the Consumer Financial Protection Bureau, Office of Information and Regulatory Affairs, Washington, DC, 20503, or by the internet to *submissions@omb.eop.gov,* With copies to the Bureau at the Consumer Financial Protection Bureau (Attention: PRA Office), 1700 G Street NW., Washington, DC, 20552, or by the internet to *CFPB_Public_PRA@cfpb.gov.*

List of Subjects in 12 CFR Part 1026

Advertising, Consumer protection, Mortgages, Reporting and recordkeeping requirements, Truth in Lending.

Text of Proposed Revisions

Certain conventions have been used to highlight the proposed revisions. New language is shown inside ►bold-faced arrows◄, while language that would be deleted is shown inside [bold-faced brackets].

Authority and Issuance

For the reasons set forth above, the Bureau of Consumer Financial Protection proposes to amend Regulation Z, 12 CFR part 1026, as set forth below:

PART 1026—TRUTH IN LENDING (REGULATION Z)

■ 1. The authority citation for part 1026 continues to read as follows:

Authority: 12 U.S.C. 2601, 2603–2605, 2607, 2609, 2617, 5511, 5512, 5532, 5581; 15 U.S.C. 1601 *et seq.*

Subpart E—Special Rules for Certain Home Mortgage Transactions

■ 2. Section 1026.43, as added elsewhere in this issue of the **Federal Register**, is amended by revising paragraphs (a)(3)(ii) and (iii), adding new paragraphs (a)(3)(iv) through (viii), revising paragraphs (b)(4), (e)(1), (e)(2), and (g)(1)(ii)(B), and adding new paragraph (e)(5), to read as follows:

§ 1026.43 Minimum standards for transactions secured by a dwelling.

(a) * * *

(3) * * *

(ii) A temporary or ''bridge'' loan with a term of 12 months or less, such as a loan to finance the purchase of a new dwelling where the consumer plans to sell a current dwelling within 12 months or a loan to finance the initial construction of a dwelling; [or]

(iii) A construction phase of 12 months or less of a construction-to-permanent loan►;◄ **[**.**]**

►(iv) An extension of credit made pursuant to a program administered by a Housing Finance Agency, as defined under 24 CFR 266.5;

(v) An extension of credit made by:

(A) A creditor designated as a Community Development Financial Institution, as defined under 12 CFR 1805.104(h);

(B) A creditor designated as a Downpayment Assistance through Secondary Financing Provider, pursuant to 24 CFR 200.194(a), operating in accordance with regulations prescribed by the U.S. Department of Housing and Urban Development applicable to such persons;

(C) A creditor designated as a Community Housing Development Organization, as defined under 24 CFR 92.2, operating in accordance with regulations prescribed by the U.S. Department of Housing and Urban Development applicable to such persons; or

(D) A creditor with a tax exemption ruling or determination letter from the Internal Revenue Service under section 501(c)(3) of the Internal Revenue Code of 1986 (26 CFR 1.501(c)(3)-1), provided that:

(*1*) During the calendar year preceding receipt of the consumer's application, the entity extended credit secured by a dwelling no more than 100 times;

(*2*) During the calendar year preceding receipt of the consumer's application, the entity extended credit secured by a dwelling only to consumers with income that did not exceed the qualifying limit for moderate income families as established pursuant to section 8 of the United States Housing Act of 1937 and amended from time to time by the U.S. Department of Housing and Urban Development;

(*3*) The extension of credit is to a consumer with income that does not exceed the qualifying limit specified in paragraph (a)(3)(v)(D)(*2*) of this section; and

(*4*) The creditor determines, in accordance with written procedures, that the consumer has a reasonable ability to repay the extension of credit.

(vi) An extension of credit made pursuant to a program authorized by sections 101 and 109 of the Emergency Economic Stabilization Act of 2008 (12 U.S.C. 5211; 5219);

(vii) An extension of credit that is a refinancing, as defined under § 1026.20(a) but without regard for whether the creditor is the creditor, holder, or servicer of the original obligation, that is eligible to be insured, guaranteed, or made pursuant to a program administered by the Federal Housing Administration, U.S. Department of Veterans Affairs, or the U.S. Department of Agriculture, provided that the agency administering the program under which the extension of credit is eligible to be insured, guaranteed, or made has not prescribed rules pursuant to section 129C(a)(5) or 129C(b)(3)(B)(ii) of TILA; or

(viii) An extension of credit that is a refinancing, as defined under § 1026.20(a) but without regard for whether the creditor is the creditor, holder, or servicer of the original obligation, that is eligible to be purchased or guaranteed by the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation, provided that:

(A) The refinancing is made pursuant to an eligible targeted refinancing program, as defined under 12 CFR 1291.1;

(B) Such entities are operating under the conservatorship or receivership of the Federal Housing Finance Agency pursuant to section 1367 of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (12 U.S.C. 4617(i)) on the date the refinancing is consummated;

(C) The existing obligation satisfied and replaced by the refinancing is owned by the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation;

(D) The existing obligation satisfied and replaced by the refinancing was not consummated on or after January 10, 2014; and

(E) The refinancing is not consummated on or after January 10, 2021.◄

(b) * * *

(4) *Higher-priced covered transaction* means a covered transaction with an annual percentage rate that exceeds the average prime offer rate for a comparable transaction as of the date the interest rate is set by 1.5 or more percentage points for a first-lien covered transaction►, other than a qualified mortgage under paragraph (e)(5) or (f) of this section; by 3.5 or more percentage points for a first-lien covered transaction that is a qualified mortgage under paragraph (e)(5) or (f) of this section;◄ or by 3.5 or more percentage points for a subordinate-lien covered transaction.

* * * * *

(e) *Qualified mortgages.* (1) *Safe harbor and presumption of compliance.* (i) *Safe harbor for loans that are not higher-priced covered transactions.* A creditor or assignee of a qualified mortgage, as defined in paragraphs (e)(2), (e)(4), ►(e)(5),◄ or (f) of this section, that is not a higher-priced covered transaction, as defined in paragraph (b)(4) of this section, complies with the repayment ability requirements of paragraph (c) of this section.

(ii) *Presumption of compliance for higher-priced covered transactions.* (A) A creditor or assignee of a qualified mortgage, as defined in paragraph (e)(2), (e)(4), ►(e)(5),◄ or (f) of this section, that is a higher-priced covered transaction, as defined in paragraph (b)(4) of this section, is presumed to comply with the repayment ability requirements of paragraph (c) of this section.

(B) To rebut the presumption of compliance described in paragraph (e)(1)(ii)(A) of this section, it must be proven that, despite meeting the prerequisites of paragraph (e)(2), (e)(4), ►(e)(5),◄ or (f) of this section, the creditor did not make a reasonable and good faith determination of the consumer's repayment ability at the time of consummation, by showing that the consumer's income, debt obligations, alimony, child support, and the consumer's monthly payment (including mortgage-related obligations) on the covered transaction and on any simultaneous loans of which the creditor was aware at consummation would leave the consumer with insufficient residual income or assets other than the value of the dwelling (including any real property attached to the dwelling) that secures the loan with which to meet living expenses, including any recurring and material non-debt obligations of which the creditor was aware at the time of consummation.

(2) *Qualified mortgage defined—general.* Except as provided in paragraph (e)(4)►, (e)(5),◄ or (f) of this section, a qualified mortgage is a covered transaction:

* * * * *

►(5) *Qualified mortgage defined—small creditor portfolio loans.* (i) Notwithstanding paragraph (e)(2) of this section, a qualified mortgage is a covered transaction:

(A) That satisfies the requirements of paragraph (e)(2) of this section other than the requirements of paragraph (e)(2)(vi) and without regard to the standards in appendix Q to this part;

(B) For which the creditor considers at or before consummation the consumer's monthly debt-to-income ratio or residual income and verifies the debt obligations and income used to determine that ratio in accordance with paragraph (c)(7) of this section, except that the calculation of the payment on the covered transaction for purposes of determining the consumer's total monthly debt obligations in paragraph (c)(7)(i)(A) shall be determined in accordance with paragraph (e)(2)(iv) of this section instead of paragraph (c)(5) of this section;

(C) That is not subject, at consummation, to a commitment to be acquired by another person, other than a person that satisfies the requirements of paragraph (e)(5)(i)(D) of this section; and

(D) For which the creditor satisfies the requirements stated in § 1026.35(b)(2)(iii)(B) and (C).

(ii) A qualified mortgage extended pursuant to paragraph (e)(5)(i) of this section immediately loses its status as a qualified mortgage under paragraph (e)(5)(i) if legal title to the qualified mortgage is sold, assigned, or otherwise transferred to another person except when:

(A) The qualified mortgage is sold, assigned, or otherwise transferred to another person three years or more after consummation of the qualified mortgage;

(B) The qualified mortgage is sold, assigned, or otherwise transferred to a creditor that satisfies the requirements of paragraph (e)(5)(i)(D) of this section;

(C) The qualified mortgage is sold, assigned, or otherwise transferred to another person pursuant to a capital restoration plan or other action under 12 U.S.C. 1831o, actions or instructions of any person acting as conservator, receiver, or bankruptcy trustee, an order of a State or Federal government agency with jurisdiction to examine the creditor pursuant to State or Federal law, or an agreement between the creditor and such an agency; or

(D) The qualified mortgage is sold, assigned, or otherwise transferred pursuant to a merger of the creditor with another person or acquisition of the creditor by another person or of another person by the creditor.◄

* * * * *

(g) * * *

(1) * * *

(ii) * * *

(B) Is a qualified mortgage under paragraph (e)(2), (e)(4), ►(e)(5),◄ or (f) of this section; and

* * * * *

■ 3. In Supplement I to Part 1026—Official Interpretations:

A. Under *Section 1026.32—Requirements for High-Cost Mortgages:*

i. Under *32(b) Definitions:*

a. Under *Paragraph 32(b)(1)(ii),* as amended elsewhere in this issue of the **Federal Register**, paragraph 5 under that heading is added.

B. Under *Section 1026.43—Minimum Standards for Transactions Secured by a Dwelling,* as added elsewhere in this issue of the **Federal Register**:

i. Under *43(a) Scope:*

a. The heading *Paragraph 43(a)(3)(v)(D)* and paragraph 1 under that heading are added.

b. The heading *Paragraph 43(a)(3)(vi)* and paragraph 1 under that heading are added.

c. The heading *Paragraph 43(a)(3)(vii)* and paragraph 1 under that heading are added.

d. The heading *Paragraph 43(a)(3)(viii)* and paragraph 1 under that heading are added.

ii. Under *43(e) Qualified Mortgages:*

a. The heading *Paragraph 43(e)(5)* and paragraphs 1 through 10 under that heading are added.

Supplement I to Part 1026—Official Interpretations

* * * * *

Subpart E—Special Rules for Certain Home Mortgage Transactions

* * * * *

Section 1026.32—Requirements for High-Cost Mortgages

* * * * *

32(b) Definitions.

Paragraph 32(b)(1).

Paragraph 32(b)(1)(ii).

* * * * *

►5. *Loan originator compensation—calculating loan originator compensation in connection with other charges or payments included in the finance charge or made to loan originators.* i. *Consumer payments to mortgage brokers.* Mortgage broker fees already included in the points and fees calculation under § 1026.32(b)(1)(i) need not be counted again under § 1026.32(b)(1)(ii). For example, assume a mortgage broker charges a consumer a $3,000 fee for a transaction. The $3,000 mortgage broker fee is included in the finance charge under § 1026.4(a)(3). Because the $3,000 mortgage broker fee is already included in points and fees under § 1026.32(b)(1)(i), it is not counted again under § 1026.32(b)(1)(ii).

ii. *Payments by a mortgage broker to its individual loan originator employee.* Compensation paid by a mortgage broker to its individual loan originator employee is not included in points and fees under § 1026.32(b)(1)(ii). For example, assume a consumer pays a $3,000 fee to a mortgage broker, and the mortgage broker pays a $1,500 commission to its individual loan originator employee for that transaction. The $3,000 mortgage broker fee is included in points and fees, but the $1,500 commission is not included in points and fees because it has already been included in points and fees as part of the $3,000 mortgage broker fee.

Alternative 1

iii. *Creditor's origination fees.* Section 1026.32(b)(1)(ii) requires a creditor to include compensation paid by a consumer or creditor to a loan originator in the calculation of points and fees in addition to any fees or charges paid by the consumer to the creditor included in points and fees under § 1026.32(b)(1)(i). For example, assume that a consumer pays to the creditor a $3,000 origination fee and that the creditor pays to its loan officer employee $1,500 in compensation attributed to the transaction. Assume further that the consumer pays no other charges to the creditor that are included in points and fees under § 1026.32(b)(1)(i) and the loan officer receives no other compensation that is included in points and fees under § 1026.32(b)(1)(ii). For purposes of calculating points and fees, the $3,000 origination fee is included in points and fees under § 1026.32(b)(1)(i) and the $1,500 in loan officer compensation is included in points and fees under § 1026.32(b)(1)(ii), equaling $4,500 in total points and fees, provided that no other points and fees are paid or compensation received.

Alternative 2

iii. *Creditor's origination fees.* Section 1026.32(b)(1)(ii) requires a creditor to reduce the amount of loan originator compensation included in the points and fees calculation under § 1026.32(b)(1)(ii) by any amount included in the points and fees calculation under § 1026.32(b)(1)(i). For example, assume that a consumer pays to the creditor a $3,000 origination fee and that the creditor pays to the loan originator $1,500 in compensation attributed to the transaction. Assume further that the consumer pays no other charges to the creditor that are included in points and fees under § 1026.32(b)(1)(i) and the loan originator receives no other compensation that is included in points and fees under § 1026.32(b)(1)(ii). For purposes of calculating points and fees, the $3,000 origination fee is included in points and fees under § 1026.32(b)(1)(i), but the $1,500 in loan originator compensation need not be included in points and fees. If, however, the consumer pays to the creditor a $1,000 origination fee and the creditor pays to the loan originator $1,500 in compensation, then the $1,000 origination fee is included in points and fees under § 1026.32(b)(1)(i), and $500 of the loan originator compensation is included in points and fees under § 1026.32(b)(1)(ii), equaling $1,500 in total points and fees, provided that no other points and fees are paid or compensation received. This example illustrates the requirements of § 1026.32(b)(1)(ii) for both retail and wholesale transactions.◄

* * * * *

Section 1026.43—Minimum Standards for Transactions Secured by a Dwelling

43(a) Scope

* * * * *

►*Paragraph 43(a)(3)(v)(D).*

1. *General.* An extension of credit is exempt from the requirements of § 1026.43(c) through (f) if the credit is extended by a creditor described in § 1026.43(a)(3)(v)(D), provided the conditions specified in that section are satisfied. The conditions specified in § 1026.43(a)(3)(v)(D)(*1*) and (*2*) are determined according to activity that occurred in the calendar year preceding the calendar year in which the consumer's application was received. Section 1026.43(a)(3)(v)(D)(*2*) provides that, during the preceding calendar year, the creditor must have extended credit only to consumers with income that did not exceed the qualifying limit then in effect for moderate income families, as specified in regulations prescribed by the U.S. Department of Housing and Urban Development pursuant to section 8 of the United States Housing Act of 1937. For example, a creditor has satisfied the requirement in § 1026.43(a)(3)(v)(D)(*2*) if the creditor extended credit only to consumers with incomes that did not exceed the qualifying limit in effect on the dates the creditor received each consumer's individual application. The condition specified in § 1026.43(a)(3)(v)(D)(*3*), which relates to the current extension of credit, provides that the extension of credit must be to a consumer with income that does not exceed the qualifying limit specified in § 1026.43(a)(3)(v)(D)(*2*) in effect on the date the creditor received the consumer's application. For example, assume that a creditor with a tax exemption ruling under section 501(c)(3) of the Internal Revenue Code of 1986 has satisfied the conditions identified in § 1026.43(a)(3)(v)(D)(*1*) and (*2*). If, on May 21, 2014, the creditor in this example extends credit secured by a dwelling to a consumer whose application reflected income in excess of the qualifying limit identified in § 1026.43(a)(3)(v)(D)(*2*) in effect on the date the creditor received that consumer's application, the creditor has not satisfied the condition in § 1026.43(a)(3)(v)(D)(*3*) and this extension of credit is not exempt from the requirements of § 1026.43(c) through (f).

Paragraph 43(a)(3)(vi).

1. *General.* The requirements of § 1026.43(c) through (f) do not apply to a mortgage loan modification made in connection with a program authorized by sections 101 and 109 of the Emergency Economic Stabilization Act of 2008. If a creditor is underwriting an extension of credit that is a refinancing, as defined by § 1026.20(a), that will be made pursuant to a program authorized by sections 101 and 109 of the Emergency Economic Stabilization Act of 2008, the creditor also need not comply with § 1026.43(c) through (f). A creditor need not determine whether the mortgage loan modification is considered a refinancing under § 1026.20(a) for purposes of determining applicability of § 1026.43; if the transaction is made in connection with these programs, the requirements of § 1026.43(c) through (f) do not apply. In addition, if a creditor underwrites a new extension of credit, such as a subordinate-lien mortgage loan, that will be made pursuant to a program authorized by sections 101 and 109 of the Emergency Economic Stabilization Act of 2008, the creditor need not comply with the requirements of § 1026.43(c) through (f).

Paragraph 43(a)(3)(vii).

1. *General.* The requirements of § 1026.43(c) through (f) do not apply to an extension of credit that is a refinancing, as defined by § 1026.20(a) but without regard for whether the creditor is the creditor, holder, or servicer of the original obligation, that is eligible to be insured, guaranteed, or made pursuant to programs administered by the Federal agencies identified in § 1026.43(a)(3)(vii), provided that rules issued by such agencies pursuant to section 129C(b)(3)(B)(ii) or 129C(a)(5) of TILA have not become effective on or before the date the refinancing is consummated. For example:

i. Assume that a consumer applies for a refinancing that is eligible to be insured, guaranteed, or made pursuant to a program administered by the U.S. Department of Veterans Affairs. If the U.S. Department of Veterans Affairs has issued rules pursuant to TILA section 129C(b)(3)(B)(ii) or 129C(a)(5) that have become effective, the exemption in § 1026.43(a)(3)(vii) does not apply because those rules will separately govern the status of U.S. Department of Veterans Affairs loans.

ii. Assume that a consumer applies for a refinancing of a subordinate-lien mortgage loan that is eligible to be insured, guaranteed, or made pursuant to a program administered by the U.S. Department of Veterans Affairs and the U.S. Department of Veterans Affairs has issued rules pursuant to TILA section 129C(b)(3)(B)(ii) or 129C(a)(5) that have become effective. Assume further that such effective rules apply to refinancings of first-lien mortgage loans, but not subordinate-lien mortgage loans. The exemption in § 1026.43(a)(3)(vii) does not apply, regardless of the status of the particular loans under the rules issued, because the U.S. Department of Veterans Affairs has issued rules pursuant to TILA section 129C(b)(3)(B)(ii) or 129C(a)(5) that have become effective. The exemption does not apply even if the applicability of such Federal agency rules is determined based on program type instead of loan type. Thus, the exemption in § 1026.43(a)(3)(vii) does not apply even if the U.S. Department of Veterans Affairs rules do not apply to the particular U.S. Department of Veterans Affairs program under which the refinancing is eligible to be insured, guaranteed, or made.

iii. Assume that a consumer applies for a refinancing that is eligible to be insured, guaranteed, or made pursuant to a program administered by the Federal Housing Administration and the Federal Housing Administration has issued rules pursuant to TILA section 129C(b)(3)(B)(ii) or 129C(a)(5) that have become effective. Assume further that the refinancing for which the consumer applies is also eligible to be insured, guaranteed, or made pursuant to a program administered by the U.S. Department of Agriculture, but the U.S. Department of Agriculture has not issued rules pursuant to TILA section 129C(b)(3)(B)(ii) or 129C(a)(5), or the U.S. Department of Agriculture has issued rules implementing TILA section 129C(b)(3)(B)(ii) or 129C(a)(5) that have not yet taken effect at the time the refinancing is consummated. The exemption applies to that refinancing because the refinancing is eligible to be to be insured, guaranteed, or made pursuant to a pursuant to program administered by a Federal agency identified in § 1026.43(a)(3)(vii), and such Federal agency has not issued rules pursuant to section 129C(b)(3)(B)(ii) or 129C(a)(5) of TILA that have become effective.

Paragraph 43(a)(3)(viii).

1. *General.* Section 1026.43(a)(3)(viii) provides an exemption from the requirements of § 1026.43(c) through (f) for certain extensions of credit that are considered refinancings, as defined in § 1026.20(a) but without regard for whether the creditor is the creditor, holder, or servicer of the original obligation, that are eligible for purchase or guarantee by Fannie Mae or Freddie Mac. The exemption provided by § 1026.43(a)(3)(viii) is available only while these entities remain in conservatorship. For example, if Fannie Mae remains in conservatorship, but Freddie Mac exits conservatorship, the exemption continues to apply to refinancings that are eligible for purchase by Fannie Mae, provided the other conditions specified in § 1026.43(a)(3)(viii) are met. Further, the exemption is available only if the existing obligation that will be satisfied and replaced by the refinancing was consummated prior to January 10, 2014. For example, if a consumer applies for an extension of credit that is a refinancing, as defined by § 1026.20(a), that is eligible to be purchased by Fannie Mae or Freddie Mac, but the consumer's current mortgage loan was consummated on or after January 10, 2014, the exemption provided by § 1026.43(a)(3)(viii) does not apply.◄

* * * * *

43(e) Qualified mortgages.

* * * * *

►*Paragraph 43(e)(5).*

1. *Satisfaction of qualified mortgage requirements.* For a covered transaction to be a qualified mortgage under § 1026.43(e)(5), the mortgage must satisfy the requirements for a qualified mortgage under § 1026.43(e)(2), other than the requirements regarding debt-to-income ratio. For example, a qualified mortgage under § 1026.43(e)(5) may not have a loan term in excess of 30 years because longer terms are prohibited for qualified mortgages under § 1026.43(e)(2)(ii). Similarly, a qualified mortgage under § 1026.43(e)(5) may not result in a balloon payment because § 1026.43(e)(2)(i)(C) provides that qualified mortgages may not have balloon payments except as provided under § 1026.43(f). However, a covered transaction need not comply with § 1026.43(e)(2)(vi), which prohibits consumer monthly debt-to-income ratios in excess of 43 percent. A covered transaction therefore can be a qualified mortgage under § 1026.43(e)(5) even though the consumer's monthly debt-to-income ratio is greater than 43 percent.

2. *Debt-to-income ratio or residual income.* Section 1026.43(e)(5) does not prescribe a specific monthly debt-to-income ratio with which creditors must comply. Instead, creditors must consider a consumer's debt-to-income ratio or residual income calculated generally in accordance with § 1026.43(c)(7) and verify the information used to calculate the debt-to-income ratio or residual income in accordance with § 1026.43(c)(3) and (4). However, § 1026.43(c)(7) refers creditors to § 1026.43(c)(5) for instructions on calculating the payment on the covered transaction. Section 1026.43(c)(5) requires creditors to calculate the payment differently than § 1026.43(e)(2)(iv). For purposes of the qualified mortgage definition in § 1026.43(e)(5), creditors must base their calculation of the consumer's debt-to-income ratio or residual income on the payment on the covered transaction calculated according to § 1026.43(e)(2)(iv) instead of according to § 1026.43(c)(5). Creditors are not required to calculate the consumer's monthly debt-to-income ratio in accordance with appendix Q to this part as is required under the general definition of qualified mortgages by § 1026.43(e)(2)(vi).

3. *Forward commitments.* A creditor may make a mortgage loan that will be transferred or sold to a purchaser pursuant to an agreement that has been entered into at or before the time the transaction is consummated. Such an agreement is sometimes known as a ''forward commitment.'' A mortgage that will be acquired by a purchaser pursuant to a forward commitment does not satisfy the requirements of § 1026.43(e)(5), whether the forward commitment provides for the purchase and sale of the specific transaction or for the purchase and sale of transactions with certain prescribed criteria that the transaction meets. However, a forward commitment to another person that also meets the requirements of § 1026.43(e)(5)(i)(D) is permitted. For example: assume a creditor that is eligible to make qualified mortgages under § 1026.43(e)(5) makes a mortgage. If that mortgage meets the purchase criteria of an investor with which the creditor has an agreement to sell loans after consummation, then the loan does not meet the definition of a qualified mortgage under § 1026.43(e)(5). However, if the investor meets the requirements of § 1026.43(e)(5)(i)(D), the mortgage will be a qualified mortgage if all other applicable criteria also are satisfied.

4. *Creditor qualifications.* To be eligible to make qualified mortgages under § 1026.43(e)(5), a creditor must satisfy the requirements stated in § 1026.35(b)(2)(iii)(B) and (C). Section 1026.35(b)(2)(iii)(B) requires that, during the preceding calendar year, the creditor and its affiliates together originated 500 or fewer first-lien covered transactions. Section 1026.35(b)(2)(iii)(C) requires that, as of the end of the preceding calendar year, the creditor had total assets of less than $2 billion, adjusted annually by the Bureau for inflation.

5. *Requirement to hold in portfolio.* Creditors generally must hold a loan in portfolio to maintain the transaction's status as a qualified mortgage under § 1026.43(e)(5), subject to four exceptions. Unless one of these exceptions applies, a loan is no longer a qualified mortgage under § 1026.43(e)(5) once legal title to the debt obligation is sold, assigned, or otherwise transferred to another person. Accordingly, unless one of the exceptions applies, the transferee could not benefit from the presumption of compliance for qualified mortgages under § 1026.43(e)(1) unless the loan also met the requirements of another qualified mortgage definition.

6. *Application to subsequent transferees.* The exceptions contained in § 1026.43(e)(5)(ii) apply not only to an initial sale, assignment, or other transfer by the originating creditor but to subsequent sales, assignments, and other transfers as well. For example,

assume Creditor A originates a qualified mortgage under § 1026.43(e)(5). Six months after consummation, Creditor A sells the qualified mortgage to Creditor B pursuant to § 1026.43(e)(5)(ii)(B) and the loan retains its qualified mortgage status because Creditor B complies with the limits on asset size and number of transactions. If Creditor B sells the qualified mortgage, it will lose its qualified mortgage status under § 1026.43(e)(5) unless the sale qualifies for one of the § 1026.43(e)(5)(ii) exceptions for sales three or more years after consummation, to another qualifying institution, as required by supervisory action, or pursuant to a merger or acquisition.

7. *Transfer three years after consummation.* Under § 1026.43(e)(5)(ii)(A), if a qualified mortgage under § 1026.43(e)(5) is sold, assigned, or otherwise transferred three years or more after consummation, the loan retains its status as a qualified mortgage under § 1026.43(e)(5) following the transfer. The transferee need not be eligible to originate qualified mortgages under § 1026.43(e)(5). The loan will continue to be a qualified mortgage throughout its life, and the transferee, and any subsequent transferees, may invoke the presumption of compliance for qualified mortgages under § 1026.43(e)(1).

8. *Transfer to another qualifying creditor.* Under § 1026.43(e)(5)(ii)(B), a qualified mortgage under § 1026.43(e)(5) may be sold, assigned, or otherwise transferred at any time to another creditor that meets the requirements of § 1026.43(e)(5)(v). That section requires that a creditor, during the preceding calendar year, together with all affiliates, 500 or fewer first-lien covered transactions and had total assets less than $2 billion (as adjusted for inflation) at the end of the preceding calendar year. A qualified mortgage under § 1026.43(e)(5) transferred to a creditor that meets these criteria would retain its qualified mortgage status even if it is transferred less than three years after consummation.

9. *Supervisory sales.* Section 1026.43(e)(5)(ii)(C) facilitates sales that are deemed necessary by supervisory agencies to revive troubled creditors and resolve failed creditors. A qualified mortgage under § 1026.43(e)(5) retains its qualified mortgage status if it is sold, assigned, or otherwise transferred to another person pursuant to: a capital restoration plan or other action under 12 U.S.C. 1831o; the actions or instructions of any person acting as conservator, receiver or bankruptcy trustee; an order of a State or Federal government agency with jurisdiction to examine the creditor pursuant to State or Federal law; or an agreement between the creditor and such an agency. A qualified mortgage under § 1026.43(e)(5) that is sold, assigned, or otherwise transferred under these circumstances retains its qualified mortgage status regardless of how long after consummation it is sold and regardless of the size or other characteristics of the transferee. Section 1026.43(e)(5)(ii)(C) does not apply to transfers done to comply with a generally applicable regulation with future effect designed to implement, interpret, or prescribe law or policy in the absence of a specific order by or a specific agreement with a governmental agency described in § 1026.43(e)(5)(ii)(C) directing the sale of one or more qualified mortgages under § 1026.43(e)(5) held by the creditor or one of the other circumstances listed in § 1026.43(e)(5)(ii)(C). For example, a qualified mortgage under § 1026.43(e)(5) that is sold pursuant to a capital restoration plan under 12 U.S.C. 1831o would retain its status as a qualified mortgage following the sale. However, if the creditor simply chose to sell the same qualified mortgage as one way to comply with general regulatory capital requirements in the absence of supervisory action or agreement it would lose its status as a qualified mortgage following the sale unless it qualifies under another definition of qualified mortgage.

10. *Mergers and acquisitions.* A qualified mortgage under § 1026.43(e)(5) retains its qualified mortgage status if a creditor merges with, is acquired by, or acquires another person regardless of whether the creditor or its successor is eligible to originate new qualified mortgages under § 1026.43(e)(5) after the merger or acquisition. However, the creditor or its successor can originate new qualified mortgages under § 1026.43(e)(5) only if it complies with all of the requirements of § 1026.43(e)(5) after the merger or acquisition. For example, assume a creditor that originates 250 covered transactions each year and originates qualified mortgages under § 1026.43(e)(5) is acquired by a larger creditor that originates 10,000 covered transactions each year. Following the acquisition, the small creditor would no longer be able to originate § 1026.43(e)(5) qualified mortgages because, together with its affiliates, it would originate more than 500 covered transactions each year. However, the § 1026.43(e)(5) qualified mortgages originated by the small creditor before the acquisition would retain their qualified mortgage status. ◄

Dated: January 10, 2013.

Richard Cordray,

Director, Bureau of Consumer Financial Protection.

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Part IV

Environmental Protection Agency

40 CFR Parts 60 and 63

National Emission Standards for Hazardous Air Pollutants for Reciprocating Internal Combustion Engines; New Source Performance Standards for Stationary Internal Combustion Engines; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 60 and 63

[EPA–HQ–OAR–2008–0708, FRL–9756–4]

RIN 2060–AQ58

National Emission Standards for Hazardous Air Pollutants for Reciprocating Internal Combustion Engines; New Source Performance Standards for Stationary Internal Combustion Engines

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The EPA is finalizing amendments to the national emission standards for hazardous air pollutants for stationary reciprocating internal combustion engines. The final amendments include alternative testing options for certain large spark ignition (generally natural gas-fueled) stationary reciprocating internal combustion engines, management practices for a subset of existing spark ignition stationary reciprocating internal combustion engines in sparsely populated areas and alternative monitoring and compliance options for the same engines in populated areas. The EPA is establishing management practices for existing compression ignition engines on offshore vessels. The EPA is also finalizing limits on the hours that stationary emergency engines may be used for emergency demand response and establishing fuel and reporting requirements for certain emergency engines used for emergency demand response. The final amendments also correct minor technical or editing errors in the current regulations for stationary reciprocating internal combustion engines.

DATES: This final rule is effective on April 1, 2013. The incorporation by reference of certain publications listed in this final rule is approved by the Director of the Federal Register as of April 1, 2013.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–HQ–OAR–2008–0708. The EPA also relies on materials in Docket ID Nos. EPA–HQ–OAR–2002–0059, EPA–HQ–OAR–2005–0029, and EPA–HQ–OAR–2005–0030 and incorporates those dockets into the record for this final rule. All documents in the docket are listed on the *www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy at the Air and Radiation Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: Ms. Melanie King, Energy Strategies Group, Sector Policies and Programs Division (D243–01), Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number (919) 541–2469; facsimile number (919) 541–5450; email address *king.melanie@epa.gov.*

SUPPLEMENTARY INFORMATION:
Background Information Document. On June 7, 2012 (77 FR 33812), the EPA proposed amendments to the national emission standards for hazardous air pollutants (NESHAP) for stationary reciprocating internal combustion engines (RICE) and the new source performance standards (NSPS) for stationary engines. A summary of the public comments on the proposal and the EPA's responses to the comments, as well as the Regulatory Impact Analysis Report, are available in Docket ID No. EPA–HQ–OAR–2008–0708.

SUPPLEMENTARY INFORMATION:
Organization of This Document. The following outline is provided to aid in locating information in the preamble.

I. General Information

A. Executive Summary

1. Purpose of the Regulatory Action

The purpose of this action is to finalize amendments to the NESHAP for stationary RICE under section 112 of the Clean Air Act (CAA). This final rule was developed to address certain issues that were raised by various stakeholders through lawsuits, several petitions for reconsideration of the 2010 RICE NESHAP amendments and other communications. This final rule also provides clarifications and corrects minor technical or editing errors in the current RICE NESHAP and revises the NSPS for stationary engines, 40 CFR part 60, subparts IIII and JJJJ, for consistency with the RICE NESHAP.

This action is conducted under the authority of section 112 of the CAA, ''Hazardous Air Pollutants'' (HAP), which requires the EPA to establish NESHAP for the control of HAP from both new and existing sources in regulated source categories.

2. Summary of the Major Provisions of the Regulatory Action

After promulgation of the 2010 RICE NESHAP amendments, the EPA received several petitions for reconsideration, legal challenges, other communications raising issues related to practical implementation and certain factual information that had not been brought to the EPA's attention during the rulemaking. The EPA has considered this information and comments submitted in response to the proposed amendments, and believes that amendments to the rule to address certain issues are appropriate. Therefore, the EPA is finalizing amendments to 40 CFR part 63, subpart ZZZZ, NESHAP for stationary RICE. The current regulation applies to owners and operators of existing and new stationary RICE at major and area sources of HAP emissions. The applicability of the rule remains the same and is not changed by this final rule. The EPA is also finalizing amendments to the NSPS for stationary engines to conform with certain amendments finalized for the RICE NESHAP. The key amendments to the regulations are summarized in the following paragraphs.

The EPA is adding an alternative compliance demonstration option for stationary 4-stroke rich burn (4SRB) spark ignition (SI) engines subject to a 76 percent or more formaldehyde reduction requirement. Owners and operators of 4SRB engines will be permitted to demonstrate compliance with the 76 percent formaldehyde reduction emission standard by testing emissions of total hydrocarbons (THC) and showing that the engine is achieving at least a 30 percent reduction of THC emissions. The alternative compliance option provides a less expensive and less complex, but equally effective, method for demonstrating compliance than testing for formaldehyde.

Certain stationary RICE are maintained in order to be able to respond to emergency power needs. This action finalizes limitations on the operation of emergency engines for emergency demand response programs. The final rule limits operation of stationary emergency RICE as part of an emergency demand response program to within the 100 hours per year that were already permitted for maintenance and testing of the engines. The limitation of 100 hours per year ensures that a sufficient number of hours are available for engines to meet regional transmission organization and independent system operator tariffs and other requirements for participating in various emergency demand response programs and will assist in stabilizing the grid during periods of instability, preventing electrical blackouts and supporting local electric system reliability. The final rule also limits operation of certain emergency engines used to avert potential voltage collapse or line overloads that could lead to the interruption of power supply in a local area or region to 50 hours per year; this operation counts as part of the 100 hours of year permitted for maintenance and testing of the engine. This rule also establishes fuel and reporting requirements for emergency engines larger than 100 horsepower (HP) used for this purpose or used (or contractually obligated to be available) for more than 15 hours of emergency demand response per calendar year.

The EPA is finalizing management practices for owners and operators of existing stationary 4-stroke SI engines above 500 HP that are area sources of HAP emissions and where the engines are remote from human activity. A remote area is defined as either a Department of Transportation (DOT) Class 1 pipeline location,[1] or, if the engine is not on a pipeline, if within a 0.25 mile radius of the facility there are 5 or fewer buildings intended for human occupancy. The EPA determined that a 0.25 mile radius was appropriate because it is similar to the area used for the DOT Class 1 pipeline location. This final rule establishes management practices for these sources rather than numeric emission limits and associated testing and monitoring. This provision and the division of remote and non-remote engines into two separate subcategories addresses reasonable concerns with accessibility, infrastructure and staffing that stem from the remoteness of the engines and higher costs that would be associated with compliance with the existing requirements. Existing stationary 4-stroke SI engines above 500 HP at area sources that are in populated areas (defined as not in DOT pipeline Class 1 areas, or if not on a pipeline, if within a 0.25 mile radius of the engine there are more than 5 buildings intended for human occupancy) are subject to an equipment standard that requires the installation of HAP-reducing aftertreatment. The EPA has the discretion to set an equipment standard as generally available control technology (GACT) for engines located at area sources of HAP. Sources are required to test their engines to demonstrate compliance initially, perform catalyst activity check-ups and either monitor the catalyst inlet temperature continuously or employ high temperature shutdown devices to protect the catalyst.

To address how certain existing compression ignition (CI) engines are currently regulated, the EPA is specifying that any existing CI engine above 300 HP at an area source of HAP emissions that was certified to meet the Tier 3 engine standards[2] and was installed before June 12, 2006, is in compliance with the NESHAP. This provision creates regulatory consistency between the same engines installed before and after June 12, 2006. Engines at area sources of HAP for which construction commenced before June 12, 2006, are considered existing engines under the NESHAP.

The EPA is finalizing amendments to the requirements for existing stationary Tier 1 and Tier 2 certified CI engines located at area sources that are subject to state and locally enforceable requirements requiring replacement of the engine by June 1, 2018. This addresses a specific concern regarding the interaction of the NESHAP with certain rules for agricultural engines in the San Joaquin Valley in California. The EPA is allowing these engines to meet management practices under the RICE NESHAP from the May 3, 2013, compliance date until January 1, 2015, or 12 years after installation date, but not later than June 1, 2018. This provision addresses concerns about requiring owners and operators to install controls on their engines in order to meet the RICE NESHAP, and then having to replace their engines shortly thereafter due to state and local rules specifying the replacement of engines. Owners and operators will have additional time to replace their engines without having to install controls, but are required to use management practices during that period.

Another change the EPA is making is to broaden the definition of remote area sources in Alaska in the RICE NESHAP. Previously, remote areas were considered those that are not on the Federal Aid Highway System (FAHS). This change permits existing stationary CI engines at other remote area sources in Alaska to meet management practices rather than numerical emission standards likely to require

[1] A Class 1 location is defined as an offshore area or any class location unit that has 10 or fewer buildings intended for human occupancy and no buildings with four or more stories within 220 yards (200 meters) on either side of the centerline of any continuous 1-mile (1.6 kilometers) length of pipeline.

[2] See 40 CFR part 89—Control of Emissions From New and In-Use Nonroad Compression-Ignition Engines.

aftertreatment. These remote areas have the same challenges as areas not on the FAHS, and complying with the current rule would similarly be prohibitively costly and potentially infeasible. In addition to area sources located in areas of Alaska that are not accessible by the FAHS being defined as remote and subject to management practices, any stationary RICE in Alaska meeting all of the following conditions are subject to management practices:

(1) The only connection to the FAHS is through the Alaska Marine Highway System, or the stationary RICE operation is within an isolated grid in Alaska that is not connected to the statewide electrical grid referred to as the Alaska Railbelt Grid, and

(2) At least 10 percent of the power generated by the stationary RICE on an annual basis is used for residential purposes, and

(3) The generating capacity of the area source is less than 12 megawatts (MW), or the stationary RICE is used exclusively for backup power for renewable energy.

The last significant change the EPA is finalizing is to require compliance with management practices rather than numeric emission limits in the RICE NESHAP for existing CI RICE on offshore drilling vessels on the Outer Continental Shelf (OCS) that become subject to the RICE NESHAP as a result of the operation of the OCS regulations (40 CFR part 55). The final amendments specify that owners and operators of existing non-emergency CI RICE with a site rating greater than 300 HP on offshore drilling vessels on the OCS are required to change the oil every 1,000 hours of operation or annually, whichever occurs first; inspect and clean air filters every 750 hours of operation or annually and replace as necessary; inspect fuel filters and belts, if installed, every 750 hours of operation or annually and replace as necessary; and inspect all flexible hoses every 1,000 hours of operation or annually and replace as necessary. Owners and operators can elect to use an oil analysis program to extend the oil change requirement.

3. Costs and Benefits

These final amendments will reduce the capital and annual costs of the original 2010 amendments by $287 million and $139 million, respectively. The EPA estimates that with these final amendments, the capital cost of compliance with the 2010 amendments to the RICE NESHAP in 2013 is $840 million and the annual cost is $490 million ($2010). These costs are identical to the costs estimated for the amendments to the RICE NESHAP proposed on June 7, 2012, since the changes from the proposal do not affect the costs of the rule in the year 2013. The capital and annual costs of the original 2010 final rule and the 2010 final rule with these final amendments incorporated into the rule are shown in Table 1.

TABLE 1—SUMMARY OF COST IMPACTS FOR EXISTING STATIONARY RICE

Engine	2010 Final rule		2010 Final rule with these final amendments
	Total Annual Cost		
SI	$253 million ($2009)	$251 million ($2010)	$115 million ($2010).
CI	$373 million ($2008)	$375 million ($2010)	$373 million ($2010).
	Total Capital Cost		
SI	$383 million ($2009)	$380 million ($2010)	$103 million ($2010).
CI	$744 million ($2008)	$748 million ($2010)	$740 million ($2010).

These final amendments would also result in decreases to the emissions reductions estimated in 2013 from the original 2010 RICE NESHAP amendments. The reductions that were estimated for the original 2010 RICE NESHAP amendments were 7,000 tpy of HAP, 124,000 tpy of CO, 2,800 tpy of PM, 96,000 tpy of NO_X and 58,000 tpy of VOC. The estimated reductions in 2013 from the 2010 RICE NESHAP rulemaking with these final amendments are 2,800 tons per year (tpy) of HAP, 36,000 tpy of carbon monoxide (CO), 2,800 tpy of particulate matter (PM), 9,600 tpy of nitrogen oxide (NO_X), and 36,000 tpy of volatile organic compounds (VOC). The difference in the emission reductions is primarily due to the changes to the requirements for existing 4-stroke stationary SI RICE at area sources of HAP that are in remote areas. These emission reduction estimates are identical to those estimated for the June 7, 2012, proposed amendments to the RICE NESHAP. The emission reductions of the original 2010 final rule and the 2010 final rule with these final amendments incorporated into the rule are shown in Table 2.

TABLE 2—SUMMARY OF REDUCTIONS FOR EXISTING STATIONARY RICE

Pollutant	Emission reductions (tpy) in the year 2013			
	2010 Final rule		2010 Final rule with these final amendments	
	CI	SI	CI	SI
HAP	1,014	6,008	1,005	1,778
CO	14,342	109,321	14,238	22,211
PM	2,844	N/A	2,818	N/A
NO_X	N/A	96,479	N/A	9,648
VOC	27,395	30,907	27,142	9,147

The EPA estimates the monetized co-benefits in 2013 of the original 2010 RICE NESHAP amendments with these final amendments incorporated to be $830 million to $2,100 million (2010 dollars) at a 3-percent discount rate and $740 million to $1,800 million (2010 dollars) at a 7-percent discount rate. The benefits that were estimated for the original 2010 RICE NESHAP amendments were $1,500 million to $3,600 million (2010 dollars) at a 3-percent discount rate and $1,300 million to $3,200 million (2010 dollars) at a 7-percent discount rate. A summary of the monetized co-benefits estimates for CI and SI engines at discount rates of 3 percent and 7 percent for the original 2010 final rule and the 2010 final rule with these final amendments incorporated into the rule is in Table 3 of this preamble.

TABLE 3—SUMMARY OF THE MONETIZED $PM_{2.5}$ CO-BENEFITS FINAL AMENDMENTS TO THE NESHAP FOR STATIONARY CI AND SI ENGINES

[millions of 2010 dollars] [a, b]

Pollutant	Emission reductions (tons per year)	Total monetized co-benefits (3 percent discount)	Total monetized co-benefits (7 percent discount)
Original 2010 Final Rules [c]			
Stationary CI Engines: Total Benefits	2,844 $PM_{2.5}$ 27,395 VOC	$950 to $2,300	$860 to $2,100.
Stationary SI Engines: Total Benefits	96,479 NO_X 30,907 VOC	$510 to $1,300	$470 to $1,100.
2010 Final Rules With These Final Amendments			
Stationary CI Engines: Directly emitted $PM_{2.5}$	2,818	$770 to $1,900	$690 to $1,700.
Stationary SI Engines: NO_X	9,648	$62 to $150	$55 to $140.

[a] All estimates are for the analysis year (2013) and are rounded to two significant figures so numbers may not sum across rows. The total monetized co-benefits reflect the human health benefits associated with reducing exposure to $PM_{2.5}$ through reductions of $PM_{2.5}$ precursors, such as NO_X and directly emitted $PM_{2.5}$. It is important to note that the monetized co-benefits do not include reduced health effects from exposure to HAP, direct exposure to NO_2, exposure to ozone, ecosystem effects or visibility impairment.

[b] PM co-benefits are shown as a range from Pope, *et al.* (2002) to Laden, *et al.* (2006). These models assume that all fine particles, regardless of their chemical composition, are equally potent in causing premature mortality because the scientific evidence is not yet sufficient to allow differentiation of effects estimates by particle type.

[c] The benefits analysis for the 2010 final rules applied out-dated benefit-per-ton estimates compared to the updated estimates described in this preamble and reflected monetized co-benefits for VOC emissions, which limits direct comparability with the monetized co-benefits estimated for this final rule. In addition, these estimates have been updated from their original currency years to 2010$, so the rounded estimates for the 2010 final rules may not match the original RIAs.

We have not re-estimated the benefits for the final rule compared to the proposal because the emission reductions estimated for the final rule are the same as those estimated for the proposed amendments. Since the June 7, 2012, reconsideration proposal, the EPA has made several updates to the approach we use to estimate mortality and morbidity benefits in the PM NAAQS Regulatory Impact Analysis (RIA),[3, 4] including updated epidemiology studies, health endpoints, and population data. Although the EPA has not re-estimated the benefits for this rule to apply this new approach, these updates generally offset each other, and we anticipate that the rounded benefits estimated for this rule are unlikely to be different than those provided above.

More detail regarding the air quality and cost impacts and the benefits from this action can be found in section IV of this preamble.

B. Does this action apply to me?

Regulated Entities. Categories and entities potentially regulated by this action include:

Category	NAICS [1]	Examples of regulated entities
Any industry using a stationary internal combustion engine as defined in the final amendments.	2211	Electric power generation, transmission, or distribution.
	622110	Medical and surgical hospitals.
	48621	Natural gas transmission.
	211111	Crude petroleum and natural gas production.
	211112	Natural gas liquids producers.
	92811	National security.

[1] North American Industry Classification System.

[3] U.S. Environmental Protection Agency (U.S. EPA). 2012a. *Regulatory Impact Analysis for the Proposed Revisions to the National Ambient Air Quality Standards for Particulate Matter.* EPA–452/R–12–003. Office of Air Quality Planning and Standards, Health and Environmental Impacts Division. June. Available at *http://www.epa.gov/ttnecas1/regdata/RIAs/PMRIACombinedFile_Bookmarked.pdf.*

[4] U.S. Environmental Protection Agency (U.S. EPA). 2012b. *Regulatory Impact Analysis for the Final Revisions to the National Ambient Air Quality Standards for Particulate Matter.* EPA–452/R–12–003. Office of Air Quality Planning and Standards, Health and Environmental Impacts Division. December. Available at *http://www.epa.gov/pm/2012/finalria.pdf.*

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. To determine whether an engine is regulated by this action, owners and operators should examine the applicability criteria of this final rule. For any questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

C. Where can I get a copy of this document?

In addition to being available in the docket, an electronic copy of this final action will also be available on the Worldwide Web (WWW) through the Technology Transfer Network (TTN). Following signature, a copy of this final action will be posted on the TTN's policy and guidance page for newly proposed or promulgated rules at the following address: *http://www.epa.gov/ttn/oarpg/.* The TTN provides information and technology exchange in various areas of air pollution control.

D. Judicial Review

Under section 307(b)(1) of the CAA, judicial review of this final rule is available only by filing a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit by April 1, 2013. Under section 307(d)(7)(B) of the CAA, only an objection to this final rule that was raised with reasonable specificity during the period for public comment can be raised during judicial review. Moreover, under section 307(b)(2) of the CAA, the requirements established by this final rule may not be challenged separately in any civil or criminal proceedings brought by EPA to enforce these requirements. Section 307(d)(7)(B) of the CAA further provides that ''[o]nly an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review.'' This section also provides a mechanism for us to convene a proceeding for reconsideration, ''[i]f the person raising an objection can demonstrate to the EPA that it was impracticable to raise such objection within [the period for public comment] or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule.'' Any person seeking to make such a demonstration to us should submit a Petition for Reconsideration to the Office of the Administrator, U.S. EPA, Room 3000, Ariel Rios Building, 1200 Pennsylvania Ave. NW., Washington, DC 20460, with a copy to both the person(s) listed in the preceding **FOR FURTHER INFORMATION CONTACT** section, and the Associate General Counsel for the Air and Radiation Law Office, Office of General Counsel (Mail Code 2344A), U.S. EPA, 1200 Pennsylvania Ave. NW., Washington, DC 20460.

II. Summary of Final Amendments

This action finalizes amendments to the NESHAP for RICE in 40 CFR part 63, subpart ZZZZ. This action also finalizes amendments to the NSPS for stationary engines in 40 CFR part 60, subparts IIII and JJJJ. The NESHAP for stationary RICE to regulate emissions of HAP was developed in several stages. The EPA initially addressed stationary RICE greater than 500 HP located at major sources of HAP emissions in 2004 (69 FR 33473). The EPA addressed new stationary RICE less than or equal to 500 HP located at major sources and new stationary RICE located at area sources in 2008 (73 FR 3568). Most recently, requirements for existing stationary RICE less than or equal to 500 HP located at major sources and existing stationary RICE located at area sources were finalized in 2010 (75 FR 9648 and 75 FR 51570).

The EPA is finalizing these amendments to address a number of issues that have been raised by different stakeholders through lawsuits, several petitions for reconsideration of the 2010 RICE NESHAP amendments, and other communications. The EPA is also finalizing revisions to 40 CFR part 60, subparts IIII and JJJJ for consistency with the RICE NESHAP and to make minor corrections and clarifications. The amendments that the EPA is finalizing in this action are discussed in this section. The changes from the proposal to this final rule are discussed in section III.

A. Total Hydrocarbon Compliance Demonstration Option

The EPA is adding an alternative method of demonstrating compliance with the NESHAP for existing and new stationary 4SRB non-emergency engines greater than 500 HP that are located at major sources of HAP emissions. Under these final amendments, the emission standard remains the same, that is, existing and new stationary 4SRB engines greater than 500 HP and located at major sources are still required to reduce formaldehyde emissions by 76 percent or more or limit the concentration of formaldehyde in the stationary RICE exhaust to 350 parts per billion by volume, dry basis or less at 15 percent oxygen (O_2). This final rule adds an alternative compliance demonstration option to the existing method of demonstrating compliance with the formaldehyde percent reduction standard. The current method is to test engines for formaldehyde. The alternative for owners and operators of 4SRB engines meeting a 76 percent or more formaldehyde reduction is to test their engines for THC showing that the engine is achieving at least a 30 percent reduction of THC emissions. Including this optional THC compliance demonstration option reduces the cost of compliance significantly while continuing to achieve the same level of HAP emission reduction because the emission standards would remain the same. As discussed in the June 7, 2012, proposal, data provided to EPA indicate that a strong relationship exists between percentage reductions of THC and percentage reductions of formaldehyde (the surrogate for HAP emissions in the NESHAP) on rich burn engines using non-selective catalytic reduction (NSCR). Data analyzed by the EPA indicate that if the NSCR is reducing THC by at least 30 percent from 4SRB engines, formaldehyde emissions are guaranteed to be reduced by at least 76 percent, which is the percentage reduction required for the relevant engines. Indeed, the percentage reduction of formaldehyde is invariably well above the 76 percent level, and is usually above 90 percent. Therefore, the EPA concluded that for SI 4SRB engines using NSCR and meeting the NESHAP by showing a percentage reduction of HAP, it would be appropriate to allow sources to demonstrate compliance with the NESHAP by showing a THC reduction of at least 30 percent. Owners and operators of existing stationary 4SRB engines less than or equal to 500 HP that are required to limit the concentration of formaldehyde in the stationary RICE exhaust to 10.3 parts per million by volume, dry basis (ppmvd) or less at 15 percent O_2 do not have the option to demonstrate compliance using THC and must continue to demonstrate compliance by testing for formaldehyde following the methods and procedures specified in the rule because the EPA could not verify a clear relationship between concentrations of THC and concentrations of formaldehyde in the exhaust from these SI 4SRB engines.

Owners and operators opting to use the THC compliance demonstration method must demonstrate compliance by showing that the average reduction of THC is equal to or greater than 30 percent. Owners and operators of 4SRB stationary RICE complying with the requirement to reduce formaldehyde emissions and demonstrating compliance by using the THC compliance demonstration option must conduct performance testing using Method 25A of 40 CFR part 60, appendix A—Determination of Total Gaseous Organic Concentration Using a Flame Ionization Analyzer. Measurements of THC at the inlet and the outlet of the NSCR must be on a dry basis and corrected to 15 percent O_2 or equivalent carbon dioxide content. To correct to 15 percent O_2, dry basis, owners and operators must measure oxygen using Method 3, 3A or 3B of 40 CFR part 60, appendix A, or ASTM Method D6522–00 (2005) and measure moisture using Method 4 of 40 CFR part 60, appendix A, or Test Method 320 of 40 CFR part 63, appendix A, or ASTM D6348–03. Because owners and operators are complying with a percent reduction requirement, the method used must be suitable for the entire range of emissions since pre and post-catalyst emissions must be measured. Method 25A is capable of measuring emissions down to 5 ppmv and is, therefore, an appropriate method for measuring THC emissions for compliance demonstration purposes. The EPA is allowing sources the option to meet a minimum THC percent reduction of 30 percent by using Method 25A of 40 CFR part 60, appendix A to demonstrate compliance with the formaldehyde percent reduction in 40 CFR part 63, subpart ZZZZ.

B. Emergency Demand Response and Reliability

The EPA is finalizing certain revisions to the proposal regarding use of existing engines for emergency demand response and system reliability. Following is a summary of the prior requirements for these engines, including those in the 2010 regulation, a discussion of the information and input the EPA received in response to the proposal, and a description of the provisions being finalized in this action.

Existing emergency engines less than or equal to 500 HP located at major sources of HAP and existing emergency engines located at area sources of HAP were not regulated under the RICE NESHAP rulemakings finalized in 2004 and 2008. They could operate uncontrolled for an unlimited amount of time. The 2010 RICE NESHAP rulemaking for the first time established requirements for these existing emergency engines, requiring affected engines to comply by May 3, 2013, for stationary CI RICE and October 19, 2013, for stationary SI RICE. Under the RICE NESHAP requirements originally finalized in 2010, these existing emergency stationary engines must limit operation to situations like blackouts and floods and to a maximum of 100 hours per year for other specified operations beginning with the applicable compliance date in 2013 for the engine. The limitation of 100 hours per year included maintenance checks and readiness testing of the engine, as well as a limit of 15 hours per year for use as part of a demand response program if the regional transmission organization or equivalent balancing authority and transmission operator has determined there are emergency conditions that could lead to a potential electrical blackout, such as unusually low frequency, equipment overload, capacity or energy deficiency, or unacceptable voltage level. Under the 2010 regulation, existing emergency engines were required to meet management practice standards based on proper operation and maintenance of the engine; meeting these standards would not require installation of aftertreatment to control emissions.

Soon after the 2010 rule was final, the EPA received petitions for reconsideration of the 15-hour limitation for emergency demand response that was finalized in the 2010 rule. According to one petition, the 15-hour limit, while usually adequate to cover the limited hours in which these engines are expected to be called upon, would not be sufficient to allow these emergency engines to participate in emergency demand response programs since some regional transmission organizations and independent system operators require engines be available for more than 15 hours in order to meet emergency demand response situations. For example, PJM's Emergency Load Response Program requires that emergency engines guarantee that they will be available for 60 hours per year. By contrast, another petition asked EPA to eliminate the emergency demand response provision because of the adverse effects that the petitioner believes would result from increased emissions from these engines. The EPA received other comments that addressed the types of situations in which engines are called upon for emergency demand response and system reliability.

The EPA believes that the emergency demand response programs that exist across the country are important programs that protect the reliability and stability of the national electric service grid. The use of stationary emergency engines as part of emergency demand response programs can help prevent grid failure or blackouts, by allowing these engines to be used for limited hours in specific circumstances of grid instability prior to the occurrence of blackouts. A standard that requires owners and operators of stationary emergency engines that participate in emergency demand response programs to apply aftertreatment could make it economically infeasible for these engines to participate in these programs, impairing the ability of regional transmission organizations and independent system operators to use these relatively small, quick-starting and reliable sources of energy to protect the reliability of their systems in times of critical need. Information provided by commenters on the proposal indicates that these emergency demand response events are rarely called.[5]

The limited circumstances specified in the final rule for operation of stationary emergency engines for emergency demand response purposes include periods during which the Reliability Coordinator, or other authorized entity as determined by the Reliability Coordinator, has declared an Energy Emergency Alert (EEA) Level 2 as defined in the North American Electric Reliability Corporation (NERC) Reliability Standard EOP–002–3, Capacity and Energy Emergency, and during periods where there is a deviation of voltage or frequency of 5 percent or more below standard voltage or frequency. During EEA Level 2 alerts there is insufficient energy supply and a true potential for electrical blackouts. System operators must call on all available resources during EEA Level 2 alerts in order to stabilize the grid to prevent failure. Therefore, this situation is a good indicator of severe instability on the system, which the EPA believes is appropriately considered an emergency situation. Consistent normal voltage provided by the utility is often called power quality and is an important factor in local electric system reliability. Reliability of the system requires electricity being provided at a normal expected voltage. The American National Standards Institute standard C84.1–1989 defines the maximum allowable voltage sag at below 5 percent. On the local distribution level local voltage levels are therefore important and a 5 percent or more change in the normal voltage or frequency is substantial and an indication that additional resources are needed to ensure local distribution system reliability.

In addition to the circumstances described above, the EPA also received comments on other situations where the

[5] See document number EPA–HQ–OAR–2008–0708–1142 in the rulemaking docket.

local transmission and distribution system operator has determined that there are conditions that could lead to a blackout for the local area where the ready availability of emergency engines is critical to system reliability. These include situations where:

- The engine is dispatched by the local balancing authority or local transmission and distribution system operator.
- The dispatch is intended to mitigate local transmission and/or distribution limitations so as to avert potential voltage collapse or line overloads that could lead to the interruption of power supply in a local area or region.
- The dispatch follows reliability, emergency operation or similar protocols that follow specific NERC, regional, state, public utility commission or local standards or guidelines.

The EPA believes the operation of emergency engines in these situations should be addressed in the final rule as well.

Therefore, based on the EPA's review of the petitions and comments that the EPA has received with respect to emergency demand response and system reliability, the EPA has concluded that it is appropriate to revise the provisions for stationary engines used in these limited circumstances. The provisions the EPA is amending are in §§ 63.6640(f) and 63.6675 of 40 CFR part 63, subpart ZZZZ. The final amendments to those sections specify that owners and operators of stationary emergency RICE can operate their engines as part of an emergency demand response program within the 100 hours already provided for operation for maintenance and testing. Owners and operators of stationary emergency engines can operate for up to 100 hours per year for emergency demand response and system reliability during periods in which the Reliability Coordinator, or other authorized entity as determined by the Reliability Coordinator, has declared an EEA Level 2 as defined in the NERC Reliability Standard EOP–002–3, Capacity and Energy Emergency, and during periods where there is a deviation of voltage or frequency of 5 percent or greater below standard voltage or frequency. In addition, existing emergency stationary RICE at area sources of HAP can operate for up to 50 hours per year if all of the following conditions are met:

- The engine is dispatched by the local balancing authority or local transmission and distribution system operator.
- The dispatch is intended to mitigate local transmission and/or distribution limitations so as to avert potential voltage collapse or line overloads that could lead to the interruption of power supply in a local area or region.
- The dispatch follows reliability, emergency operation or similar protocols that follow specific NERC, regional, state, public utility commission or local standards or guidelines.
- The owner or operator has a pre-existing plan that contemplates the engine's operation under the circumstances described above; and
- The owner or operator identifies and records the specific NERC, regional, state, public utility commission or local standards or guidelines that are being followed for dispatching the engine. The local balancing authority or local transmission and distribution system operator may keep these records on behalf of the engine owner or operator.

For all engines operating to satisfy emergency demand response or system reliability under the circumstances described above, the hours spent for emergency demand response operation and local system reliability are added to the hours spent for maintenance and testing purposes and are counted towards the limit of 100 hours per year. If the total time spent for maintenance and testing, emergency demand response, and system reliability operation exceeds 100 hours per year, the engine will not be considered an emergency engine under this subpart and will need to meet all requirements for non-emergency engines.

As noted above, the EPA received comments expressing concerns about the emissions from emergency engines, noting that the engines are likely to be dispatched on days when energy demand is high, which often coincides with days when air quality is poor. While the EPA is sensitive to these concerns, the availability of these engines for a more tailored response to emergencies may be preferable in terms of air quality impacts than relying on other generation, including coal-fired spinning reserve generation. After consideration of the concerns raised in the comments, the EPA is finalizing provisions that require stationary emergency CI RICE with a site rating of more than 100 brake HP and a displacement of less than 30 liters per cylinder that operate or are contractually obligated to be available for more than 15 hours per year (up to a maximum of 100 hours per year) for emergency demand response, or that operate for local system reliability, to use diesel fuel meeting the specifications of 40 CFR 80.510(b) beginning January 1, 2015, except that any existing diesel fuel purchased (or otherwise obtained) prior to January 1, 2015, may be used until depleted. The specifications of 40 CFR 80.510(b) require that diesel fuel have a maximum sulfur content of 15 ppm and either a minimum cetane index of 40 or a maximum aromatic content of 35 volume percent; this fuel is referred to as "ultra low sulfur diesel fuel" (ULSD). This emission reduction requirement was not part of the original 2010 rulemaking. Although the EPA does not have information specifying the percentage of existing stationary emergency CI engines currently using residual fuel oil or non-ULSD distillate fuel, the most recent U.S. Energy Information Administration data available for sales of distillate and residual fuel oil to end users [6] show that significant amounts of non-ULSD are still being purchased by end users that typically operate stationary combustion sources, including stationary emergency CI engines. For example, in the category of Commercial End Use, sales data for the year 2011 show that only 56 percent of the total distillate and residual fuel oil sold was ULSD. The data provided for Electric Power End Use show that 57 percent of total fuel sold was residual fuel oil. For Industrial End Use, the percentage of total fuel that was residual fuel oil was 26 percent. The EPA believes that requiring cleaner fuel for these stationary emergency CI engines will significantly limit or reduce the emissions of regulated air pollutants emitted from these engines, further protecting public health and the environment. Information provided to EPA by commenters [7] showed that the use of ULSD will significantly reduce emissions of air toxics, including metallic HAP (e.g., nickel, zinc, lead) and benzene.

In addition to the fuel requirement, owners and operators of stationary emergency CI RICE larger than 100 HP that operate or are contractually obligated to be available for more than 15 hours per year (up to a maximum of 100 hours per year) for emergency demand response must report the dates and times the engines operate for emergency demand response annually to the EPA, beginning with operation during the 2015 calendar year. Owners and operators of these engines are also required to report the dates, times and situations that the engines operate to mitigate local transmission and/or

[6] U.S. Energy Information Administration. Distillate Fuel Oil and Kerosene Sales by End Use. Available at *http://www.eia.gov/dnav/pet/pet_cons_821use_dcu_nus_a.htm*.

[7] See document number EPA–HQ–OAR–2008–0708–1459 in the rulemaking docket.

distribution limitations annually to the EPA, beginning with operation during the 2015 calendar year. This information is necessary to determine whether these engines are operating in compliance with the regulations and will assist the EPA in assessing the impacts of the emissions from these engines.

The EPA is adding these requirements beginning in January, 2015, rather than upon initial implementation of the NESHAP for existing engines in May or October of 2013, to provide sources with appropriate lead time to institute these new requirements and make any physical adjustments to engines and other facilities like tanks or other containment structures, as well as any needed adjustments to contracts and other business activities, that may be necessitated by these new requirements.

The EPA is also amending the NSPS for stationary CI and SI engines in 40 CFR part 60, subparts IIII and JJJJ, respectively, to provide the same limitation for stationary emergency engines for emergency demand response and system reliability operation as for engines subject to the RICE NESHAP. The NSPS regulations currently do not include such a provision for emergency demand response or system reliability operation; the issue was not raised during the original promulgation of the NSPS. The EPA is adding an emergency demand response and system reliability provision under the NSPS regulations in these final amendments. The EPA is revising the existing language in §§ 60.4211(f) and 60.4219 of 40 CFR part 60, subpart IIII, and §§ 60.4243(d) and 60.4248 of 40 CFR part 60, subpart JJJJ, to specify that emergency engines must limit operation for engine maintenance and testing and emergency demand response to a maximum of 100 hours per year; 50 of the 100 hours may be used to operate to mitigate local reliability issues, as discussed previously for the RICE NESHAP.

The EPA is also finalizing amendments to the NSPS regulations that require owners and operators of stationary emergency engines larger than 100 HP that operate or are contractually obligated to be available for more than 15 hours per year (up to a maximum of 100 hours per year) for emergency demand response to report the dates and times the engines operated for emergency demand response annually to the EPA, beginning with operation during the 2015 calendar year. Owners and operators of these engines are also required to report the dates, times and situations that the engines operate to mitigate local transmission and/or distribution limitations annually to the EPA, beginning with operation during the 2015 calendar year. The EPA anticipates that in most cases, the entity that dispatches the engines to operate, such as the curtailment service provider or utility, will report the information to the EPA on behalf of the facility that owns the engine. Thus, the burden of the reporting requirement will likely be on the entities that dispatch the engines. The EPA's burden estimate (see section V.B Paperwork Reduction Act) assumes the dispatching entity will report the date and hours dispatched without contacting individual engine operators. Emergency engines subject to 40 CFR part 60, subpart IIII are already required by subpart IIII to use diesel fuel that meets the requirements of 40 CFR 80.510(b).

The 2010 regulation specified that existing emergency engines at area sources of HAP that are residential, commercial, or institutional facilities were not subject to the RICE NESHAP requirements as long as the engines were limited to no more than 15 hours per year for emergency demand response. The EPA is specifying in the final rule that existing emergency engines at area sources of HAP that are residential, commercial, or institutional facilities are subject to the applicable requirements for stationary emergency engines in the RICE NESHAP if they operate or are contractually obligated to be available for more than 15 hours per year (up to a maximum of 100 hours per year) for emergency demand response, or they operate to mitigate local transmission and/or distribution limitations. Information provided by commenters on the 2010 regulation and the amendments proposed in June 2012 indicates that these engines typically operate less than 15 hours per year for emergency demand response.

For stationary emergency engines above 500 HP at major sources of HAP that were installed before June 12, 2006, prior to these final amendments, there was no emergency demand response provision and there was no time limit on the use of emergency engines for routine testing and maintenance in § 63.6640(f)(2)(ii). Those engines were not the focus of the 2010 RICE NESHAP amendments; therefore, the EPA did not make any changes to the requirements for those engines as part of the 2010 amendments. For consistency, the EPA is now also revising 40 CFR part 63, subpart ZZZZ to require owners and operators of stationary emergency engines above 500 HP at major sources of HAP installed prior to June 12, 2006, to limit operation of their engines for maintenance and testing and emergency demand response program to a total of 100 hours per year. These engines would also be required to use diesel fuel meeting the specifications of 40 CFR 80.510(b) beginning January 1, 2015, however, if the engine operates or is contractually obligated to be available for more than 15 hours per year. Any existing diesel fuel purchased (or otherwise obtained) prior to January 1, 2015 may be used until depleted. In addition to the fuel requirement, owners and operators of these engines must report the dates and times the engines operate for emergency demand response annually to the EPA, beginning with operation during the 2015 calendar year.

More detail regarding the public comments regarding emergency demand response and the EPA's responses can be found in the Response to Public Comments document available in the rulemaking docket.

C. Peak Shaving

In the June 7, 2012, proposal, the EPA proposed a temporary provision for existing stationary emergency engines located at area sources to apply the 50 hours per year that is allowed under § 63.6640(f) for non-emergency operation towards any non-emergency operation, including peak shaving. The peak shaving provision was proposed to expire in April 2017. As discussed further in section III.B, the EPA is not finalizing the proposed temporary 50-hour provision for existing stationary emergency engines located at area sources engaged in peak shaving and other non-emergency use as part of a financial arrangement with another entity. However, in consideration of the short time between this final rule and the May 3, 2013, or October 19, 2013, compliance dates for affected sources, this final rule includes a provision limiting the use of existing stationary emergency engines located at area sources to 50 hours per year prior to May 3, 2014, for peak shaving or non-emergency demand response to generate income for a facility, or to otherwise supply power as part of a financial arrangement with another entity if the engines are operated as part of a peak shaving (load management) program with the local distribution system operator and the power is provided only to the facility itself or to support the local distribution system. This extension provides additional time so that these sources that wish to engage in peak shaving can come into compliance with the applicable requirements for non-emergency engines.

D. Non-Emergency Stationary SI RICE Greater Than 500 HP Located at Area Sources

The EPA is finalizing amendments to the requirements that apply to existing stationary non-emergency 4-stroke SI RICE greater than 500 HP located at area sources of HAP emissions, which are generally natural gas fired engines.

The EPA is creating a subcategory for existing spark ignition engines located in sparsely populated areas. Engines located in remote areas that are not close to significant human activity may be difficult to access, may not have electricity or communications, and may be unmanned most of the time. The costs of the emission controls, testing, and continuous monitoring requirements may be unreasonable when compared to the HAP emission reductions that would be achieved, considering that the engines are in sparsely populated areas. Moreover, the location of these engines is such that there would be limited public exposure to the emissions. The EPA believes that establishing a subcategory for SI engines at area sources of HAP located in sparsely populated areas accomplishes the agency's goals and is adequate in protecting public health. The EPA is creating this subcategory using criteria based on the existing DOT classification system for natural gas pipelines. This system classifies locations based on their distance to natural gas pipelines covered by the Pipeline and Hazardous Materials Safety Administration regulations. The DOT system defines a class location unit as an onshore area that extends 220 yards or 200 meters on either side of the centerline of any continuous 1-mile (1.6 kilometers) length of natural gas pipeline. The DOT approach further classifies pipeline locations into Class 1 through Class 4 locations based on the number of buildings intended for human occupancy. A Class 1 location is defined as an offshore area or any class location unit that has 10 or fewer buildings intended for human occupancy. The DOT classification system also has special provisions for locations where buildings with four or more stories above ground are prevalent and locations that lie within 100 yards (91 meters) of either a building or a small, well-defined outside area (such as a playground, recreation area, outdoor theater, or other place of public assembly) that is occupied by 20 or more persons on at least 5 days a week for 10 weeks in any 12-month period. To be considered remote under this final rule, a source on a pipeline could not fall under these special provisions and, in addition, must be in a Class 1 location. For those engines not associated with pipelines, the EPA is using similar criteria. An engine would be considered to be in sparsely populated areas if within 0.25 mile radius of the engine there are 5 or fewer buildings intended for human occupancy.

Owners and operators of existing stationary non-emergency 4-stroke lean burn (4SLB) and 4SRB RICE greater than 500 HP at area sources that are in sparsely populated areas as described above would be required to perform the following:

- Change oil and filter every 2,160 hours of operation or annually, whichever comes first;
- Inspect spark plugs every 2,160 hours of operation or annually, whichever comes first, and replace as necessary; and
- Inspect all hoses and belts every 2,160 hours of operation or annually, whichever comes first, and replace as necessary.

Sources have the option to use an oil analysis program as described in § 63.6625(i) of the rule in order to extend the specified oil change requirement. The oil analysis must be performed at the same frequency specified for changing the oil in Table 2d of the rule. The analysis program must at a minimum analyze the following three parameters: Total Acid Number, viscosity, and percent water content. The condemning limits for these parameters are as follows: Total Acid Number increases by more than 3.0 milligrams of potassium hydroxide per gram from Total Acid Number of the oil when new; viscosity of the oil has changed by more than 20 percent from the viscosity of the oil when new; or percent water content (by volume) is greater than 0.5. If none of these condemning limits are exceeded, the engine owner or operator is not required to change the oil. If any of the limits are exceeded, the engine owner or operator must change the oil within 2 business days of receiving the results of the analysis; if the engine is not in operation when the results of the analysis are received, the engine owner or operator must change the oil within 2 business days or before commencing operation, whichever is later. The owner or operator must keep records of the parameters that are analyzed as part of the program, the results of the analysis, and the oil changes for the engine. The analysis program must be part of the maintenance plan for the engine.

Owners and operators of existing stationary 4SLB and 4SRB area source engines above 500 HP in sparsely populated areas would also have to operate and maintain the stationary RICE and aftertreatment control device (if any) according to the manufacturer's emission-related written instructions or develop their own maintenance plan, which must provide to the extent practicable for the maintenance and operation of the engine in a manner consistent with good air pollution control practice for minimizing emissions.

Owners and operators of engines in sparsely populated areas would have to conduct a review of the surrounding area every 12 months to determine if the nearby population has changed. If the engine no longer meets the criteria for a sparsely populated area, the owner and operator must within 1 year comply with the emission standards specified below for populated areas.

For engines in populated areas, i.e., existing stationary 4SLB and 4SRB non-emergency engines greater than 500 HP at area sources that are located on DOT Class 2 through Class 4 pipeline segments or, for engines not associated with pipelines, that do not meet the 0.25 mile radius with 5 or less buildings criteria, the EPA is revising the requirements that were finalized in the 2010 rule. The EPA is adopting an equipment standard requiring the installation of a catalyst to reduce HAP emissions. Owners and operators of existing area source 4SLB non-emergency engines greater than 500 HP in populated areas would be required to install an oxidation catalyst. Owners and operators of existing area source 4SRB non-emergency engines greater than 500 HP in populated areas would be required to install NSCR. Owners and operators must conduct an initial test to demonstrate that the engine achieves at least a 93 percent reduction in CO emissions or a CO concentration level of 47 ppmvd at 15 percent O_2, if the engine is a 4SLB engine. Similarly, owners and operators must conduct an initial performance test to demonstrate that the engine achieves at least either a 75 percent CO reduction, a 30 percent THC reduction, or a CO concentration level of 270 ppmvd at 15 percent O_2 if the engine is a 4SRB engine. The initial test must consist of three test runs. Each test run must be of at least 15 minute duration, except that each test run conducted using appendix A to 40 CFR part 63, subpart ZZZZ must consist of one measurement cycle as defined by the method and include at least 2 minutes of test data phase measurement. To measure CO, emission sources must use the CO methods already specified in subpart ZZZZ, or appendix A to 40 CFR part 63, subpart ZZZZ. The THC testing must be conducted using EPA Method 25A.

The owner or operator of both engine types must also use a high temperature shutdown device that detects if the catalyst inlet temperature is too high, or, alternatively, the owner or operator can monitor the catalyst inlet temperature continuously and maintain the temperature within the range specified in the rule. For 4SLB engines the catalyst inlet temperature must remain at or above 450 °F and at or below 1,350 °F. For 4SRB engines the temperature must be greater than or equal to 750 °F and less than or equal to 1,250 °F at the catalyst inlet.

Owners and operators must in addition to the initial performance test conduct annual checks of the catalyst to ensure proper catalyst activity. The annual check of the catalyst must at a minimum consist of one 15-minute run using the methods discussed above, except that each test run conducted using appendix A to 40 CFR part 63, subpart ZZZZ must consist of one measurement cycle as defined by the method and include at least 2 minutes of test data phase measurement. Owners and operators of 4SLB engines must demonstrate during the catalyst activity test that the catalyst achieves at least a 93 percent reduction in CO emissions or that the engine exhaust CO emissions are no more than 47 ppmvd at 15 percent O_2. Owners and operators of 4SRB engines must demonstrate during the catalyst activity check that their catalyst is reducing CO emissions by 75 percent or more, the CO concentration level at the engine exhaust is less than or equal to 270 ppmvd at 15 percent O_2, or THC emissions are being reduced by at least 30 percent.

If the emissions from the engine do not exceed the levels required for the initial test or annual checks of the catalyst, then the catalyst is considered to be working properly. If the emissions exceed the specified pollutant levels in the rule, the exceedance(s) is/are not considered a violation, but the owner or operator would be required to shut down the engine and take appropriate corrective action (e.g., repairs, clean or replace the catalyst, as appropriate). A follow-up test must be conducted within 7 days of the engine being started up again to demonstrate that the emission levels are being met. If the retest shows that the emissions continue to exceed the specified levels, the stationary RICE must again be shut down as soon as safely possible, and the engine may not operate, except for purposes of start-up and testing, until the owner/operator demonstrates through testing that the emissions do not exceed the levels specified.

E. Stationary CI RICE Certified to Tier Standards

The EPA is amending the requirements for any stationary CI engine certified to the Tier 3 standards in 40 CFR part 89 (Tier 2 for engines above 560 kilowatt (kW)) located at an area source and installed before June 12, 2006. The EPA is finalizing amendments to specify that any existing certified Tier 3 (Tier 2 for engines above 560 kW) CI engine that was installed before June 12, 2006, is in compliance with the RICE NESHAP. This amendment includes any existing stationary Tier 3 (Tier 2 for engines above 560 kW) certified CI engine located at an area source of HAP emissions. Without these amendments, Tier 3 engines, which were built to meet stringent emission standards, would not be able to comply with the applicable RICE NESHAP emission standards for existing engines without further testing and monitoring, and possible retrofit with further controls, due to differences in the emission standards and testing protocols in the RICE NESHAP versus the Tier 3 standards in 40 CFR part 89. However, an identical engine certified to the Tier 3 standards (or Tier 2 standards for engines above 560 kW) in 40 CFR part 89 that was installed after June 12, 2006, would not have to be retrofit in order to comply with the NESHAP. The EPA believes that the Tier 3 standards (Tier 2 for engines above 560 kW) are technologically stringent regulations and believes it is unnecessary to require further regulation of engines meeting these standards.

The EPA is also amending the requirements for existing stationary CI engines that are certified to the Tier 1 and Tier 2 standards in 40 CFR part 89, located at area sources of HAP, greater than 300 HP and subject to a state or local rule that requires the engine to be replaced. The EPA does not think it is appropriate to require emission controls on a stationary CI engine that is going to be retired only a short time after the rule goes into effect. These engines (equipped with aftertreatment) could end up being in operation for less than 2 years or at most only 5 years before having to be replaced with a certified Tier 4 engine. It would not be reasonable to require the engine owner to invest in costly controls and monitoring equipment for an engine that will be replaced shortly after the installation of the controls. Consequently, the EPA is allowing these engines to meet management practices from the applicable May 3, 2013, compliance date until January 1, 2015, or 12 years after installation date (whichever is later), but not later than June 1, 2018, after which time the CO emission standards in Table 2d of 40 CFR part 63, subpart ZZZZ) apply. The management practices include requirements for when to inspect and replace the engine oil and filter, air cleaner, hoses and belts. The complete details of which management practices are required are shown in Table 2d of the rule. Owners and operators of these existing stationary CI engines located at area sources of HAP emissions that intend to meet management practices rather than the emission limits prior to January 1, 2015, or 12 years after installation date, but not later than June 1, 2018, must submit a notification by March 3, 2013, stating that they intend to use this provision and identifying the state or local regulation that the engine is subject to.

F. Definition for Remote Areas of Alaska

The RICE NESHAP amendments finalized in 2010 specified less stringent requirements for existing non-emergency CI engines at area sources located in remote areas of Alaska. Remote areas are defined under the 2010 rule as those not accessible by the FAHS. In this action, the EPA is expanding the definition of remote areas of Alaska to extend beyond areas that are not accessible by the FAHS. The EPA is expanding the current definition because some areas that are accessible by the FAHS face the same challenges as areas that are not accessible, including high energy costs, extreme weather conditions, lengthy travel times, inaccessibility, and very low population density. Many of these areas are not connected to the electric grid and rely on back up diesel generation to support fluctuating renewable energy systems. The energy supply system is another area that is particularly different in Alaska compared to the rest of the country where the majority of customers are connected to the grid. These final amendments specify that existing stationary CI engines at area sources of HAP in areas of Alaska that are accessible by the FAHS and that meet all of the following criteria will also be considered remote and subject to management practices under the rule:

- The stationary CI engine is located in an area not connected to the Alaska Railbelt Grid,
- At least 10 percent of the power generated by the engine per year is used for residential purposes, and
- The generating capacity of the area source is less than 12 MW, or the engine

is used exclusively for backup power for renewable energy.

The EPA is limiting the remote classification to engines that are used at least partially for residential purposes, where the impact of higher energy costs is of greatest concern. The classification is further limited to sources that are used infrequently as backup for renewable power, or that are at smaller capacity facilities, which are generally in more sparsely populated areas.

G. Requirements for Offshore Vessels

The EPA is revising the requirements in the RICE NESHAP for existing non-emergency CI RICE greater than 300 HP on offshore vessels that are area sources of HAP. Engines on vessels on the OCS in certain circumstances become subject to the provisions of the RICE NESHAP as a result of the operation of the OCS regulations at 40 CFR part 55. The rationale for this revision is discussed further in section III.D. The EPA is finalizing the following management practice requirements for existing non-emergency CI RICE greater than 300 HP on offshore vessels that are area sources of HAP:

• Change oil every 1,000 hours of operation or annually, whichever comes first, except that sources can extend the period for changing the oil if the oil is part of an oil analysis program as discussed below and the condemning limits are not exceeded;

• Inspect and clean air filters every 750 hours of operation or annually, whichever comes first, and replace as necessary;

• Inspect fuel filters and belts, if installed, every 750 hours of operation or annually, whichever comes first, and replace as necessary; and

• Inspect all flexible hoses every 1,000 hours of operation or annually, whichever comes first, and replace as necessary.

These sources may use an oil analysis program in order to extend the specified oil change requirement. The analysis program must at a minimum analyze the following three parameters: Total Base Number, viscosity and percent water content. The analysis must be conducted at the same frequency specified for changing the engine oil. If the condemning limits provided below are not exceeded, the engine owner or operator is not required to change the oil. If any of the condemning limits are exceeded, the engine owner or operator must change the oil within two business days or before continuing to use the engine, whichever is later. The condemning limits are as follows:

• Total Base Number is less than 30 percent of the Total Base Number of the oil when new; or

• Viscosity of the oil has changed by more than 20 percent from the viscosity of the oil when new; or

• Percent water content (by volume) is greater than 0.5.

Owners and operators of these existing stationary CI RICE must develop a maintenance plan that specifies how the management practices will be met and keep records to demonstrate that the required management practices are being met.

H. Miscellaneous Corrections and Revisions

The EPA is making some minor corrections and clarifications to the stationary engine rules to address miscellaneous issues. The revisions are as follows:

• Revising Tables 1b and 2b of 40 CFR part 63, subpart ZZZZ to correct language requiring the pressure drop to be at plus or minus 10 percent of 100 percent load for all engines. The engines that were regulated in 2010 are not subject to the load requirements and therefore the EPA is correcting these tables to make this clear.

• Adding a footnote to Table 1b of 40 CFR part 63, subpart ZZZZ stating that sources can petition the Administrator for a different temperature range consistent with Table 2b of the rule.

• Correcting rows 8 and 10 in Table 2d of 40 CFR part 63, subpart ZZZZ to indicate that the requirements apply to non-emergency, non-black start stationary RICE greater than 500 HP that are 4SLB and 4SRB that operate more than 24 hours per year, as intended in the original rule.

• Revising the language in § 63.6625(b) of 40 CFR part 63, subpart ZZZZ that states ''* * * in paragraphs (b)(1) through (5) of this section'' to ''in paragraphs (b)(1) through (6) of this section.''

• Changing Tables 2c and 2d of 40 CFR part 63, subpart ZZZZ, where it currently specifies to inspect air cleaner, to also specify that it must be replaced as necessary.

• Revising § 63.6620(b) of 40 CFR part 63, subpart ZZZZ to indicate that testing must be conducted within plus or minus 10 percent of 100 percent load for stationary RICE greater than 500 HP located at a major source (except existing non-emergency CI stationary RICE greater than 500 HP located at a major source) that are subject to testing.

• Specifying that, as was intended in the rule adding these requirements, the operating limitations (pressure drop and catalyst inlet temperature) in Tables 1b and 2b of 40 CFR part 63, subpart ZZZZ do not have to be met during startup.

• For consistency, and as provided in the original RICE NESHAP for other stationary RICE, clarifying in 40 CFR part 63, subpart ZZZZ that the existing stationary RICE regulated in 2010 (i.e., engines constructed before June 12, 2006, that are less than or equal to 500 HP located at major sources or engines located at area sources) must burn landfill or digester gas equivalent to 10 percent or more of the gross heat input on an annual basis in order to qualify as a landfill or digester gas engine under the rule.

• Clarifying § 60.4207(b) of 40 CFR part 60, subpart IIII to specify that owners and operators of stationary CI engines less than 30 liters per cylinder that are subject to the subpart that use diesel fuel must use diesel fuel that meets the requirements of 40 CFR 80.510(b), except owners and operators may use up any diesel fuel acquired prior to October 1, 2010, that does not meet the requirements of 40 CFR 80.510(b) for nonroad diesel fuel.

• Adding appendix A to 40 CFR part 63, subpart ZZZZ, which includes procedures that can be used for measuring CO emissions from existing stationary 4SLB and 4SRB stationary RICE above 500 HP located at area sources of HAP that are complying with the emission limits in Table 2d of 40 CFR part 63, subpart ZZZZ.

• Reinstating the footnotes for Table 2 of 40 CFR part 60, subpart JJJJ. The footnotes were inadvertently removed when the rule was amended on June 28, 2011 (76 FR 37954).

• Adding ''part 60'' in Table 4 of the NESHAP, in row 2 where it refers to 40 CFR appendix A.

• Clarifying in § 63.6625(a) of 40 CFR part 63, subpart ZZZZ that a continuous emission monitoring system is only required to be installed at the outlet of the control device for engines that are complying with the requirement to limit the concentration of CO.

• Adding definitions of terms used in Equation 4 of § 63.6620 of 40 CFR part 63, subpart ZZZZ.

• Clarifying that, as was intended in the rule adding these requirements, all of the standards for stationary SI RICE in § 60.4231(b) of 40 CFR part 60, subpart JJJJ are for stationary SI RICE that use gasoline.

• Clarifying that, as was intended in the rule adding these requirements, all of the standards for stationary SI RICE in § 60.4231(c) of 40 CFR part 60, subpart JJJJ are for stationary SI RICE that are rich burn engines that use liquified petroleum gas (LPG).

• Clarifying that, as was intended in the rule adding these requirements, all of the standards for stationary SI RICE in § 60.4231(d) of 40 CFR part 60, subpart JJJJ are for stationary SI RICE that are not gasoline engines or rich burn engines that use LPG.

• Clarifying in § 63.6625(b)(1) and the entries for § 63.8(c)(1)(i) and (iii) in Table 8 of 40 CFR part 63, subpart ZZZZ that a startup, shutdown, and malfunction plan is not required for a continuous parameter monitoring system.

• Clarifying in the entry for § 63.10(b)(1) in Table 8 of 40 CFR part 63, subpart ZZZZ that the most recent two years of data do not have to be retained on site.

• Revising footnote 2 of Table 2c and footnote 1 of Table 2d of 40 CFR part 63, subpart ZZZZ to include a reference to § 63.6625(j), as was intended in the rule addressing these requirements.

III. Summary of Significant Changes Since Proposal

A. Emergency Demand Response and Reliability

The EPA proposed to limit operation of emergency stationary RICE as part of an emergency demand response program to within the 100 hours per year that is already permitted for maintenance and testing of the engines. The EPA proposed that owners and operators of stationary emergency engines could operate the engines for emergency demand response when the Reliability Coordinator, or other authorized entity as determined by the Reliability Coordinator, has declared an EEA Level 2 as defined in the NERC Reliability Standard EOP–002–3, Capacity and Energy Emergencies, plus during periods where there is a deviation of voltage or frequency of 5 percent or more below standard voltage or frequency. After considering public comments received on the proposed rule, the EPA is finalizing the proposed amendment to limit operation for maintenance and testing and emergency demand response to no more than 100 hours per year.

The EPA received some comments in support of the provision for emergency demand response operation, while other commenters opposed the limitation. The commenters who supported the provision noted that the engines are rarely called for emergency demand response, and that the EPA has limited the emergency demand response operation to emergency situations where a blackout is imminent. The commenters also noted that the public health impacts created by a widespread power outage outweigh the air quality impacts from the engines. The EPA agrees with the commenters that it is appropriate to include a provision for operation of emergency engines for a limited number of hours per year as part of emergency demand response programs to help prevent grid failure or blackouts. Preventing stationary emergency engines from being able to qualify and participate in emergency demand response programs without having to apply aftertreatment could force owners and operators to remove their engines from these programs, which could impair the ability of regional transmission organizations and independent system operators to use these relatively small, quick-starting and reliable sources of energy to protect the reliability of their systems.

The commenters who opposed the provision for demand response provided no significant argument that the conditions under which these engines would be permitted to operate for emergency demand response would not be emergency conditions. Commenters who opposed the provision were concerned about the air quality and health impacts of emissions from stationary engines. The commenters were concerned that recent actions by the Federal Energy Regulatory Commission (FERC) that impact demand response compensation in organized wholesale energy markets will greatly increase the amount of demand response participating in organized wholesale capacity markets. In response to the commenters, the EPA notes that, prior to the 2013 compliance dates for existing engines, there are no limitations on the hours of operation for those engines. The standards that go into effect in 2013 will for the first time establish requirements for these engines, including limitations on their hours of operation in certain situations such as emergency demand response, and ULSD fuel requirements which will reduce HAP emissions from the engines. Regarding the FERC regulations and their effect on use of demand response in capacity markets, these are comments more appropriately directed towards the FERC. As noted above, the emergency demand response situations during which the emergency engines may be used for a limited number of hours per year are appropriately considered emergency situations.

Commenters were also concerned that these engines would be called to operate for demand response on high ozone days, further contributing to nonattainment with ozone standards. However, other commenters noted that emergency demand response events do not predominantly occur on ozone exceedance days. These commenters also note that some of the commenters opposing use of emergency engines during emergency demand response would benefit by such a limitation because other emission sources may be used instead of the emergency engines, including sources that some of these commenters may operate, and that the effect on total emissions of using these alternative emission sources is not clear. Concerns about contribution to ozone nonattainment by stationary engines can be addressed through area-specific requirements such as state-based State Implementation Plans that would be directed towards ozone nonattainment areas. More detail regarding the public comments and the EPA's responses can be found in the Response to Public Comments document available in the rulemaking docket.

As mentioned in the previous paragraph, in response to the concerns about the air quality impact of emissions from emergency engines operating in emergency demand response programs, and based on public comments received on the proposed rule, the EPA is finalizing a requirement for owners and operators of existing emergency CI stationary RICE with a site rating of more than 100 brake HP and a displacement of less than 30 liters per cylinder that use diesel fuel and operate or are contractually obligated to be available for more than 15 hours per year (up to a maximum of 100 hours per year) for emergency demand response to use diesel fuel that meets the requirements in 40 CFR 80.510(b) for nonroad diesel fuel. This fuel requirement also applies to owners and operators of new emergency CI stationary RICE with a site rating of more than 500 brake HP with a displacement of less than 30 liters per cylinder located at a major source of HAP that use diesel fuel and operate or are contractually obligated to be available for more than 15 hours per year (up to a maximum of 100 hours per year) for emergency demand response. Owners and operators must begin meeting this ULSD fuel requirement on January 1, 2015, except that any existing diesel fuel purchased (or otherwise obtained) prior to January 1, 2015, may be used until depleted. As noted by commenters on the proposed amendments and as discussed in section II.B, requiring the use of diesel fuel meeting the requirements of 40 CFR 80.510(b) is expected to reduce the HAP emissions significantly from the engines compared to emissions resulting from use of unregulated diesel fuel. The fuel requirement begins on January 1, 2015, in order to give affected sources appropriate lead time to institute these new requirements and make any physical adjustments to engines and other facilities like tanks or containment structures, as well as any needed adjustments to contracts and other business activities, that may be necessitated by these new requirements.

The final amendments also require owners and operators of emergency stationary RICE larger than 100 HP that operate or are contractually obligated to be available for more than 15 hours per year (up to a maximum of 100 hours per year) for emergency demand response to submit an annual report to the EPA documenting the dates and times that the emergency stationary RICE operated for emergency demand response, beginning with the 2015 calendar year. Commenters on the proposed amendments recommended that the EPA gather information on the impacts of the emissions from emergency engines during emergency demand response situations. The EPA agrees that a reporting requirement will increase the EPA's ability to ensure that these engines are operating in compliance with the regulations and that it will provide further information regarding the impacts of these engines on emissions. In response to these comments, the EPA is establishing a requirement to annually report to EPA the engine location and duration of operation for emergency demand response. This information will be used by the EPA, as well as state and local air pollution control agencies, to assess the health impacts of the emissions from these engines and to aid the EPA in ensuring that these engines comply with the regulations. Additional discussion of the rationale for the fuel and reporting requirements, as well as responses to other significant comments regarding emergency engines engaged in emergency demand response, can be found in the Response to Public Comments document in the docket.

Public commenters, in particular the National Rural Electric Cooperative Association (NRECA), indicated that the proposed EEA Level 2 and 5 percent voltage or frequency deviation triggers did not account for situations when the local balancing authority or transmission operator for the local electric system has determined that electric reliability is in jeopardy, and recommended that the EPA include additional situations where the local transmission and distribution system operator has determined that there are conditions that could lead to a blackout for the local area. The comments from NRECA indicated that rural distribution lines are not configured in a typical grid pattern, but instead have distribution lines that can run well over 50 miles from a substation and regularly extend 15 miles or longer. During periods of exceptionally heavy stress within the region or sub-region, electricity from regional power generators may not be available because of transmission constraints, according to the commenter. The commenter indicated that in many cases, there may be only one transmission line that feeds the rural distribution system, and no alternative means to transmit power into the local system.

In response to those comments and in recognition of the unique challenges faced by the local transmission and distribution system operators in rural areas, the EPA is specifying in the final rule that existing emergency stationary RICE at area sources can be used for 50 hours per year as part of a financial arrangement with another entity if all of the following conditions are met:

- The engine is dispatched by the local balancing authority or local transmission and distribution system operator.
- The dispatch is intended to mitigate local transmission and/or distribution limitations so as to avert potential voltage collapse or line overloads that could lead to the interruption of power supply in a local area or region.
- The dispatch follows reliability, emergency operation or similar protocols that follow specific NERC, regional, state, public utility commission or local standards or guidelines.
- The power is provided only to the facility itself or to support the local transmission and distribution system.
- The owner or operator identifies and records the specific NERC, regional, state, public utility commission or local standards or guidelines that are being followed for dispatching the engine. The local balancing authority or local transmission and distribution system operator may keep these records on behalf of the engine owner or operator.

Engines operating in systems that do not meet the conditions described here will not be considered emergency engines if they operate for these purposes as part of a financial arrangement with another entity.

Stationary emergency CI RICE with a site rating of more than 100 brake HP and a displacement of less than 30 liters per cylinder located at area sources that operate for this purpose are also required to use diesel fuel meeting the specifications of 40 CFR 80.510(b) beginning January 1, 2015, except that any existing diesel fuel purchased (or otherwise obtained) prior to January 1, 2015, may be used until depleted. Owners and operators of these engines are also required to report the dates and times the engines operated for this purpose annually to the EPA, beginning with operation during the 2015 calendar year. The report must also identify the entity that dispatched the engine and the situation that necessitated the dispatch of the engine. Further discussion of the rationale for the changes is available in the Response to Public Comments document in the docket.

B. Peak Shaving

The EPA proposed a temporary provision for existing stationary emergency engines located at area sources to apply the 50 hours per year that is allowed under § 63.6640(f) for non-emergency operation towards any non-emergency operation, including operation as part of a financial agreement with another entity. The peak shaving provision was proposed to expire in April 2017. The purpose of the proposed provision for peak shaving was to give sources an additional resource for maintaining reliability while facilities are coming into compliance with the NESHAP From Coal and Oil-Fired Electric Utility Steam Generating Units (77 FR 9304, February 16, 2012). Based on public comments received on the proposal, the EPA is not finalizing the proposed provision for peak shaving in this action. As noted by the commenters, operation for peak shaving does not fairly come under the definition of emergency use as it is designed to increase capacity in the system, rather than responding to an emergency situation such as a blackout or imminent brownout. The EPA believes that peak shaving activity and other activities designed to increase capacity should be treated as part of long term capacity planning, not as use akin to emergencies. The EPA agrees with commenters who state that allowance for emergency engines to be used for peak shaving could well lead to increased use of these engines, particularly in situations that are not emergency situations. The EPA also agrees that use of internal combustion engines for peak shaving is not based on emergency use, but instead is generally based on the economic benefit gained by operating the engine rather than another power source. The EPA agrees with the commenters that there is not sufficient information on the record to show that these engines are needed to maintain reliability while facilities are coming into compliance with the NESHAP From Coal and Oil-Fired Electric Utility Steam Generating Units, and the commenters who supported the limited temporary provision did not provide information to show that rule would cause reliability issues that necessitate the operation of these engines. The EPA believes that given this information, it is appropriate to treat use of internal combustion engines as peak power units not as emergency use but as normal power generation, and thus believes it is appropriate to require emissions aftertreatment requirements (or similar controls as appropriate for non-emergency engines) for engines engaging in these activities for compensation. Further discussion is available in the Response to Public Comments document in the docket.

However, in consideration of the short time between this final rule and the May 3, 2013, or October 19, 2013 compliance dates for affected sources, this final rule permits the use of existing stationary emergency engines located at area sources for 50 hours per year through May 3, 2014 for peak shaving or non-emergency demand response to generate income for a facility, or to otherwise supply power as part of a financial arrangement with another entity if the engines are operated as part of a peak shaving (load management) program with the local distribution system operator and the power is provided only to the facility itself or to support the local distribution system. Owners and operators of these engines, which have heretofore not been regulated, may have taken actions based on the June 7, 2012, proposal that would now leave them in danger of being in noncompliance with the applicable requirements for the engine in the RICE NESHAP.

C. Non-Emergency Stationary SI RICE Greater Than 500 HP Located at Area Sources

The EPA proposed to require existing stationary non-emergency 4-stroke SI RICE greater than 500 HP located at area sources of HAP that are in sparsely populated areas to meet management practices. The proposed management practices required the engine owner and operator to change the oil and filter and inspect spark plugs, hoses and belts every 1,440 hours of operation or annually, whichever comes first. The proposed management practices were based on similar requirements for existing non-emergency stationary SI RICE smaller than 500 HP. The EPA received public comments indicating that the interval for performing the management practices for engines larger than 500 HP should be every 2,160 hours of operation or annually, whichever comes first. Commenters indicated that larger engines have increased capabilities compared to smaller size engines, which allows engines to extend the maintenance interval. Larger engines have increased oil capacities, use improved oil grades/synthetics, and use oil sweetening systems, according to the commenters. Commenters also noted that larger engines use better quality, more expensive spark plugs that last longer than 1,440 hours, and that less frequent maintenance intervals reduce the environmental impacts associated with disposing waste oils and traveling to remote locations. The EPA agrees with the arguments presented by the commenters. Therefore, in this final rule, EPA is requiring engine owners and operators to change the oil and filter and inspect spark plugs, hoses and belts every 2,160 hours of operation or annually, whichever comes first.

For existing stationary non-emergency SI 4SRB RICE that are in populated areas, the EPA proposed an equipment standard that required the installation of NSCR to reduce HAP emissions. The proposed rule required these engines to demonstrate that the catalyst achieves at least a 75 percent CO reduction or a 30 percent THC reduction. The EPA is retaining this requirement in this final rule, but is adding another option in response to public comments that allows the owner and operator of the engine to demonstrate that the catalyst achieves a CO concentration level of 270 ppmvd at 15 percent O_2. As noted by the public comments, this represents a 75 percent reduction from typical uncontrolled emissions from existing stationary non-emergency SI 4SRB RICE and is the CO standard required for new SI 4SRB engines in the NSPS for stationary SI engines. The EPA is also clarifying that, as was intended in the original proposal, engines located in Class 4 locations are not considered remote. More detail regarding the public comments and the rationale for these changes can be found in the Response to Public Comments document, which is available in the docket for this rulemaking.

D. Definition for Remote Areas of Alaska

The EPA proposed to expand the definition of remote areas of Alaska to extend beyond areas that are not accessible by the FAHS. Specifically, the EPA proposed that areas of Alaska that are accessible by the FAHS and that met all of the following criteria would also be considered remote and subject to management practices under the rule: (1) The stationary CI engine is located in an area not connected to the Alaska Railbelt Grid; (2) at least 10 percent of the power generated by the engine per year is used for residential purposes; and (3) the generating capacity of the area source is less than 12 MW, or the engine is used exclusively for backup power for renewable energy and is used less than 500 hours per year on a 10-year rolling average. After considering the public comments received on the proposed criteria, the EPA is finalizing the first two criteria as proposed, but finalizing a slightly different third criterion. In this final rule, existing CI engines at area sources of HAP are considered remote if they meet the first and second criteria above and they are either at a source with a generating capacity less than 12 MW, or used exclusively for backup power for renewable energy. Based on public comments received on the proposal, the EPA is not finalizing the limitation that the engine be used less than 500 hours per year on a 10-year rolling average. Commenters indicated that basing the applicability on the previous 10 years of operation would ignore recent investments in renewable energy that have significantly decreased engine hours of operation in recent years. The EPA is also defining ''backup power for renewable energy'' in this final rule as engines that provide backup power to a facility that generates electricity from renewable energy resources, as that term is defined in Alaska Statute 42.45.045(l)(5). The rationale for these changes can be found in the Response to Public Comments document available in the docket.

E. Requirements for Offshore Vessels

The RICE NESHAP does not on its face apply to mobile sources, including marine vessels. However, the regulations applicable to sources on the OCS, codified at 40 CFR part 55, specify that vessels are OCS sources when they are (1) permanently or temporarily attached to the seabed and erected thereon and used for the purpose of exploring, developing or producing resources there from, within the meaning of section 4(a)(1) of the OCS Lands Act (43 U.S.C. 1331, *et seq.*); or (2) physically attached to an OCS facility, in which case only the stationary sources aspects of the vessels will be regulated. 40 CFR 55.2. The OCS regulations provide that NESHAP requirements apply to a vessel that is an OCS source where the provisions are ''rationally related to the attainment and maintenance of the federal or state ambient air quality standards or the requirements of part C of title I of the Act.'' 40 CFR 55.13(e).

The EPA received comments during the public comment period for the June 7, 2012, proposal recommending that the RICE NESHAP be amended such that for any existing non-emergency CI RICE above 300 HP on offshore vessels on the OCS that become subject to the RICE NESHAP as a result of the operation of the OCS regulations (40 CFR part 55), such engines may meet the NESHAP through management practices rather than numeric emission limits. This amendment was not contained or contemplated in the June 7, 2012, proposal. However, the comments indicated several significant issues related to application of the NESHAP to regulation of existing marine vessel engines located in the OCS as a result of the OCS regulations; in particular, whether the numerical standards applicable to other CI engines located at area sources (marine vessels located in the OCS are generally located at area sources) are technologically feasible for existing marine engines located in the OCS. Some commenters noted specific technological issues relevant to engines on marine vessels in the OCS. The commenters indicated that emission controls for existing CI RICE to meet the NESHAP may be technically infeasible due to weight and space constraints, catalyst fouling from the low-load engine operation required by the U.S. Coast Guard, safety concerns regarding engine backpressure and lack of catalyst vendor experience with retrofitting. Commenters suggested that, to the extent marine vessel engines become subject to the NESHAP as a result of the OCS regulations, these engines should be subject to GACT requirements that the commenters believe are more appropriate for these types of engines. The commenters indicated that management practices similar to those currently required in the rule for existing non-emergency stationary CI RICE smaller than 300 HP are more appropriate as GACT for existing non-emergency stationary CI RICE above 300 HP on vessels operating on the OCS.

Based on these comments, the EPA published a reopening of the comment period to take further comment on whether the RICE NESHAP should be revised to require management practices for these vessels (77 FR 60341, October 3, 2012). Based on the comments received during the two comment periods, the EPA agrees with the commenters that management practices are more reasonable as GACT for existing non-emergency stationary CI RICE larger than 300 HP on vessels operating on the OCS and is finalizing management practices for these engines. The EPA did not receive any public comments indicating that HAP emission controls were generally available and had been demonstrated for the large engines on the vessels. The final management practices include changing the oil every 1,000 hours of operation or annually, whichever comes first; inspecting and cleaning air filters every 750 hours of operation or annually, whichever comes first, and replacing as necessary; inspecting fuel filters and belts, if installed, every 750 hours of operation or annually, whichever comes first, and replacing as necessary; and inspecting all flexible hoses every 1,000 hours of operation or annually, whichever comes first, and replacing as necessary. Facilities have the option of using an oil analysis program to extend the oil change requirement. Additional discussion of the rationale for these changes can be found in the Response to Public Comments document available in the docket.

IV. Summary of Environmental, Energy and Economic Impacts

A. What are the air quality impacts?

The EPA estimates that the rule with the final amendments incorporated will reduce emissions from existing stationary RICE as shown in Table 4 of this preamble. The emissions reductions the EPA previously estimated for the 2010 amendments to the RICE NESHAP are shown for comparison. Reductions are shown for the year 2013, which is the first year the final RICE NESHAP will be implemented for existing stationary RICE.

TABLE 4—SUMMARY OF REDUCTIONS FOR EXISTING STATIONARY RICE

Pollutant	Emission Reductions (tpy) in the year 2013			
	2010 Final rule		2010 Final rule with these final amendments	
	CI	SI	CI	SI
HAP	1,014	6,008	1,005	1,778
CO	14,342	109,321	14,238	22,211
PM	2,844	N/A	2,818	N/A
NO_X	N/A	96,479	N/A	9,648
VOC	27,395	30,907	27,142	9,147

The EPA estimates that more than 900,000 stationary CI engines will be subject to the rule in total, but only a small number of stationary CI engines are affected by the final amendments in this action. The EPA did not estimate any changes in the reductions from the 2010 rule for the amendments associated with emergency engines. To determine emissions from emergency engines for the 2010 rule, the EPA estimated that these types of engines would on average operate for 50 hours per year. The average hours of operation for emergency engines is not expected to change based on the final amendments and 50 hours per year is still believed to be representative of average emergency engine operation. Information provided by commenters demonstrated that these engines have been operated very infrequently for emergency demand response events.[8] Therefore, the emissions previously calculated remain appropriate.

It is estimated that approximately 330,000 stationary SI engines will be subject to the rule in total; however, only a subset of stationary SI engines are affected by the final amendments in this action. The decrease in estimated reductions for SI engines is primarily due to final amendments to the requirements for existing 4SRB and 4SLB SI engines larger than 500 HP at area sources of HAP that are in remote areas. Those engines were required by the 2010 rule to meet emission limits that were expected to require the installation of aftertreatment to reduce emissions; under these final amendments, those engines are required

[8] See document number EPA–HQ–OAR–2008–0708–1142 in the rulemaking docket.

to meet management practices that would not require the installation of aftertreatment. Further information regarding the estimated reductions of this final rule can be found in the memorandum titled, ''RICE NESHAP Reconsideration Final Amendments—Cost and Environmental Impacts,'' which is available in the docket (EPA–HQ–OAR–2008–0708). The EPA did not estimate any impacts associated with the minor changes to the NSPS for stationary CI and SI engines.

B. What are the cost impacts?

The final amendments are expected to reduce the overall cost of the original 2010 RICE NESHAP amendments. The EPA estimates that with these final amendments incorporated, the cost of the rule for existing stationary RICE will be as shown in Table 5 of this preamble. The costs the EPA previously estimated for the 2010 amendments to the RICE NESHAP are shown for comparison. The costs that were previously estimated are shown in the original year ($2008 for CI and $2009 for SI), as well as updated to 2010 dollars.

TABLE 5—SUMMARY OF COST IMPACTS FOR EXISTING STATIONARY RICE

Engine	2010 Final Rule		2010 Final Rule with these Final Amendments
Total Annual Cost			
SI	$253 million ($2009)	$251 million ($2010)	$115 million ($2010).
CI	$373 million ($2008)	$375 million ($2010)	$373 million ($2010).
Total Capital Cost			
SI	$383 million ($2009)	$380 million ($2010)	$103 million ($2010).
CI	$744 million ($2008)	$748 million ($2010)	$740 million ($2010).

Further information regarding the estimated cost impacts of the final amendments, including the cost of the final amendments in 2010 dollars, can be found in the memorandum titled, ''RICE NESHAP Reconsideration Final Amendments—Cost and Environmental Impacts,'' which is available in the docket (EPA–HQ–OAR–2008–0708). The EPA did not estimate costs associated with the changes to the NSPS for stationary CI and SI engines. The changes to the NSPS are minor and are not expected to impact the costs of those rules.

C. What are the benefits?

Emission controls installed to meet the requirements of this final rule will generate benefits by reducing emissions of HAP as well as criteria pollutants and their precursors, including CO, NO_X and VOC. NO_X and VOC are precursors to $PM_{2.5}$ (particles smaller than 2.5 microns) and ozone. The criteria pollutant benefits are considered co-benefits for this rule. For this final rule, the EPA was only able to quantify the health co-benefits associated with reduced exposure to $PM_{2.5}$ from emission reductions of NO_X and directly emitted $PM_{2.5}$. The EPA has not re-estimated the benefits from the proposal for this final rule because the emission reductions have not changed since the reconsideration proposal.[9]

The EPA previously estimated that the monetized co-benefits in 2013 of the stationary CI NESHAP would be $940 million to $2,300 million (2008 dollars) at a 3-percent discount rate and $850 million to $2,100 million (2008 dollars) at a 7-percent discount rate.[10] For stationary SI engines, EPA previously estimated that the monetized co-benefits in 2013 would be $510 million to $1,200 million (2009 dollars) at a 3-percent discount rate) and $460 million to $1,100 million (2009 dollars) at a 7-percent discount rate.[11]

The final amendments are expected to reduce the overall emission reductions of the rules, primarily due to the changes to requirements for engines in remote areas. In addition to revising the anticipated emission reductions, the EPA has also updated the methodology used to calculate the co-benefits to be consistent with methods used in more recent rulemakings, which is summarized below and discussed in more detail in the CI and SI Final Reconsideration RIAs, the RIAs for this rulemaking. The EPA estimates the monetized co-benefits of the final amendments of the CI NESHAP in 2013 to be $770 million to $1,900 million (2010 dollars) at a 3-percent discount rate and $690 million to $1,700 million (2010 dollars) at a 7-percent discount rate. For SI engines, the EPA estimates the monetized co-benefits of the final amendments in 2013 to be $62 million to $150 million (2010 dollars) at a 3-percent discount rate and $55 million to $140 million (2010 dollars) at a 7-percent discount rate.

Using alternate relationships between $PM_{2.5}$ and premature mortality supplied by experts, higher and lower co-benefits estimates are plausible, but most of the expert-based estimates fall between

[9] Since the June 7, 2012 reconsideration proposal, the EPA has made several updates to the approach used to estimate mortality and morbidity benefits, as demonstrated in the RIA for the PM NAAQS. Changes include applying the concentration-response functions from more recent epidemiology studies, adding some health endpoints, and updating population data. Although the EPA has not re-estimated the benefits for this rule by applying these changes, we anticipate that the rounded benefits estimated for this rule are unlikely to be very different than those provided here. Specifically, we anticipate that the changes that would likely lead to small increases in the benefits would likely be offset by changes that would likely lead to small decreases in the benefits. References for the RIA for the PM NAAQS are: (1) U.S. Environmental Protection Agency (U.S. EPA). 2012a. Regulatory Impact Analysis for the Proposed Revisions to the National Ambient Air Quality Standards for Particulate Matter. EPA–452/R–12–003. Office of Air Quality Planning and Standards, Health and Environmental Impacts Division. June. Available at *http://www.epa.gov/ttnecas1/regdata/RIAs/PMRIACombinedFile_Bookmarked.pdf.* (2) U.S. Environmental Protection Agency (U.S. EPA). 2012b. Regulatory Impact Analysis for the Final Revisions to the National Ambient Air Quality Standards for Particulate Matter. EPA–452/R–12–003. Office of Air Quality Planning and Standards, Health and Environmental Impacts Division. December. Available at *http://www.epa.gov/pm/2012/finalria.pdf.*

[10] U.S. Environmental Protection Agency. 2010. *Regulatory Impact Analysis (RIA) for Existing Stationary Compression Ignition Engines NESHAP: Final Draft.* Research Triangle Park, NC. February. *http://www.epa.gov/ttn/ecas/regdata/RIAs/CIRICENESHAPRIA2-17-0cleanpublication.pdf.*

[11] U.S. Environmental Protection Agency. 2010. *Regulatory Impact Analysis (RIA) for Existing Stationary Spark Ignition (SI) RICE NESHAP: Final Report.* Research Triangle Park, NC. August. *http://www.epa.gov/ttn/ecas/regdata/RIAs/riceriafinal.pdf.*

these two estimates.[12] A summary of the monetized co-benefits estimates for CI and SI engines at discount rates of 3-percent and 7-percent is in Table 6 of this preamble.

TABLE 6—SUMMARY OF THE MONETIZED $PM_{2.5}$ CO-BENEFITS FINAL AMENDMENTS TO THE NESHAP FOR STATIONARY CI AND SI ENGINES

[Millions of 2010 dollars] [a] [b]

Pollutant	Emission reductions (tons per year)	Total monetized co-benefits (3 percent discount)	Total monetized co-benefits (7 percent discount)
Original 2010 Final Rules [c]			
Stationary CI Engines:			
Total Benefits	2,844 $PM_{2.5}$, 27,395 VOC	$950 to $2,300	$860 to $2,100.
Stationary SI Engines:			
Total Benefits	96,479 NO_X, 30,907 VOC	$510 to $1,300	$470 to $1,100.
2010 Final Rules With These Final Amendments			
Stationary CI Engines:			
Directly emitted $PM_{2.5}$	2,818	$770 to $1,900	$690 to $1,700.
Stationary SI Engines:			
NO_X	9,648	$62 to $150	$55 to $140.

[a] All estimates are for the analysis year (2013) and are rounded to two significant figures so numbers may not sum across rows. The total monetized co-benefits reflect the human health benefits associated with reducing exposure to $PM_{2.5}$ through reductions of $PM_{2.5}$ precursors, such as NO_X and directly emitted $PM_{2.5}$. It is important to note that the monetized co-benefits do not include reduced health effects from exposure to HAP, direct exposure to NO_2, exposure to ozone, ecosystem effects or visibility impairment.

[b] PM co-benefits are shown as a range from Pope, *et al.* (2002) to Laden, *et al.* (2006). These models assume that all fine particles, regardless of their chemical composition, are equally potent in causing premature mortality because the scientific evidence is not yet sufficient to allow differentiation of effects estimates by particle type.

[c] The benefits analysis for the 2010 final rules applied out-dated benefit-per-ton estimates compared to the updated estimates described in this preamble and reflected monetized co-benefits for VOC emissions, which limits direct comparability with the monetized co-benefits estimated for this final rule. In addition, these estimates have been updated from their original currency years to 2010$, so the rounded estimates for the 2010 final rules may not match the original RIAs.

These co-benefits estimates represent the total monetized human health benefits for populations exposed to less $PM_{2.5}$ in 2013 from controls installed to reduce air pollutants in order to meet this final rule. To estimate human health co-benefits of these rules, the EPA used benefit-per-ton factors to quantify the changes in $PM_{2.5}$-related health impacts and monetized benefits based on changes in directly emitted $PM_{2.5}$ and NO_X emissions. These benefit-per-ton factors were derived using the general approach and methodology laid out in Fann, Fulcher and Hubbell (2009).[13] This approach uses a model to convert emissions of $PM_{2.5}$ precursors into changes in ambient $PM_{2.5}$ levels and another model to estimate the changes in human health associated with that change in air quality, which are then divided by the emission reductions to create the benefit-per-ton estimates. However, for these rules, the EPA utilized air quality modeling of emissions in the ''Non-EGU Point other'' category because the EPA does not have modeling specifically for stationary engines.[14] [15] The primary difference between the estimates used in this analysis and the estimates reported in Fann, Fulcher and Hubbell (2009) is the air quality modeling data utilized. While the air quality data used in Fann, Fulcher and Hubbell (2009) reflects broad pollutant/source category combinations, such as all non-EGU stationary point sources, the air quality modeling data used in this analysis has narrower sector categories. In addition, the updated air quality modeling data reflects more recent emissions data (2005 rather than 2001) and has a higher spatial resolution (12 km rather than 36 km grid cells). The benefits methodology, such as health endpoints assessed, risk estimates applied, and valuation techniques applied did not change. As a result, the benefit-per-ton estimates presented herein better reflect the geographic areas and populations likely to be affected by this sector. However, these updated estimates still have similar limitations as all national-average benefit-per-ton estimates in that they reflect the geographic distribution of the modeled emissions, which may not exactly match the emission reductions in this rulemaking, and they may not reflect local variability in population density, meteorology, exposure, baseline health incidence rates or other local factors for any specific location.[16]

[12] Roman, *et al.*, 2008. *Expert Judgment Assessment of the Mortality Impact of Changes in Ambient Fine Particulate Matter in the U.S.*, Environ. Sci. Technol., 42, 7, 2268–2274.

[13] Fann, N., C.M. Fulcher, B.J. Hubbell. 2009. *The influence of location, source, and emission type in estimates of the human health benefits of reducing a ton of air pollution.* Air Qual Atmos Health (2009) 2:169–176.

[14] U.S. Environmental Protection Agency. 2012. *Technical support document: Estimating the benefit per ton of reducing $PM_{2.5}$ precursors from other point sources.* Research Triangle Park, NC.

[15] Stationary engines are included in the other non-EGU point source category. If the affected stationary engines are more rural than the average of the non-EGU sources modeled, then it is possible that the benefits may be somewhat less than the EPA has estimated here. The TSD provides the geographic distribution of the air quality changes associated with this sector. It is important to emphasize that this modeling represents the best available information on the air quality impact on a per ton basis for these sources.

[16] To the extent that the $PM_{2.5}$ improvements achieved by the 2010 final rule would have been located in areas with lower average population density compared to the engines regulated under these amendments, there is a potential for the estimated loss in benefits to be overstated by the use of national-average benefit-per-ton estimates. For example, if only engines in areas with higher population density are regulated, this scenario should result in higher benefit-per-ton estimates than a scenario only regulating engines in areas with lower population density. It is important to

The EPA applies these national benefit-per-ton estimates calculated for this sector separately for directly emitted $PM_{2.5}$ and NO_X and multiply them by the corresponding emission reductions. The sector modeling does not provide estimates of the $PM_{2.5}$-related benefits associated with reducing VOC emissions, but these unquantified benefits are generally small compared to other $PM_{2.5}$ precursors. More information regarding the derivation of the benefit-per-ton estimates for this category is available in the Technical Support Document, which is available in the docket for this rulemaking.

These models assume that all fine particles, regardless of their chemical composition, are equally potent in causing premature mortality because the scientific evidence is not yet sufficient to allow differentiation of effects estimates by particle type. The main $PM_{2.5}$ precursors affected by this final rule are directly emitted $PM_{2.5}$ and NO_X. Even though the EPA assumes that all fine particles have equivalent health effects, the benefit-per-ton estimates vary between precursors depending on the location and magnitude of their impact on $PM_{2.5}$ levels, which drive population exposure. For example, directly emitted NO_X has a lower benefit-per-ton estimate than direct $PM_{2.5}$ because it does not form as much $PM_{2.5}$; thus, the exposure would be lower, and the monetized health benefits would be lower.

It is important to note that the magnitude of the $PM_{2.5}$ co-benefits is largely driven by the concentration response function for premature mortality. Experts have advised the EPA to consider a variety of assumptions, including estimates based both on empirical (epidemiological) studies and judgments elicited from scientific experts, to characterize the uncertainty in the relationship between $PM_{2.5}$ concentrations and premature mortality. The EPA cites two key empirical studies, one based on the American Cancer Society cohort study [17] and the extended Six Cities cohort study.[18] In the RIA for the proposed reconsideration amendments rule, which is available in the docket, the EPA also includes benefits estimates derived from the expert judgments and other assumptions.

The EPA strives to use the best available science to support our benefits analyses. The EPA recognizes that interpretation of the science regarding air pollution and health is dynamic and evolving. After reviewing the scientific literature, the EPA has determined that the no-threshold model is the most appropriate model for assessing the mortality benefits associated with reducing $PM_{2.5}$ exposure. Consistent with this finding, the EPA has conformed the previous threshold sensitivity analysis to the current state of the PM science by incorporating a new ''Lowest Measured Level'' (LML) assessment in the RIA accompanying these rules. While an LML assessment provides some insight into the level of uncertainty in the estimated PM mortality benefits, the EPA does not view the LML as a threshold and continues to quantify PM-related mortality impacts using a full range of modeled air quality concentrations.

Most of the estimated PM-related co-benefits for these rules would accrue to populations exposed to higher levels of $PM_{2.5}$. For this analysis, policy-specific air quality data are not available due to time or resource limitations, and, thus, the EPA is unable to estimate the percentage of premature mortality associated with this specific rule's emission reductions at each $PM_{2.5}$ level. As a surrogate measure of mortality impacts, the EPA provides the percentage of the population exposed at each $PM_{2.5}$ level using the source apportionment modeling used to calculate the benefit-per-ton estimates for this sector. Using the Pope, *et al.* (2002) study, 77 percent of the population is exposed to annual mean $PM_{2.5}$ levels at or above the LML of 7.5 micrograms per cubic meter ($\mu g/m^3$). Using the Laden, *et al.* (2006) study, 25 percent of the population is exposed above the LML of 10 $\mu g/m^3$. It is important to emphasize that we have high confidence in $PM_{2.5}$-related effects down to the lowest LML of the major cohort studies. This fact is important, because, as the EPA models avoided premature deaths among populations exposed to levels of $PM_{2.5}$, the EPA has lower confidence in levels below the LML for each study.

Every benefit analysis examining the potential effects of a change in environmental protection requirements is limited, to some extent, by data gaps, model capabilities (such as geographic coverage) and uncertainties in the underlying scientific and economic studies used to configure the benefit and cost models. Despite these uncertainties, the EPA believes the benefit analysis for these rules provides a reasonable indication of the expected health benefits of the rulemaking under a set of reasonable assumptions. This analysis does not include the type of detailed uncertainty assessment found in the 2006 $PM_{2.5}$ National Ambient Air Quality Standard (NAAQS) RIA because the EPA lacks the necessary air quality input and monitoring data to run the benefits model. In addition, the EPA has not conducted air quality modeling for these rules, and using a benefit-per-ton approach adds another important source of uncertainty to the benefits estimates. The 2006 $PM_{2.5}$ NAAQS benefits analysis [19] provides an indication of the sensitivity of our results to various assumptions.

It should be noted that the monetized co-benefits estimates provided above do not include benefits from several important benefit categories, including exposure to HAP, NO_X, ozone, as well as ecosystem effects and visibility impairment. Although the EPA does not have sufficient information or modeling available to provide monetized estimates for these amendments, the EPA includes a qualitative assessment of these unquantified benefits in the RIAs for these final amendments.

For more information on the benefits analysis, please refer to the CI and SI RIAs for these amendments, which are available in the docket.

D. What are the non-air health, environmental and energy impacts?

The EPA does not anticipate any significant non-air health, environmental or energy impacts as a result of these final amendments.

V. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

Under section 3(f)(1) of Executive Order 12866 (58 FR 51735, October 4, 1993), this action is an ''economically significant regulatory action'' because it is likely to have an annual effect on the

note that the benefit-per-ton estimates that EPA applied in this assessment reflect pollution transport as well as a variety of emission source locations, including areas with high and low population density. Without information regarding the specific location of the engines affected by the 2010 final rule and the amendments, it is not possible to be more precise regarding the true magnitude of the loss in benefits.

[17] Pope, *et al.*, 2002. *Lung Cancer, Cardiopulmonary Mortality, and Long-term Exposure to Fine Particulate Air Pollution.* Journal of the American Medical Association 287:1132–1141.

[18] Laden, *et al.*, 2006. *Reduction in Fine Particulate Air Pollution and Mortality.* American Journal of Respiratory and Critical Care Medicine 173: 667–672.

[19] U.S. Environmental Protection Agency, 2006. *Proposed amendments Regulatory Impact Analysis: $PM_{2.5}$ NAAQS.* Prepared by Office of Air and Radiation. October. Available on the Internet at *http://www.epa.gov/ttn/ecas/ria.html*.

economy of $100 million or more. Accordingly, the EPA submitted this action to the Office of Management and Budget (OMB) for review under Executive Order 12866 and Executive Order 13563 (76 FR 3821, January 21, 2011), and any changes made in response to OMB recommendations have been documented in the docket for this action. In addition, the EPA prepared a RIA of the potential costs and benefits associated with this action.

A summary of the monetized benefits, compliance costs and net benefits for the 2010 rule with the final amendments to the stationary CI engines NESHAP at discount rates of 3 percent and 7 percent is in Table 7 of this preamble. The summary for stationary SI engines is included in Table 8 of this preamble. OMB Circular A–4 recommends that analysis of a change in an existing regulatory program use a baseline that assumes ''no change'' in the existing regulation. For purposes of this final rule, however, the EPA has decided that it is appropriate to assume a baseline in which the original 2010 rule did not exist. The EPA feels that this baseline is appropriate because full implementation of this final rule has not taken place as of yet (it will take place in 2013). In addition, this assumption is consistent with the baseline definition applied in the proposed NESHAP for Industrial, Commercial, and Institutional Boilers (76 FR 80532) and NSPS for Commercial/Industrial Solid Waste Incineration Units (76 FR 80452). We have not re-estimated the benefits from the proposal for this final rule because the emission reductions have not changed since the reconsideration proposal. Since the June 7, 2012, reconsideration proposal, we have updated the epidemiology studies used to calculate mortality and morbidity benefits in the PM NAAQS proposal RIA.[20] These updates would reduce the monetized benefits estimated for the RICE NESHAP reconsideration by less than 4 percent.

TABLE 7—SUMMARY OF THE MONETIZED BENEFITS, COMPLIANCE COSTS AND NET BENEFITS FOR THE 2010 RULE WITH THE FINAL AMENDMENTS TO THE STATIONARY CI ENGINE NESHAP IN 2013

[Millions of 2010 dollars] [a]

	3-Percent discount rate	7-Percent discount rate
Total Monetized Benefits [b]	$770 to $1,900	$690 to $1,700.
Total Compliance Costs [c]	$373	$373.
Net Benefits	$400 to $1,500	$320 to $1,300.
Non-Monetized Benefits	Health effects from exposure to HAP. Health effects from direct exposure to NO_2 and ozone. Health effects from $PM_{2.5}$ exposure from VOC. Ecosystem effects. Visibility impairment.	

[a] All estimates are for the implementation year (2013) and are rounded to two significant figures.

[b] The total monetized co-benefits reflect the human health benefits associated with reducing exposure to $PM_{2.5}$ through reductions of $PM_{2.5}$ precursors, such as NO_X and directly emitted $PM_{2.5}$. Co-benefits are shown as a range from Pope, *et al.* (2002) to Laden, *et al.* (2006). These models assume that all fine particles, regardless of their chemical composition, are equally potent in causing premature mortality because the scientific evidence is not yet sufficient to allow differentiation of effects estimates by particle type.

[c] The engineering compliance costs are annualized using a 7-percent discount rate.

TABLE 8—SUMMARY OF THE MONETIZED BENEFITS, COMPLIANCE COSTS AND NET BENEFITS FOR THE 2010 RULE WITH THE FINAL AMENDMENTS TO THE STATIONARY SI ENGINE NESHAP IN 2013

[Millions of 2010 dollars] [a]

	3-Percent discount rate	7-Percent discount rate
Total Monetized Benefits [b]	$62 to $150	$55 to $140.
Total Compliance Costs [c]	$115	$115.
Net Benefits	$−53 to $35	$−60 to $25.
Non-Monetized Benefits	Health effects from exposure to HAP. Health effects from direct exposure to NO_2 and ozone. Health effects from $PM_{2.5}$ exposure from VOC. Ecosystem effects. Visibility impairment.	

[a] All estimates are for the implementation year (2013) and are rounded to two significant figures.

[b] The total monetized co-benefits reflect the human health benefits associated with reducing exposure to $PM_{2.5}$ through reductions of $PM_{2.5}$ precursors, such as NO_X and directly emitted $PM_{2.5}$. Co-benefits are shown as a range from Pope, *et al.* (2002) to Laden, *et al.* (2006). These models assume that all fine particles, regardless of their chemical composition, are equally potent in causing premature mortality because the scientific evidence is not yet sufficient to allow differentiation of effects estimates by particle type.

[c] The engineering compliance costs are annualized using a 7-percent discount rate.

For more information on the cost-benefit analysis, please refer to the RIA for these final amendments, which is available in the docket for this rulemaking.

[20] U.S. Environmental Protection Agency (U.S. EPA). 2012. Regulatory Impact Analysis for the Proposed Revisions to the National Ambient Air Quality Standards for Particulate Matter. EPA–452/R–12–003. Office of Air Quality Planning and Standards, Health and Environmental Impacts Division. June. Available at *http://www.epa.gov/ttnecas1/regdata/RIAs/PMRIACombinedFile_Bookmarked.pdf*.

B. Paperwork Reduction Act

The information collection requirements in this final rule for stationary SI RICE have been submitted for approval to OMB under the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. The information collection requirements are not enforceable until OMB approves them.

As discussed in this preamble to this final action, there are reporting requirements that will begin in 2016. Owners and operators of emergency stationary engines that operate or are contractually obligated to be available for more than 15 hours per year for emergency demand response must document their operation in annual reports to the EPA. These reports are necessary to enable EPA or States to identify affected facilities that may not be in compliance with the requirements. The burden of this reporting requirement is not included in the ICR burden estimate because it is after the first 3 years after which sources must begin complying with the rule. The reporting burden beginning in 2016 would only be included starting with the first ICR renewal. The EPA anticipates that in most cases, the entity that dispatches the engines to operate, such as the curtailment service provider or utility, will report the information to EPA on behalf of the facility that owns the engine. Thus, the burden of the reporting requirement will likely be on the entities that dispatch the engines. The number of entities is uncertain, but the EPA estimates that approximately 446 local utilities would engage in the reporting requirement. The EPA estimates that each utility would spend approximately 16 hours per year reporting the information to the EPA. As of June 2012, the total compensation for management/professional staff was $51.23 per hour. Adjusting this compensation rate by applying an overhead rate of 167 percent yields a total wage rate of $85.60 per hour.[21] This results in an estimated burden of 7,136 hours at a cost of $611,000 per year, beginning in the year 2015. For curtailment service providers, the EPA estimated the burden of the requirement to be 1,000 hours at a cost of $60,000 in the first year of implementation, 2015, and 250 hours at a cost of $15,000 in subsequent years (using a wage rate of $60 per hour). Using an estimated number of 70 curtailment service providers nationwide that are operating engines for emergency demand response, the burden for curtailment service providers would be 70,000 hours at a cost of $4.2 million in the first year of implementation, 2015, and 17,500 hours at a cost of $1 million in subsequent years. Summing the totals for the cooperatives and curtailment service providers yields a total of 77,136 labor hours at a cost of $4.8 million in the first year that reporting is required, 2015, and 24,636 labor hours at a cost of $1.7 million in subsequent years.

An Agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9. When this ICR is approved by OMB, the Agency will publish a technical amendment to 40 CFR part 9 in the **Federal Register** to display the OMB control number for the approved information collection requirements contained in this final rule.

The OMB has previously approved the information collection requirements contained in the 2010 RICE NESHAP final rulemaking, including those for stationary CI RICE, under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. and has assigned OMB control number 2060–0548. The OMB control numbers for the EPA's regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations and small governmental jurisdictions.

For purposes of assessing the impacts of this rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field. The SBA defines a small business in terms of the maximum employment, annual sales, or annual energy-generating capacity (for electricity generating units—EGUs) of the owning entity. As mentioned earlier in this preamble, facilities across several industries use affected CI and SI stationary RICE; therefore, a number of size standards are utilized in this analysis.

After considering the economic impacts of this final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. The small entities directly regulated by this final rule are those in the 15 industries identified in the 6-digit NAICS code represented in this analysis; the employment size standard (where it applies) varies from 500 to 1,000 employees. The annual sales standard (where it applies) is as low as 0.75 million dollars and as high as 33.5 million dollars. In addition, for the electric power generation industry, which is one of the affected industries, the small business size standard is an ultimate parent entity defined as having a total electric output of 4 million megawatt-hours in the previous fiscal year. We have determined that the percentage of small entities impacted by this final rule having annualized costs of greater than 1 percent of their sales is less than 2 percent of all affected small entities according to the small entity analysis.

Although the final reconsideration rule will not have a significant economic impact on a substantial number of small entities, the EPA nonetheless tried to reduce the impact of this rule on small entities. When developing the revised standards, the EPA took special steps to ensure that the burdens imposed on small entities were minimal. The EPA conducted several meetings with industry trade associations to discuss regulatory options and the corresponding burden on industry, such as recordkeeping and reporting. In addition, as mentioned earlier in this preamble, the EPA is reducing the regulatory requirements for a variety of area sources affected under each of the RICE rules with amendments to the final RICE rules promulgated in 2010.

For more information on the small entity impacts associated with this rulemaking, please refer to the Economic Impact and Small Business Analyses in the public docket. These analyses can be found in the RIA for each of the rules affected by this action.

D. Unfunded Mandates Reform Act

This rule does not contain a federal mandate that may result in expenditures of $100 million or more for state, local and tribal governments, in the aggregate, or the private sector in any one year. The EPA is finalizing management

[21] *http://www.bls.gov/news.release/ecec.t05.htm.*

practices for certain existing engines located at area sources and is finalizing amendments that will provide owners and operators with alternative and less expensive compliance demonstration methods. As a result of these changes, the EPA anticipates a substantial reduction in the cost burden associated with this rule. Thus, this final rule is not subject to the requirements of sections 202 or 205 of UMRA.

This final rule is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. The changes being finalized in this action by the agency will mostly affect stationary engine owners and operators and will not affect small governments. These final amendments will lead to a reduction in the cost burden.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This action primarily affects private industry, and does not impose significant economic costs on state or local governments. Thus, Executive Order 13132 does not apply to this action. In the spirit of Executive Order 13132, and consistent with the EPA policy to promote communications between the EPA and state and local governments, the EPA specifically solicited comment on the proposed action from state and local officials.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). It will not have substantial direct effects on tribal governments, on the relationship between the federal government and Indian tribes or on the distribution of power and responsibilities between the federal government and Indian tribes, as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to this action. In the spirit of Executive Order 13175, and consistent with the EPA policy to promote communications between the EPA and tribal governments, the EPA has conducted outreach to tribal governments by providing information on the rule during National Tribal Air Association/EPA Policy Calls.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

The EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that are based on health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it is based solely on technology performance.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not a ''significant energy action'' as defined in Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is not likely to have a significant adverse effect on the supply, distribution or use of energy. This action reduces the burden of the rule on owners and operators of stationary engines by providing less burdensome compliance demonstration methods to owners and operators and greater flexibility in the operation of emergency engines. As a result of these changes, the EPA anticipates a substantial reduction in the cost burden associated with this rule.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law 104–113, 12(d) (15 U.S.C. 272 note) directs the EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs the EPA to provide Congress, through OMB, explanations when the agency decides not to use available and applicable voluntary consensus standards.

This rulemaking involves technical standards. The EPA has decided to use EPA Method 25A of 40 CFR part 60, appendix A. While the agency identified two voluntary consensus standards as being potentially applicable, the EPA has decided not to use them in this rulemaking. The two candidate voluntary consensus standards, ISO 14965:2000(E) and EN 12619 (1999), identified would not be practical due to lack of equivalency, documentation, validation data and other important technical and policy considerations. The search and review results have been documented and are placed in the docket for this final rule.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629 (February 16, 1994)) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies and activities on minority populations and low-income populations in the United States.

The EPA has concluded that it is not feasible to determine whether there would be disproportionately high and adverse human health or environmental effects on minority, low income or indigenous populations from this final rule, as the EPA does not have specific information about the location of the stationary RICE affected by this final rule. The EPA has taken steps to reduce the impact of the final changes for SI engines by limiting the subcategory for remote engines to those that are not in populated areas.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A Major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is a ''major rule'' as defined by 5 U.S.C. 804(2). This rule will be effective on April 1, 2013.

List of Subjects

40 CFR Part 60

Administrative practice and procedure, Air pollution control, Incorporation by reference, Intergovernmental relations, Reporting and recordkeeping requirements.

40 CFR Part 63

Administrative practice and procedure, Air pollution control, Hazardous substances, Incorporation by reference, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: January 14, 2013.

Lisa P. Jackson,

Administrator.

For the reasons stated in the preamble, title 40, chapter I of the Code of Federal Regulations is amended as follows:

PART 60—[AMENDED]

■ 1. The authority citation for part 60 continues to read as follows:

Authority: 42 U.S.C. 7401, *et seq.*

Subpart A—[Amended]

■ 2. Section 60.17 is amended by adding paragraph (r) to read as follows:

§ 60.17 Incorporations by reference.

* * * * *

(r) The following material is available from the North American Electric Reliability Corporation, 3353 Peachtree Road NE., Suite 600, North Tower, Atlanta, GA 30326, *http://www.nerc.com*, and is available at the following Web site: *http://www.nerc.com/files/EOP-002-3_1.pdf*.

(1) North American Electric Reliability Corporation, Reliability Standards for the Bulk of Electric Systems of North America, Reliability Standard EOP–002–3, Capacity and Energy Emergencies, updated November 19, 2012, IBR approved for §§ 60.4211(f) and 60.4243(d).

(2) [Reserved]

Subpart IIII—[Amended]

■ 3. Section 60.4207 is amended by revising paragraph (b) to read as follows:

§ 60.4207 What fuel requirements must I meet if I am an owner or operator of a stationary CI internal combustion engine subject to this subpart?

* * * * *

(b) Beginning October 1, 2010, owners and operators of stationary CI ICE subject to this subpart with a displacement of less than 30 liters per cylinder that use diesel fuel must use diesel fuel that meets the requirements of 40 CFR 80.510(b) for nonroad diesel fuel, except that any existing diesel fuel purchased (or otherwise obtained) prior to October 1, 2010, may be used until depleted.

* * * * *

■ 4. Section 60.4211 is amended by revising paragraph (f) to read as follows:

§ 60.4211 What are my compliance requirements if I am an owner or operator of a stationary CI internal combustion engine?

* * * * *

(f) If you own or operate an emergency stationary ICE, you must operate the emergency stationary ICE according to the requirements in paragraphs (f)(1) through (3) of this section. In order for the engine to be considered an emergency stationary ICE under this subpart, any operation other than emergency operation, maintenance and testing, emergency demand response, and operation in non-emergency situations for 50 hours per year, as described in paragraphs (f)(1) through (3) of this section, is prohibited. If you do not operate the engine according to the requirements in paragraphs (f)(1) through (3) of this section, the engine will not be considered an emergency engine under this subpart and must meet all requirements for non-emergency engines.

(1) There is no time limit on the use of emergency stationary ICE in emergency situations.

(2) You may operate your emergency stationary ICE for any combination of the purposes specified in paragraphs (f)(2)(i) through (iii) of this section for a maximum of 100 hours per calendar year. Any operation for non-emergency situations as allowed by paragraph (f)(3) of this section counts as part of the 100 hours per calendar year allowed by this paragraph (f)(2).

(i) Emergency stationary ICE may be operated for maintenance checks and readiness testing, provided that the tests are recommended by federal, state or local government, the manufacturer, the vendor, the regional transmission organization or equivalent balancing authority and transmission operator, or the insurance company associated with the engine. The owner or operator may petition the Administrator for approval of additional hours to be used for maintenance checks and readiness testing, but a petition is not required if the owner or operator maintains records indicating that federal, state, or local standards require maintenance and testing of emergency ICE beyond 100 hours per calendar year.

(ii) Emergency stationary ICE may be operated for emergency demand response for periods in which the Reliability Coordinator under the North American Electric Reliability Corporation (NERC) Reliability Standard EOP–002–3, Capacity and Energy Emergencies (incorporated by reference, see § 60.17), or other authorized entity as determined by the Reliability Coordinator, has declared an Energy Emergency Alert Level 2 as defined in the NERC Reliability Standard EOP–002–3.

(iii) Emergency stationary ICE may be operated for periods where there is a deviation of voltage or frequency of 5 percent or greater below standard voltage or frequency.

(3) Emergency stationary ICE may be operated for up to 50 hours per calendar year in non-emergency situations. The 50 hours of operation in non-emergency situations are counted as part of the 100 hours per calendar year for maintenance and testing and emergency demand response provided in paragraph (f)(2) of this section. Except as provided in paragraph (f)(3)(i) of this section, the 50 hours per calendar year for non-emergency situations cannot be used for peak shaving or non-emergency demand response, or to generate income for a facility to an electric grid or otherwise supply power as part of a financial arrangement with another entity.

(i) The 50 hours per year for non-emergency situations can be used to supply power as part of a financial arrangement with another entity if all of the following conditions are met:

(A) The engine is dispatched by the local balancing authority or local transmission and distribution system operator;

(B) The dispatch is intended to mitigate local transmission and/or distribution limitations so as to avert potential voltage collapse or line overloads that could lead to the interruption of power supply in a local area or region.

(C) The dispatch follows reliability, emergency operation or similar protocols that follow specific NERC, regional, state, public utility commission or local standards or guidelines.

(D) The power is provided only to the facility itself or to support the local transmission and distribution system.

(E) The owner or operator identifies and records the entity that dispatches the engine and the specific NERC, regional, state, public utility commission or local standards or guidelines that are being followed for dispatching the engine. The local balancing authority or local transmission and distribution system operator may keep these records on behalf of the engine owner or operator.

(ii) [Reserved]

* * * * *

■ 5. Section 60.4214 is amended by adding paragraph (d) to read as follows:

§ 60.4214 What are my notification, reporting, and recordkeeping requirements if I am an owner or operator of a stationary CI internal combustion engine?

* * * * *

(d) If you own or operate an emergency stationary CI ICE with a maximum engine power more than 100 HP that operates or is contractually obligated to be available for more than 15 hours per calendar year for the purposes specified in § 60.4211(f)(2)(ii) and (iii) or that operates for the purposes specified in § 60.4211(f)(3)(i), you must submit an annual report according to the requirements in paragraphs (d)(1) through (3) of this section.

(1) The report must contain the following information:

(i) Company name and address where the engine is located.

(ii) Date of the report and beginning and ending dates of the reporting period.

(iii) Engine site rating and model year.

(iv) Latitude and longitude of the engine in decimal degrees reported to the fifth decimal place.

(v) Hours operated for the purposes specified in § 60.4211(f)(2)(ii) and (iii), including the date, start time, and end time for engine operation for the purposes specified in § 60.4211(f)(2)(ii) and (iii).

(vi) Number of hours the engine is contractually obligated to be available for the purposes specified in § 60.4211(f)(2)(ii) and (iii).

(vii) Hours spent for operation for the purposes specified in § 60.4211(f)(3)(i), including the date, start time, and end time for engine operation for the purposes specified in § 60.4211(f)(3)(i). The report must also identify the entity that dispatched the engine and the situation that necessitated the dispatch of the engine.

(2) The first annual report must cover the calendar year 2015 and must be submitted no later than March 31, 2016. Subsequent annual reports for each calendar year must be submitted no later than March 31 of the following calendar year.

(3) The annual report must be submitted electronically using the subpart specific reporting form in the Compliance and Emissions Data Reporting Interface (CEDRI) that is accessed through EPA's Central Data Exchange (CDX) (*www.epa.gov/cdx*). However, if the reporting form specific to this subpart is not available in CEDRI at the time that the report is due, the written report must be submitted to the Administrator at the appropriate address listed in § 60.4.

■ 6. Section 60.4219 is amended by revising the definition of ''Emergency stationary internal combustion engine'' to read as follows:

§ 60.4219 What definitions apply to this subpart?

* * * * *

Emergency stationary internal combustion engine means any stationary reciprocating internal combustion engine that meets all of the criteria in paragraphs (1) through (3) of this definition. All emergency stationary ICE must comply with the requirements specified in § 60.4211(f) in order to be considered emergency stationary ICE. If the engine does not comply with the requirements specified in § 60.4211(f), then it is not considered to be an emergency stationary ICE under this subpart.

(1) The stationary ICE is operated to provide electrical power or mechanical work during an emergency situation. Examples include stationary ICE used to produce power for critical networks or equipment (including power supplied to portions of a facility) when electric power from the local utility (or the normal power source, if the facility runs on its own power production) is interrupted, or stationary ICE used to pump water in the case of fire or flood, etc.

(2) The stationary ICE is operated under limited circumstances for situations not included in paragraph (1) of this definition, as specified in § 60.4211(f).

(3) The stationary ICE operates as part of a financial arrangement with another entity in situations not included in paragraph (1) of this definition only as allowed in § 60.4211(f)(2)(ii) or (iii) and § 60.4211(f)(3)(i).

* * * * *

Subpart JJJJ—[Amended]

■ 7. Section 60.4231 is amended by revising paragraphs (b) through (d) to read as follows:

§ 60.4231 What emission standards must I meet if I am a manufacturer of stationary SI internal combustion engines or equipment containing such engines?

* * * * *

(b) Stationary SI internal combustion engine manufacturers must certify their stationary SI ICE with a maximum engine power greater than 19 KW (25 HP) (except emergency stationary ICE with a maximum engine power greater than 25 HP and less than 130 HP) that use gasoline and that are manufactured on or after the applicable date in § 60.4230(a)(2), or manufactured on or after the applicable date in § 60.4230(a)(4) for emergency stationary ICE with a maximum engine power greater than or equal to 130 HP, to the certification emission standards and other requirements for new nonroad SI engines in 40 CFR part 1048. Stationary SI internal combustion engine manufacturers must certify their emergency stationary SI ICE with a maximum engine power greater than 25 HP and less than 130 HP that use gasoline and that are manufactured on or after the applicable date in § 60.4230(a)(4) to the Phase 1 emission standards in 40 CFR 90.103, applicable to class II engines, and other requirements for new nonroad SI engines in 40 CFR part 90. Stationary SI internal combustion engine manufacturers may certify their stationary SI ICE with a maximum engine power less than or equal to 30 KW (40 HP) with a total displacement less than or equal to 1,000 cubic centimeters (cc) that use gasoline to the certification emission standards and other requirements for new nonroad SI engines in 40 CFR part 90 or 1054, as appropriate.

(c) Stationary SI internal combustion engine manufacturers must certify their stationary SI ICE with a maximum engine power greater than 19 KW (25 HP) (except emergency stationary ICE with a maximum engine power greater than 25 HP and less than 130 HP) that are rich burn engines that use LPG and that are manufactured on or after the applicable date in § 60.4230(a)(2), or manufactured on or after the applicable date in § 60.4230(a)(4) for emergency stationary ICE with a maximum engine power greater than or equal to 130 HP, to the certification emission standards and other requirements for new nonroad SI engines in 40 CFR part 1048. Stationary SI internal combustion engine manufacturers must certify their emergency stationary SI ICE greater than 25 HP and less than 130 HP that are rich burn engines that use LPG and that are manufactured on or after the applicable date in § 60.4230(a)(4) to the Phase 1 emission standards in 40 CFR 90.103, applicable to class II engines, and other requirements for new nonroad SI engines in 40 CFR part 90. Stationary SI internal combustion engine manufacturers may certify their stationary SI ICE with a maximum engine power less than or equal to 30 KW (40 HP) with a total displacement less than or equal to 1,000 cc that are rich burn engines that use LPG to the certification emission standards and other requirements for new nonroad SI engines in 40 CFR part 90 or 1054, as appropriate.

(d) Stationary SI internal combustion engine manufacturers who choose to certify their stationary SI ICE with a maximum engine power greater than 19 KW (25 HP) and less than 75 KW (100 HP) (except gasoline and rich burn engines that use LPG and emergency stationary ICE with a maximum engine power greater than 25 HP and less than 130 HP) under the voluntary manufacturer certification program described in this subpart must certify those engines to the certification emission standards for new nonroad SI engines in 40 CFR part 1048. Stationary SI internal combustion engine manufacturers who choose to certify their emergency stationary SI ICE greater than 25 HP and less than 130 HP (except gasoline and rich burn engines that use LPG), must certify those engines to the Phase 1 emission standards in 40 CFR 90.103, applicable to class II engines, for new nonroad SI engines in 40 CFR part 90. Stationary SI internal combustion engine manufacturers may certify their stationary SI ICE with a maximum engine power less than or equal to 30 KW (40 HP) with a total displacement less than or equal to 1,000 cc (except gasoline and rich burn engines that use LPG) to the certification emission standards for new nonroad SI engines in 40 CFR part 90 or 1054, as appropriate. For stationary SI ICE with a maximum engine power greater than 19 KW (25 HP) and less than 75 KW (100 HP) (except gasoline and rich burn engines that use LPG and emergency stationary ICE with a maximum engine power greater than 25 HP and less than 130 HP) manufactured prior to January 1, 2011, manufacturers may choose to certify these engines to the standards in Table 1 to this subpart applicable to engines with a maximum engine power greater than or equal to 100 HP and less than 500 HP.

* * * * *

■ 8. Section 60.4243 is amended by revising paragraph (d) to read as follows:

§ 60.4243 What are my compliance requirements if I am an owner or operator of a stationary SI internal combustion engine?

* * * * *

(d) If you own or operate an emergency stationary ICE, you must operate the emergency stationary ICE according to the requirements in paragraphs (d)(1) through (3) of this section. In order for the engine to be considered an emergency stationary ICE under this subpart, any operation other than emergency operation, maintenance and testing, emergency demand response, and operation in non-emergency situations for 50 hours per year, as described in paragraphs (d)(1) through (3) of this section, is prohibited. If you do not operate the engine according to the requirements in paragraphs (d)(1) through (3) of this section, the engine will not be considered an emergency engine under this subpart and must meet all requirements for non-emergency engines.

(1) There is no time limit on the use of emergency stationary ICE in emergency situations.

(2) You may operate your emergency stationary ICE for any combination of the purposes specified in paragraphs (d)(2)(i) through (iii) of this section for a maximum of 100 hours per calendar year. Any operation for non-emergency situations as allowed by paragraph (d)(3) of this section counts as part of the 100 hours per calendar year allowed by this paragraph (d)(2).

(i) Emergency stationary ICE may be operated for maintenance checks and readiness testing, provided that the tests are recommended by federal, state or local government, the manufacturer, the vendor, the regional transmission organization or equivalent balancing authority and transmission operator, or the insurance company associated with the engine. The owner or operator may petition the Administrator for approval of additional hours to be used for maintenance checks and readiness testing, but a petition is not required if the owner or operator maintains records indicating that federal, state, or local standards require maintenance and testing of emergency ICE beyond 100 hours per calendar year.

(ii) Emergency stationary ICE may be operated for emergency demand response for periods in which the Reliability Coordinator under the North American Electric Reliability Corporation (NERC) Reliability Standard EOP–002–3, Capacity and Energy Emergencies (incorporated by reference, see § 60.17), or other authorized entity as determined by the Reliability Coordinator, has declared an Energy Emergency Alert Level 2 as defined in the NERC Reliability Standard EOP–002–3.

(iii) Emergency stationary ICE may be operated for periods where there is a deviation of voltage or frequency of 5 percent or greater below standard voltage or frequency.

(3) Emergency stationary ICE may be operated for up to 50 hours per calendar year in non-emergency situations. The 50 hours of operation in non-emergency situations are counted as part of the 100 hours per calendar year for maintenance and testing and emergency demand response provided in paragraph (d)(2) of this section. Except as provided in paragraph (d)(3)(i) of this section, the 50 hours per year for non-emergency situations cannot be used for peak shaving or non-emergency demand response, or to generate income for a facility to an electric grid or otherwise supply power as part of a financial arrangement with another entity.

(i) The 50 hours per year for non-emergency situations can be used to supply power as part of a financial arrangement with another entity if all of the following conditions are met:

(A) The engine is dispatched by the local balancing authority or local transmission and distribution system operator;

(B) The dispatch is intended to mitigate local transmission and/or distribution limitations so as to avert potential voltage collapse or line overloads that could lead to the interruption of power supply in a local area or region.

(C) The dispatch follows reliability, emergency operation or similar protocols that follow specific NERC, regional, state, public utility commission or local standards or guidelines.

(D) The power is provided only to the facility itself or to support the local transmission and distribution system.

(E) The owner or operator identifies and records the entity that dispatches the engine and the specific NERC, regional, state, public utility commission or local standards or guidelines that are being followed for dispatching the engine. The local balancing authority or local transmission and distribution system operator may keep these records on behalf of the engine owner or operator.

(ii) [Reserved]

* * * * *

■ 9. Section 60.4245 is amended by adding paragraph (e) to read as follows:

§ 60.4245 What are my notification, reporting, and recordkeeping requirements if I am an owner or operator of a stationary SI internal combustion engine?

* * * * *

(e) If you own or operate an emergency stationary SI ICE with a maximum engine power more than 100 HP that operates or is contractually obligated to be available for more than 15 hours per calendar year for the purposes specified in § 60.4243(d)(2)(ii) and (iii) or that operates for the purposes specified in § 60.4243(d)(3)(i), you must submit an annual report according to the requirements in paragraphs (e)(1) through (3) of this section.

(1) The report must contain the following information:

(i) Company name and address where the engine is located.

(ii) Date of the report and beginning and ending dates of the reporting period.

(iii) Engine site rating and model year.

(iv) Latitude and longitude of the engine in decimal degrees reported to the fifth decimal place.

(v) Hours operated for the purposes specified in § 60.4243(d)(2)(ii) and (iii), including the date, start time, and end time for engine operation for the purposes specified in § 60.4243(d)(2)(ii) and (iii).

(vi) Number of hours the engine is contractually obligated to be available for the purposes specified in § 60.4243(d)(2)(ii) and (iii).

(vii) Hours spent for operation for the purposes specified in § 60.4243(d)(3)(i), including the date, start time, and end time for engine operation for the purposes specified in § 60.4243(d)(3)(i). The report must also identify the entity that dispatched the engine and the situation that necessitated the dispatch of the engine.

(2) The first annual report must cover the calendar year 2015 and must be submitted no later than March 31, 2016. Subsequent annual reports for each calendar year must be submitted no later than March 31 of the following calendar year.

(3) The annual report must be submitted electronically using the subpart specific reporting form in the Compliance and Emissions Data Reporting Interface (CEDRI) that is accessed through EPA's Central Data Exchange (CDX) (*www.epa.gov/cdx*). However, if the reporting form specific to this subpart is not available in CEDRI at the time that the report is due, the written report must be submitted to the Administrator at the appropriate address listed in § 60.4.

■ 10. Section 60.4248 is amended by revising the definition of ''Emergency stationary internal combustion engine'' to read as follows:

§ 60.4248 What definitions apply to this subpart?

* * * * *

Emergency stationary internal combustion engine means any stationary reciprocating internal combustion engine that meets all of the criteria in paragraphs (1) through (3) of this definition. All emergency stationary ICE must comply with the requirements specified in § 60.4243(d) in order to be considered emergency stationary ICE. If the engine does not comply with the requirements specified in § 60.4243(d), then it is not considered to be an emergency stationary ICE under this subpart.

(1) The stationary ICE is operated to provide electrical power or mechanical work during an emergency situation. Examples include stationary ICE used to produce power for critical networks or equipment (including power supplied to portions of a facility) when electric power from the local utility (or the normal power source, if the facility runs on its own power production) is interrupted, or stationary ICE used to pump water in the case of fire or flood, etc.

(2) The stationary ICE is operated under limited circumstances for situations not included in paragraph (1) of this definition, as specified in § 60.4243(d).

(3) The stationary ICE operates as part of a financial arrangement with another entity in situations not included in paragraph (1) of this definition only as allowed in § 60.4243(d)(2)(ii) or (iii) and § 60.4243(d)(3)(i).

* * * * *

■ 11. Table 2 to Subpart JJJJ of part 60 is revised to read as follows:

As stated in § 60.4244, you must comply with the following requirements for performance tests within 10 percent of 100 percent peak (or the highest achievable) load:

TABLE 2 TO SUBPART JJJJ OF PART 60—REQUIREMENTS FOR PERFORMANCE TESTS

For each	Complying with the requirement to	You must	Using	According to the following requirements
1. Stationary SI internal combustion engine demonstrating compliance according to § 60.4244.	a. limit the concentration of NO_X in the stationary SI internal combustion engine exhaust.	i. Select the sampling port location and the number of traverse points;	(1) Method 1 or 1A of 40 CFR part 60, Appendix A or ASTM Method D6522–00 (Reapproved 2005).[a e]	(a) If using a control device, the sampling site must be located at the outlet of the control device.
		ii. Determine the O_2 concentration of the stationary internal combustion engine exhaust at the sampling port location;	(2) Method 3, 3A, or 3B[b] of 40 CFR part 60, appendix A or ASTM Method D6522–00 (Reapproved 2005). [a e]	(b) Measurements to determine O_2 concentration must be made at the same time as the measurements for NO_X concentration.
		iii. If necessary, determine the exhaust flowrate of the stationary internal combustion engine exhaust;	(3) Method 2 or 19 of 40 CFR part 60, appendix A.	
		iv. If necessary, measure moisture content of the stationary internal combustion engine exhaust at the sampling port location; and	(4) Method 4 of 40 CFR part 60, appendix A, Method 320 of 40 CFR part 63, appendix A, or ASTM D 6348–03. [e]	(c) Measurements to determine moisture must be made at the same time as the measurementfor NO_X concentration.

TABLE 2 TO SUBPART JJJJ OF PART 60—REQUIREMENTS FOR PERFORMANCE TESTS—Continued

For each	Complying with the requirement to	You must	Using	According to the following requirements
		v. Measure NO_X at the exhaust of the stationary internal combustion engine.	(5) Method 7E of 40 CFR part 60, appendix A, Method D6522–00 (Reapproved 2005) [a e], Method 320 of 40 CFR part 63, appendix A, or ASTM D 6348–03. [e]	(d) Results of this test consist of the average of the three 1-hour or longer runs.
	b. limit the concentration of CO in the stationary SI internal combustion engine exhaust.	i. Select the sampling port location and the number of traverse points;	(1) Method 1 or 1A of 40 CFR part 60, appendix A or ASTM Method D6522–00 (Reapproved 2005). [a e]	(a) If using a control device, the sampling site must be located at the outlet of the control device.
		ii. Determine the O_2 concentration of the stationary internal combustion engine exhaust at the sampling port location;	(2) Method 3, 3A, or 3B [b] of 40 CFR part 60, appendix A or ASTM Method D6522–00 (Reapproved 2005). [a e]	(b) Measurements to determine O_2 concentration must be made at the same time as the measurements for CO concentration.
		iii. If necessary, determine the exhaust flowrate of the stationary internal combustion engine exhaust;	(3) Method 2 or 19 of 40 CFR part 60, appendix A.	
		iv. If necessary, measure moisture content of the stationary internal combustion engine exhaust at the sampling port location; and	(4) Method 4 of 40 CFR part 60, appendix A, Method 320 of 40 CFR part 63, appendix A, or ASTM D 6348–03. [e]	(c) Measurements to determine moisture must be made at the same time as the measurement for CO concentration.
		v. Measure CO at the exhaust of the stationary internal combustion engine.	(5) Method 10 of 40 CFR part 60, appendix A, ASTM Method D6522–00 (Reapproved 2005) [a e], Method 320 of 40 CFR part 63, appendix A, or ASTM D 6348–03. [e]	(d) Results of this test consist of the average of the three 1-hour or longer runs.
	c. limit the concentration of VOC in the stationary SI internal combustion engine exhaust	i. Select the sampling port location and the number of traverse points;	(1) Method 1 or 1A of 40 CFR part 60, appendix A.	(a) If using a control device, the sampling site must be located at the outlet of the control device.
		ii. Determine the O_2 concentration of the stationary internal combustion engine exhaust at the sampling port location;	(2) Method 3, 3A, or 3B [b] of 40 CFR part 60, appendix A or ASTM Method D6522–00 (Reapproved 2005). [a e]	(b) Measurements to determine O_2 concentration must be made at the same time as the measurements for VOC concentration.
		iii. If necessary, determine the exhaust flowrate of the stationary internal combustion engine exhaust;	(3) Method 2 or 19 of 40 CFR part 60, appendix A.	
		iv. If necessary, measure moisture content of the stationary internal combustion engine exhaust at the sampling port location; and	(4) Method 4 of 40 CFR part 60, appendix A, Method 320 of 40 CFR part 63, appendix A, or ASTM D 6348–03. [e]	(c) Measurements to determine moisture must be made at the same time as the measurementfor VOC concentration.

TABLE 2 TO SUBPART JJJJ OF PART 60—REQUIREMENTS FOR PERFORMANCE TESTS—Continued

For each	Complying with the requirement to	You must	Using	According to the following requirements
		v. Measure VOC at the exhaust of the stationary internal combustion engine.	(5) Methods 25A and 18 of 40 CFR part 60, appendix A, Method 25A with the use of a methane cutter as described in 40 CFR 1065.265, Method 18 of 40 CFR part 60, appendix A,[c d] Method 320 of 40 CFR part 63, appendix A, or ASTM D 6348–03.[e]	(d) Results of this test consist of the average of the three 1-hour or longer runs.

[a] You may petition the Administrator for approval to use alternative methods for portable analyzer.
[b] You may use ASME PTC 19.10–1981, Flue and Exhaust Gas Analyses, for measuring the O_2 content of the exhaust gas as an alternative to EPA Method 3B.
[c] You may use EPA Method 18 of 40 CFR part 60, appendix, provided that you conduct an adequate presurvey test prior to the emissions test, such as the one described in OTM 11 on EPA's Web site (*http://www.epa.gov/ttn/emc/prelim/otm11.pdf*).
[d] You may use ASTM D6420–99 (2004), Test Method for Determination of Gaseous Organic Compounds by Direct Interface Gas Chromatography/Mass Spectrometry as an alternative to EPA Method 18 for measuring total nonmethane organic.
[e] Incorporated by reference, see 40 CFR 60.17.

PART 63—[AMENDED]

■ 12. The authority citation for part 63 continues to read as follows:

Authority: 42 U.S.C. 7401, *et seq.*

Subpart A—[Amended]

■ 13. Section 63.14 is amended by:
■ a. Revising paragraphs (b)(28) and (b)(54);
■ b. Adding paragraph (d)(10);
■ c. Revising paragraph (i)(1); and
■ d. Adding paragraph (s) to read as follows:

§ 63.14 Incorporations by reference.

* * * * *

(b) * * *

(28) ASTM D6420–99 (Reapproved 2004), Standard Test Method for Determination of Gaseous Organic Compounds by Direct Interface Gas Chromatography-Mass Spectrometry (Approved October 1, 2004), IBR approved for §§ 60.485(g), 60.485a(g), 63.457(b), 63.772(a) and (e), 63.1282(a) and (d), 63.2351(b), 63.2354(b) and table 8 to subpart HHHHHHH of this part.

* * * * *

(54) ASTM D6348–03, Standard Test Method for Determination of Gaseous Compounds by Extractive Direct Interface Fourier Transform Infrared (FTIR) Spectroscopy, approved 2003, IBR approved for §§ 63.457, 63.1349, table 4 to subpart DDDD of this part, table 4 to subpart ZZZZ of this part, and table 8 to subpart HHHHHHH of this part.

* * * * *

(d) * * *

(10) Alaska Statute, Title 42—Public Utilities And Carriers And Energy Programs, Chapter 45—Rural and Statewide Energy Programs, Article 1, Power Assistance Programs, Sec. 42.45.045. Renewable energy grant fund and recommendation program, effective May 3, 2012, available at *http://www.legis.state.ak.us/basis/folio.asp*, IBR approved for § 63.6675.

* * * * *

(i) * * *

(1) ANSI/ASME PTC 19.10–1981, Flue and Exhaust Gas Analyses [part 10, Instruments and Apparatus], issued August 31, 1981, IBR approved for §§ 63.309(k), 63.457(k), 63.772(e) and (h), 63.865(b), 63.1282(d) and (g), 63.3166(a), 63.3360(e), 63.3545(a), 63.3555(a), 63.4166(a), 63.4362(a), 63.4766(a), 63.4965(a), 63.5160(d), 63.9307(c), 63.9323(a), 63.11148(e), 63.11155(e), 63.11162(f), 63.11163(g), 63.11410(j), 63.11551(a), 63.11646(a), 63.11945, table 5 to subpart DDDDD of this part, table 4 to subpart JJJJJ of this part, table 5 to subpart UUUUU of this part, and table 1 to subpart ZZZZZ of this part.

* * * * *

(s) The following material is available from the North American Electric Reliability Corporation, 3353 Peachtree Road NE., Suite 600, North Tower, Atlanta, GA 30326, *http://www.nerc.com*, and is available at the following Web site: *http://www.nerc.com/files/EOP-002-3_1.pdf*.

(1) North American Electric Reliability Corporation, Reliability Standards for the Bulk of Electric Systems of North America, Reliability Standard EOP–002–3, Capacity and Energy Emergencies, updated November 19, 2012, IBR approved for § 63.6640(f).

(2) [Reserved]

Subpart ZZZZ—[Amended]

■ 14. Section 63.6585 is amended by adding paragraph (f) to read as follows:

§ 63.6585 Am I subject to this subpart?

* * * * *

(f) The emergency stationary RICE listed in paragraphs (f)(1) through (3) of this section are not subject to this subpart. The stationary RICE must meet the definition of an emergency stationary RICE in § 63.6675, which includes operating according to the provisions specified in § 63.6640(f).

(1) Existing residential emergency stationary RICE located at an area source of HAP emissions that do not operate or are not contractually obligated to be available for more than 15 hours per calendar year for the purposes specified in § 63.6640(f)(2)(ii) and (iii) and that do not operate for the purpose specified in § 63.6640(f)(4)(ii).

(2) Existing commercial emergency stationary RICE located at an area source of HAP emissions that do not operate or are not contractually obligated to be available for more than 15 hours per calendar year for the purposes specified in § 63.6640(f)(2)(ii) and (iii) and that do not operate for the purpose specified in § 63.6640(f)(4)(ii).

(3) Existing institutional emergency stationary RICE located at an area source of HAP emissions that do not operate or are not contractually obligated to be available for more than 15 hours per calendar year for the purposes specified in § 63.6640(f)(2)(ii) and (iii) and that do not operate for the purpose specified in § 63.6640(f)(4)(ii).

■ 15. Section 63.6590 is amended by revising paragraphs (b)(1)(i) and (b)(3)(iii) and removing paragraphs (b)(3)(vi) through (viii).

The revisions read as follows.

§ 63.6590 What parts of my plant does this subpart cover?

* * * * *

(b) * * *

(1) * * *

(i) The stationary RICE is a new or reconstructed emergency stationary RICE with a site rating of more than 500 brake HP located at a major source of HAP emissions that does not operate or is not contractually obligated to be available for more than 15 hours per calendar year for the purposes specified in § 63.6640(f)(2)(ii) and (iii).

* * * * *

(3) * * *

(iii) Existing emergency stationary RICE with a site rating of more than 500 brake HP located at a major source of HAP emissions that does not operate or is not contractually obligated to be available for more than 15 hours per calendar year for the purposes specified in § 63.6640(f)(2)(ii) and (iii).

* * * * *

■ 16. Section 63.6595 is amended by revising paragraph (a)(1) to read as follows:

§ 63.6595 When do I have to comply with this subpart?

(a) * * *

(1) If you have an existing stationary RICE, excluding existing non-emergency CI stationary RICE, with a site rating of more than 500 brake HP located at a major source of HAP emissions, you must comply with the applicable emission limitations, operating limitations and other requirements no later than June 15, 2007. If you have an existing non-emergency CI stationary RICE with a site rating of more than 500 brake HP located at a major source of HAP emissions, an existing stationary CI RICE with a site rating of less than or equal to 500 brake HP located at a major source of HAP emissions, or an existing stationary CI RICE located at an area source of HAP emissions, you must comply with the applicable emission limitations, operating limitations, and other requirements no later than May 3, 2013. If you have an existing stationary SI RICE with a site rating of less than or equal to 500 brake HP located at a major source of HAP emissions, or an existing stationary SI RICE located at an area source of HAP emissions, you must comply with the applicable emission limitations, operating limitations, and other requirements no later than October 19, 2013.

* * * * *

■ 17. Section 63.6602 is revised to read as follows:

§ 63.6602 What emission limitations and other requirements must I meet if I own or operate an existing stationary RICE with a site rating of equal to or less than 500 brake HP located at a major source of HAP emissions?

If you own or operate an existing stationary RICE with a site rating of equal to or less than 500 brake HP located at a major source of HAP emissions, you must comply with the emission limitations and other requirements in Table 2c to this subpart which apply to you. Compliance with the numerical emission limitations established in this subpart is based on the results of testing the average of three 1-hour runs using the testing requirements and procedures in § 63.6620 and Table 4 to this subpart.

■ 18. Section 63.6603 is amended by:
■ a. Revising the section heading;
■ b. Revising paragraph (a);
■ c. Revising paragraph (b); and
■ d. Adding paragraphs (c) through (f).

The revisions and addition read as follows:

§ 63.6603 What emission limitations, operating limitations, and other requirements must I meet if I own or operate an existing stationary RICE located at an area source of HAP emissions?

* * * * *

(a) If you own or operate an existing stationary RICE located at an area source of HAP emissions, you must comply with the requirements in Table 2d to this subpart and the operating limitations in Table 2b to this subpart that apply to you.

(b) If you own or operate an existing stationary non-emergency CI RICE with a site rating of more than 300 HP located at an area source of HAP that meets either paragraph (b)(1) or (2) of this section, you do not have to meet the numerical CO emission limitations specified in Table 2d of this subpart. Existing stationary non-emergency CI RICE with a site rating of more than 300 HP located at an area source of HAP that meet either paragraph (b)(1) or (2) of this section must meet the management practices that are shown for stationary non-emergency CI RICE with a site rating of less than or equal to 300 HP in Table 2d of this subpart.

(1) The area source is located in an area of Alaska that is not accessible by the Federal Aid Highway System (FAHS).

(2) The stationary RICE is located at an area source that meets paragraphs (b)(2)(i), (ii), and (iii) of this section.

(i) The only connection to the FAHS is through the Alaska Marine Highway System (AMHS), or the stationary RICE operation is within an isolated grid in Alaska that is not connected to the statewide electrical grid referred to as the Alaska Railbelt Grid.

(ii) At least 10 percent of the power generated by the stationary RICE on an annual basis is used for residential purposes.

(iii) The generating capacity of the area source is less than 12 megawatts, or the stationary RICE is used exclusively for backup power for renewable energy.

(c) If you own or operate an existing stationary non-emergency CI RICE with a site rating of more than 300 HP located on an offshore vessel that is an area source of HAP and is a nonroad vehicle that is an Outer Continental Shelf (OCS) source as defined in 40 CFR 55.2, you do not have to meet the numerical CO emission limitations specified in Table 2d of this subpart. You must meet all of the following management practices:

(1) Change oil every 1,000 hours of operation or annually, whichever comes first. Sources have the option to utilize an oil analysis program as described in § 63.6625(i) in order to extend the specified oil change requirement.

(2) Inspect and clean air filters every 750 hours of operation or annually, whichever comes first, and replace as necessary.

(3) Inspect fuel filters and belts, if installed, every 750 hours of operation or annually, whichever comes first, and replace as necessary.

(4) Inspect all flexible hoses every 1,000 hours of operation or annually, whichever comes first, and replace as necessary.

(d) If you own or operate an existing non-emergency CI RICE with a site rating of more than 300 HP located at an area source of HAP emissions that is certified to the Tier 1 or Tier 2 emission standards in Table 1 of 40 CFR 89.112 and that is subject to an enforceable state or local standard that requires the engine to be replaced no later than June 1, 2018, you may until January 1, 2015, or 12 years after the installation date of the engine (whichever is later), but not later than June 1, 2018, choose to comply with the management practices that are shown for stationary non-emergency CI RICE with a site rating of less than or equal to 300 HP in Table 2d of this subpart instead of the applicable emission limitations in Table 2d, operating limitations in Table 2b, and crankcase ventilation system requirements in § 63.6625(g). You must comply with the emission limitations in Table 2d and operating limitations in Table 2b that apply for non-emergency CI RICE with a site rating of more than 300 HP located at an area source of HAP emissions by January 1, 2015, or 12 years after the installation date of the engine (whichever is later), but not later than June 1, 2018. You must also comply with the crankcase ventilation system requirements in § 63.6625(g) by January 1, 2015, or 12 years after the installation date of the engine (whichever is later), but not later than June 1, 2018.

(e) If you own or operate an existing non-emergency CI RICE with a site rating of more than 300 HP located at an area source of HAP emissions that is certified to the Tier 3 (Tier 2 for engines above 560 kilowatt (kW)) emission standards in Table 1 of 40 CFR 89.112, you may comply with the requirements under this part by meeting the requirements for Tier 3 engines (Tier 2 for engines above 560 kW) in 40 CFR part 60 subpart IIII instead of the emission limitations and other requirements that would otherwise apply under this part for existing non-emergency CI RICE with a site rating of more than 300 HP located at an area source of HAP emissions.

(f) An existing non-emergency SI 4SLB and 4SRB stationary RICE with a site rating of more than 500 HP located at area sources of HAP must meet the definition of remote stationary RICE in § 63.6675 on the initial compliance date for the engine, October 19, 2013, in order to be considered a remote stationary RICE under this subpart. Owners and operators of existing non-emergency SI 4SLB and 4SRB stationary RICE with a site rating of more than 500 HP located at area sources of HAP that meet the definition of remote stationary RICE in § 63.6675 of this subpart as of October 19, 2013 must evaluate the status of their stationary RICE every 12 months. Owners and operators must keep records of the initial and annual evaluation of the status of the engine. If the evaluation indicates that the stationary RICE no longer meets the definition of remote stationary RICE in § 63.6675 of this subpart, the owner or operator must comply with all of the requirements for existing non-emergency SI 4SLB and 4SRB stationary RICE with a site rating of more than 500 HP located at area sources of HAP that are not remote stationary RICE within 1 year of the evaluation.

■ 19. Section 63.6604 is revised to read as follows:

§ 63.6604 What fuel requirements must I meet if I own or operate a stationary CI RICE?

(a) If you own or operate an existing non-emergency, non-black start CI stationary RICE with a site rating of more than 300 brake HP with a displacement of less than 30 liters per cylinder that uses diesel fuel, you must use diesel fuel that meets the requirements in 40 CFR 80.510(b) for nonroad diesel fuel.

(b) Beginning January 1, 2015, if you own or operate an existing emergency CI stationary RICE with a site rating of more than 100 brake HP and a displacement of less than 30 liters per cylinder that uses diesel fuel and operates or is contractually obligated to be available for more than 15 hours per calendar year for the purposes specified in § 63.6640(f)(2)(ii) and (iii) or that operates for the purpose specified in § 63.6640(f)(4)(ii), you must use diesel fuel that meets the requirements in 40 CFR 80.510(b) for nonroad diesel fuel, except that any existing diesel fuel purchased (or otherwise obtained) prior to January 1, 2015, may be used until depleted.

(c) Beginning January 1, 2015, if you own or operate a new emergency CI stationary RICE with a site rating of more than 500 brake HP and a displacement of less than 30 liters per cylinder located at a major source of HAP that uses diesel fuel and operates or is contractually obligated to be available for more than 15 hours per calendar year for the purposes specified in § 63.6640(f)(2)(ii) and (iii), you must use diesel fuel that meets the requirements in 40 CFR 80.510(b) for nonroad diesel fuel, except that any existing diesel fuel purchased (or otherwise obtained) prior to January 1, 2015, may be used until depleted.

(d) Existing CI stationary RICE located in Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, at area sources in areas of Alaska that meet either § 63.6603(b)(1) or § 63.6603(b)(2), or are on offshore vessels that meet § 63.6603(c) are exempt from the requirements of this section.

■ 20. Section 63.6605 is amended by revising paragraph (a) to read as follows:

§ 63.6605 What are my general requirements for complying with this subpart?

(a) You must be in compliance with the emission limitations, operating limitations, and other requirements in this subpart that apply to you at all times.

* * * * *

■ 21. Section 63.6620 is amended by revising paragraphs (b), (d) and (e) to read as follows:

§ 63.6620 What performance tests and other procedures must I use?

* * * * *

(b) Each performance test must be conducted according to the requirements that this subpart specifies in Table 4 to this subpart. If you own or operate a non-operational stationary RICE that is subject to performance testing, you do not need to start up the engine solely to conduct the performance test. Owners and operators of a non-operational engine can conduct the performance test when the engine is started up again. The test must be conducted at any load condition within plus or minus 10 percent of 100 percent load for the stationary RICE listed in paragraphs (b)(1) through (4) of this section.

(1) Non-emergency 4SRB stationary RICE with a site rating of greater than 500 brake HP located at a major source of HAP emissions.

(2) New non-emergency 4SLB stationary RICE with a site rating of greater than or equal to 250 brake HP located at a major source of HAP emissions.

(3) New non-emergency 2SLB stationary RICE with a site rating of greater than 500 brake HP located at a major source of HAP emissions.

(4) New non-emergency CI stationary RICE with a site rating of greater than 500 brake HP located at a major source of HAP emissions.

* * * * *

(d) You must conduct three separate test runs for each performance test required in this section, as specified in § 63.7(e)(3). Each test run must last at least 1 hour, unless otherwise specified in this subpart.

(e)(1) You must use Equation 1 of this section to determine

$$\frac{C_i - C_o}{C_i} \times 100 = R \qquad (Eq.\ 1)$$

compliance with the percent reduction requirement:

Where:

C_i = concentration of carbon monoxide (CO), total hydrocarbons (THC), or formaldehyde at the control device inlet,

C_o = concentration of CO, THC, or formaldehyde at the control device outlet, and

R = percent reduction of CO, THC, or formaldehyde emissions.

(2) You must normalize the CO, THC, or formaldehyde concentrations at the inlet and outlet of the control device to a dry basis and to 15 percent oxygen, or an equivalent percent carbon dioxide (CO_2). If pollutant concentrations are to be corrected to 15 percent oxygen and CO_2 concentration is measured in lieu of oxygen concentration measurement, a CO_2 correction factor is needed. Calculate the CO_2 correction factor as described in paragraphs (e)(2)(i) through (iii) of this section.

(i) Calculate the fuel-specific F_o value for the fuel burned during the test using values obtained from Method 19, Section 5.2, and the following equation:

$$F_O = \frac{0.209\ F_d}{F_C} \quad (Eq.\ 2)$$

Where:

F_o = Fuel factor based on the ratio of oxygen volume to the ultimate CO_2 volume produced by the fuel at zero percent excess air.

0.209 = Fraction of air that is oxygen, percent/100.

F_d = Ratio of the volume of dry effluent gas to the gross calorific value of the fuel from Method 19, dsm^3/J ($dscf/10^6$ Btu).

F_c = Ratio of the volume of CO_2 produced to the gross calorific value of the fuel from Method 19, dsm^3/J ($dscf/10^6$ Btu)

(ii) Calculate the CO_2 correction factor for correcting

$$X_{CO2} = \frac{5.9}{F_O} \quad (Eq.\ 3)$$

measurement data to 15 percent O_2, as follows:

Where:

X_{CO2} = CO_2 correction factor, percent.

5.9 = 20.9 percent O_2—15 percent O_2, the defined O_2 correction value, percent.

(iii) Calculate the CO, THC, and formaldehyde gas concentrations adjusted to 15 percent O_2 using CO_2 as follows:

$$C_{adj} = C_d \frac{X_{CO2}}{\%CO_2} \quad (Eq.\ 4)$$

Where:

C_{adj} = Calculated concentration of CO, THC, or formaldehyde adjusted to 15 percent O_2.

C_d = Measured concentration of CO, THC, or formaldehyde, uncorrected.

X_{CO2} = CO_2 correction factor, percent.

$\%CO_2$ = Measured CO_2 concentration measured, dry basis, percent.

* * * * *

■ 22. Section 63.6625 is amended by:

■ a. Revising paragraph (a) introductory text;

■ b. Revising the first sentence in paragraph (b) introductory text;

■ c. Revising paragraph (b)(1)(iv);

■ d. Revising paragraph (e)(6),

■ e. Revising paragraph (g),

■ f. Revising paragraph (i); and

■ g. Revising paragraph (j).

The revisions read as follows:

§ 63.6625 What are my monitoring, installation, collection, operation, and maintenance requirements?

(a) If you elect to install a CEMS as specified in Table 5 of this subpart, you must install, operate, and maintain a CEMS to monitor CO and either O_2 or CO_2 according to the requirements in paragraphs (a)(1) through (4) of this section. If you are meeting a requirement to reduce CO emissions, the CEMS must be installed at both the inlet and outlet of the control device. If you are meeting a requirement to limit the concentration of CO, the CEMS must be installed at the outlet of the control device.

* * * * *

(b) If you are required to install a continuous parameter monitoring system (CPMS) as specified in Table 5 of this subpart, you must install, operate, and maintain each CPMS according to the requirements in paragraphs (b)(1) through (6) of this section. * * *

(1) * * *

(iv) Ongoing operation and maintenance procedures in accordance with provisions in § 63.8(c)(1)(ii) and (c)(3); and

* * * * *

(e) * * *

(6) An existing non-emergency, non-black start stationary RICE located at an area source of HAP emissions which combusts landfill or digester gas equivalent to 10 percent or more of the gross heat input on an annual basis.

* * * * *

(g) If you own or operate an existing non-emergency, non-black start CI engine greater than or equal to 300 HP that is not equipped with a closed crankcase ventilation system, you must comply with either paragraph (g)(1) or paragraph (2) of this section. Owners and operators must follow the manufacturer's specified maintenance requirements for operating and maintaining the open or closed crankcase ventilation systems and replacing the crankcase filters, or can request the Administrator to approve different maintenance requirements that are as protective as manufacturer requirements. Existing CI engines located at area sources in areas of Alaska that meet either § 63.6603(b)(1) or § 63.6603(b)(2) do not have to meet the requirements of this paragraph (g). Existing CI engines located on offshore vessels that meet § 63.6603(c) do not have to meet the requirements of this paragraph (g).

(1) Install a closed crankcase ventilation system that prevents crankcase emissions from being emitted to the atmosphere, or

(2) Install an open crankcase filtration emission control system that reduces emissions from the crankcase by filtering the exhaust stream to remove oil mist, particulates and metals.

* * * * *

(i) If you own or operate a stationary CI engine that is subject to the work, operation or management practices in items 1 or 2 of Table 2c to this subpart or in items 1 or 4 of Table 2d to this subpart, you have the option of utilizing an oil analysis program in order to extend the specified oil change requirement in Tables 2c and 2d to this subpart. The oil analysis must be performed at the same frequency specified for changing the oil in Table 2c or 2d to this subpart. The analysis program must at a minimum analyze the following three parameters: Total Base Number, viscosity, and percent water content. The condemning limits for these parameters are as follows: Total Base Number is less than 30 percent of the Total Base Number of the oil when new; viscosity of the oil has changed by more than 20 percent from the viscosity of the oil when new; or percent water content (by volume) is greater than 0.5. If all of these condemning limits are not exceeded, the engine owner or operator is not required to change the oil. If any of the limits are exceeded, the engine owner or operator must change the oil within 2 business days of receiving the results of the analysis; if the engine is not in operation when the results of the analysis are received, the engine owner or operator must change the oil within 2 business days or before commencing operation, whichever is later. The owner or operator must keep records of the parameters that are analyzed as part of the program, the results of the analysis, and the oil changes for the engine. The analysis program must be part of the maintenance plan for the engine.

(j) If you own or operate a stationary SI engine that is subject to the work, operation or management practices in items 6, 7, or 8 of Table 2c to this subpart or in items 5, 6, 7, 9, or 11 of Table 2d to this subpart, you have the option of utilizing an oil analysis program in order to extend the specified oil change requirement in Tables 2c and 2d to this subpart. The oil analysis must be performed at the same frequency specified for changing the oil in Table 2c or 2d to this subpart. The analysis program must at a minimum analyze the following three parameters: Total Acid Number, viscosity, and percent water content. The condemning limits for these parameters are as follows: Total Acid Number increases by more than 3.0 milligrams of potassium hydroxide (KOH) per gram from Total Acid Number of the oil when new; viscosity of the oil has changed by more than 20 percent from the viscosity of the oil when new; or percent water content (by volume) is greater than 0.5. If all of these condemning limits are not exceeded, the engine owner or operator is not required to change the oil. If any of the limits are exceeded, the engine owner or operator must change the oil within 2 business days of receiving the results of the analysis; if the engine is not in operation when the results of the analysis are received, the engine owner or operator must change the oil within 2 business days or before commencing operation, whichever is later. The owner or operator must keep records of the parameters that are analyzed as part of the program, the results of the analysis, and the oil changes for the engine. The analysis program must be part of the maintenance plan for the engine.

■ 23. Section 63.6630 is amended by revising the section heading and paragraph (a) and adding paragraphs (d) and (e) to read as follows:

§ 63.6630 How do I demonstrate initial compliance with the emission limitations, operating limitations, and other requirements?

(a) You must demonstrate initial compliance with each emission limitation, operating limitation, and other requirement that applies to you according to Table 5 of this subpart.

* * * * *

(d) Non-emergency 4SRB stationary RICE complying with the requirement to reduce formaldehyde emissions by 76 percent or more can demonstrate initial compliance with the formaldehyde emission limit by testing for THC instead of formaldehyde. The testing must be conducted according to the requirements in Table 4 of this subpart. The average reduction of emissions of THC determined from the performance test must be equal to or greater than 30 percent.

(e) The initial compliance demonstration required for existing non-emergency 4SLB and 4SRB stationary RICE with a site rating of more than 500 HP located at an area source of HAP that are not remote stationary RICE and that are operated more than 24 hours per calendar year must be conducted according to the following requirements:

(1) The compliance demonstration must consist of at least three test runs.

(2) Each test run must be of at least 15 minute duration, except that each test conducted using the method in appendix A to this subpart must consist of at least one measurement cycle and include at least 2 minutes of test data phase measurement.

(3) If you are demonstrating compliance with the CO concentration or CO percent reduction requirement, you must measure CO emissions using one of the CO measurement methods specified in Table 4 of this subpart, or using appendix A to this subpart.

(4) If you are demonstrating compliance with the THC percent reduction requirement, you must measure THC emissions using Method 25A, reported as propane, of 40 CFR part 60, appendix A.

(5) You must measure O_2 using one of the O_2 measurement methods specified in Table 4 of this subpart. Measurements to determine O_2 concentration must be made at the same time as the measurements for CO or THC concentration.

(6) If you are demonstrating compliance with the CO or THC percent reduction requirement, you must measure CO or THC emissions and O_2 emissions simultaneously at the inlet and outlet of the control device.

■ 24. Section 63.6640 is amended by:

■ a. Revising the section heading;

■ b. Revising paragraph (a);

■ c. Adding paragraph (c); and

■ d. Revising paragraph (f).

The revisions and addition read as follows:

§ 63.6640 How do I demonstrate continuous compliance with the emission limitations, operating limitations, and other requirements?

(a) You must demonstrate continuous compliance with each emission limitation, operating limitation, and other requirements in Tables 1a and 1b, Tables 2a and 2b, Table 2c, and Table 2d to this subpart that apply to you according to methods specified in Table 6 to this subpart.

* * * * *

(c) The annual compliance demonstration required for existing non-emergency 4SLB and 4SRB stationary RICE with a site rating of more than 500 HP located at an area source of HAP that are not remote stationary RICE and that are operated more than 24 hours per calendar year must be conducted according to the following requirements:

(1) The compliance demonstration must consist of at least one test run.

(2) Each test run must be of at least 15 minute duration, except that each test conducted using the method in appendix A to this subpart must consist of at least one measurement cycle and include at least 2 minutes of test data phase measurement.

(3) If you are demonstrating compliance with the CO concentration or CO percent reduction requirement, you must measure CO emissions using one of the CO measurement methods specified in Table 4 of this subpart, or using appendix A to this subpart.

(4) If you are demonstrating compliance with the THC percent reduction requirement, you must measure THC emissions using Method 25A, reported as propane, of 40 CFR part 60, appendix A.

(5) You must measure O_2 using one of the O_2 measurement methods specified in Table 4 of this subpart. Measurements to determine O_2 concentration must be made at the same time as the measurements for CO or THC concentration.

(6) If you are demonstrating compliance with the CO or THC percent reduction requirement, you must measure CO or THC emissions and O_2 emissions simultaneously at the inlet and outlet of the control device.

(7) If the results of the annual compliance demonstration show that the emissions exceed the levels specified in Table 6 of this subpart, the stationary RICE must be shut down as soon as safely possible, and appropriate corrective action must be taken (e.g., repairs, catalyst cleaning, catalyst replacement). The stationary RICE must be retested within 7 days of being restarted and the emissions must meet the levels specified in Table 6 of this subpart. If the retest shows that the emissions continue to exceed the specified levels, the stationary RICE must again be shut down as soon as safely possible, and the stationary RICE may not operate, except for purposes of startup and testing, until the owner/operator demonstrates through testing that the emissions do not exceed the levels specified in Table 6 of this subpart.

* * * * *

(f) If you own or operate an emergency stationary RICE, you must operate the emergency stationary RICE according to the requirements in paragraphs (f)(1) through (4) of this section. In order for the engine to be considered an emergency stationary RICE under this subpart, any operation other than emergency operation, maintenance and testing, emergency demand response, and operation in non-emergency situations for 50 hours per year, as described in paragraphs (f)(1) through (4) of this section, is prohibited. If you do not operate the engine according to the requirements in paragraphs (f)(1) through (4) of this section, the engine will not be considered an emergency engine under this subpart and must meet all requirements for non-emergency engines.

(1) There is no time limit on the use of emergency stationary RICE in emergency situations.

(2) You may operate your emergency stationary RICE for any combination of the purposes specified in paragraphs (f)(2)(i) through (iii) of this section for a maximum of 100 hours per calendar year. Any operation for non-emergency situations as allowed by paragraphs (f)(3) and (4) of this section counts as part of the 100 hours per calendar year allowed by this paragraph (f)(2).

(i) Emergency stationary RICE may be operated for maintenance checks and readiness testing, provided that the tests are recommended by federal, state or local government, the manufacturer, the vendor, the regional transmission organization or equivalent balancing authority and transmission operator, or the insurance company associated with the engine. The owner or operator may petition the Administrator for approval of additional hours to be used for maintenance checks and readiness testing, but a petition is not required if the owner or operator maintains records indicating that federal, state, or local standards require maintenance and testing of emergency RICE beyond 100 hours per calendar year.

(ii) Emergency stationary RICE may be operated for emergency demand response for periods in which the Reliability Coordinator under the North American Electric Reliability Corporation (NERC) Reliability Standard EOP–002–3, Capacity and Energy Emergencies (incorporated by reference, see § 63.14), or other authorized entity as determined by the Reliability Coordinator, has declared an Energy Emergency Alert Level 2 as defined in the NERC Reliability Standard EOP–002–3.

(iii) Emergency stationary RICE may be operated for periods where there is a deviation of voltage or frequency of 5 percent or greater below standard voltage or frequency.

(3) Emergency stationary RICE located at major sources of HAP may be operated for up to 50 hours per calendar year in non-emergency situations. The 50 hours of operation in non-emergency situations are counted as part of the 100 hours per calendar year for maintenance and testing and emergency demand response provided in paragraph (f)(2) of this section. The 50 hours per year for non-emergency situations cannot be used for peak shaving or non-emergency demand response, or to generate income for a facility to supply power to an electric grid or otherwise supply power as part of a financial arrangement with another entity.

(4) Emergency stationary RICE located at area sources of HAP may be operated for up to 50 hours per calendar year in non-emergency situations. The 50 hours of operation in non-emergency situations are counted as part of the 100 hours per calendar year for maintenance and testing and emergency demand response provided in paragraph (f)(2) of this section. Except as provided in paragraphs (f)(4)(i) and (ii) of this section, the 50 hours per year for non-emergency situations cannot be used for peak shaving or non-emergency demand response, or to generate income for a facility to an electric grid or otherwise supply power as part of a financial arrangement with another entity.

(i) Prior to May 3, 2014, the 50 hours per year for non-emergency situations can be used for peak shaving or non-emergency demand response to generate income for a facility, or to otherwise supply power as part of a financial arrangement with another entity if the engine is operated as part of a peak shaving (load management program) with the local distribution system operator and the power is provided only to the facility itself or to support the local distribution system.

(ii) The 50 hours per year for non-emergency situations can be used to supply power as part of a financial arrangement with another entity if all of the following conditions are met:

(A) The engine is dispatched by the local balancing authority or local transmission and distribution system operator.

(B) The dispatch is intended to mitigate local transmission and/or distribution limitations so as to avert potential voltage collapse or line overloads that could lead to the interruption of power supply in a local area or region.

(C) The dispatch follows reliability, emergency operation or similar protocols that follow specific NERC, regional, state, public utility commission or local standards or guidelines.

(D) The power is provided only to the facility itself or to support the local transmission and distribution system.

(E) The owner or operator identifies and records the entity that dispatches the engine and the specific NERC, regional, state, public utility commission or local standards or guidelines that are being followed for dispatching the engine. The local balancing authority or local transmission and distribution system operator may keep these records on behalf of the engine owner or operator.

■ 25. Section 63.6645 is amended by adding paragraph (i) to read as follows:

§ 63.6645 What notifications must I submit and when?

* * * * *

(i) If you own or operate an existing non-emergency CI RICE with a site rating of more than 300 HP located at an area source of HAP emissions that is certified to the Tier 1 or Tier 2 emission standards in Table 1 of 40 CFR 89.112 and subject to an enforceable state or local standard requiring engine replacement and you intend to meet management practices rather than emission limits, as specified in § 63.6603(d), you must submit a notification by March 3, 2013, stating that you intend to use the provision in § 63.6603(d) and identifying the state or local regulation that the engine is subject to.

■ 26. Section 63.6650 is amended by adding paragraph (h) to read as follows:

§ 63.6650 What reports must I submit and when?

* * * * *

(h) If you own or operate an emergency stationary RICE with a site rating of more than 100 brake HP that operates or is contractually obligated to be available for more than 15 hours per calendar year for the purposes specified in § 63.6640(f)(2)(ii) and (iii) or that operates for the purpose specified in § 63.6640(f)(4)(ii), you must submit an annual report according to the requirements in paragraphs (h)(1) through (3) of this section.

(1) The report must contain the following information:

(i) Company name and address where the engine is located.

(ii) Date of the report and beginning and ending dates of the reporting period.

(iii) Engine site rating and model year.

(iv) Latitude and longitude of the engine in decimal degrees reported to the fifth decimal place.

(v) Hours operated for the purposes specified in § 63.6640(f)(2)(ii) and (iii), including the date, start time, and end time for engine operation for the purposes specified in § 63.6640(f)(2)(ii) and (iii).

(vi) Number of hours the engine is contractually obligated to be available for the purposes specified in § 63.6640(f)(2)(ii) and (iii).

(vii) Hours spent for operation for the purpose specified in § 63.6640(f)(4)(ii), including the date, start time, and end time for engine operation for the purposes specified in § 63.6640(f)(4)(ii). The report must also identify the entity that dispatched the engine and the situation that necessitated the dispatch of the engine.

(viii) If there were no deviations from the fuel requirements in § 63.6604 that apply to the engine (if any), a statement that there were no deviations from the fuel requirements during the reporting period.

(ix) If there were deviations from the fuel requirements in § 63.6604 that apply to the engine (if any), information on the number, duration, and cause of deviations, and the corrective action taken.

(2) The first annual report must cover the calendar year 2015 and must be submitted no later than March 31, 2016. Subsequent annual reports for each calendar year must be submitted no later than March 31 of the following calendar year.

(3) The annual report must be submitted electronically using the subpart specific reporting form in the Compliance and Emissions Data Reporting Interface (CEDRI) that is accessed through EPA's Central Data Exchange (CDX) (*www.epa.gov/cdx*). However, if the reporting form specific to this subpart is not available in CEDRI at the time that the report is due, the written report must be submitted to the Administrator at the appropriate address listed in § 63.13.

■ 27. Section 63.6655 is amended by revising paragraph (f) introductory text to read as follows:

§ 63.6655 What records must I keep?

* * * * *

(f) If you own or operate any of the stationary RICE in paragraphs (f)(1) through (2) of this section, you must keep records of the hours of operation of the engine that is recorded through the non-resettable hour meter. The owner or operator must document how many hours are spent for emergency operation, including what classified the operation as emergency and how many hours are spent for non-emergency operation. If the engine is used for the purposes specified in § 63.6640(f)(2)(ii) or (iii) or § 63.6640(f)(4)(ii), the owner or operator must keep records of the notification of the emergency situation, and the date, start time, and end time of engine operation for these purposes.

* * * * *

■ 28. Section 63.6675 is amended by:

■ a. Adding in alphabetical order the definition of *Alaska Railbelt Grid;*

■ b. Adding in alphabetical order the definition of *Backup power for renewable energy;*

■ c. Revising the definition of *Emergency stationary RICE;* and

■ d. Adding in alphabetical order the definition of *Remote stationary RICE.*

The additions and revision read as follows.

§ 63.6675 What definitions apply to this subpart?

* * * * *

Alaska Railbelt Grid means the service areas of the six regulated public utilities that extend from Fairbanks to Anchorage and the Kenai Peninsula. These utilities are Golden Valley Electric Association; Chugach Electric Association; Matanuska Electric Association; Homer Electric Association; Anchorage Municipal Light & Power; and the City of Seward Electric System.

* * * * *

Backup power for renewable energy means an engine that provides backup power to a facility that generates electricity from renewable energy resources, as that term is defined in Alaska Statute 42.45.045(l)(5) (incorporated by reference, see § 63.14).

* * * * *

Emergency stationary RICE means any stationary reciprocating internal combustion engine that meets all of the criteria in paragraphs (1) through (3) of this definition. All emergency stationary RICE must comply with the requirements specified in § 63.6640(f) in order to be considered emergency stationary RICE. If the engine does not comply with the requirements specified in § 63.6640(f), then it is not considered to be an emergency stationary RICE under this subpart.

(1) The stationary RICE is operated to provide electrical power or mechanical work during an emergency situation. Examples include stationary RICE used to produce power for critical networks or equipment (including power supplied to portions of a facility) when electric power from the local utility (or the normal power source, if the facility runs on its own power production) is interrupted, or stationary RICE used to pump water in the case of fire or flood, etc.

(2) The stationary RICE is operated under limited circumstances for situations not included in paragraph (1) of this definition, as specified in § 63.6640(f).

(3) The stationary RICE operates as part of a financial arrangement with another entity in situations not included in paragraph (1) of this definition only as allowed in § 63.6640(f)(2)(ii) or (iii) and § 63.6640(f)(4)(i) or (ii).

* * * * *

Remote stationary RICE means stationary RICE meeting any of the following criteria:

(1) Stationary RICE located in an offshore area that is beyond the line of ordinary low water along that portion of the coast of the United States that is in direct contact with the open seas and beyond the line marking the seaward limit of inland waters.

(2) Stationary RICE located on a pipeline segment that meets both of the criteria in paragraphs (2)(i) and (ii) of this definition.

(i) A pipeline segment with 10 or fewer buildings intended for human occupancy and no buildings with four or more stories within 220 yards (200 meters) on either side of the centerline of any continuous 1-mile (1.6 kilometers) length of pipeline. Each separate dwelling unit in a multiple dwelling unit building is counted as a separate building intended for human occupancy.

(ii) The pipeline segment does not lie within 100 yards (91 meters) of either a building or a small, well-defined outside area (such as a playground, recreation area, outdoor theater, or other place of public assembly) that is occupied by 20 or more persons on at least 5 days a week for 10 weeks in any 12-month period. The days and weeks need not be consecutive. The building or area is considered occupied for a full day if it is occupied for any portion of the day.

(iii) For purposes of this paragraph (2), the term pipeline segment means all parts of those physical facilities through which gas moves in transportation, including but not limited to pipe, valves, and other appurtenance attached to pipe, compressor units, metering stations, regulator stations, delivery stations, holders, and fabricated assemblies. Stationary RICE located within 50 yards (46 meters) of the pipeline segment providing power for equipment on a pipeline segment are part of the pipeline segment. Transportation of gas means the gathering, transmission, or distribution of gas by pipeline, or the storage of gas. A building is intended for human occupancy if its primary use is for a purpose involving the presence of humans.

(3) Stationary RICE that are not located on gas pipelines and that have 5 or fewer buildings intended for human occupancy and no buildings with four or more stories within a 0.25 mile radius around the engine. A building is intended for human occupancy if its primary use is for a purpose involving the presence of humans.

* * * * *

■ 29. Table 1b to Subpart ZZZZ of Part 63 is revised to read as follows:

As stated in §§ 63.6600, 63.6603, 63.6630 and 63.6640, you must comply with the following operating limitations for existing, new and reconstructed

4SRB stationary RICE >500 HP located at a major source of HAP emissions:

TABLE 1b TO SUBPART ZZZZ OF PART 63—OPERATING LIMITATIONS FOR EXISTING, NEW, AND RECONSTRUCTED SI 4SRB STATIONARY RICE >500 HP LOCATED AT A MAJOR SOURCE OF HAP EMISSIONS

For each . . .	You must meet the following operating limitation, except during periods of startup . . .
1. existing, new and reconstructed 4SRB stationary RICE >500 HP located at a major source of HAP emissions complying with the requirement to reduce formaldehyde emissions by 76 percent or more (or by 75 percent or more, if applicable) and using NSCR; or existing, new and reconstructed 4SRB stationary RICE >500 HP located at a major source of HAP emissions complying with the requirement to limit the concentration of formaldehyde in the stationary RICE exhaust to 350 ppbvd or less at 15 percent O_2 and using NSCR;	a. maintain your catalyst so that the pressure drop across the catalyst does not change by more than 2 inches of water at 100 percent load plus or minus 10 percent from the pressure drop across the catalyst measured during the initial performance test; and b. maintain the temperature of your stationary RICE exhaust so that the catalyst inlet temperature is greater than or equal to 750 °F and less than or equal to 1250 °F.[1]
2. existing, new and reconstructed 4SRB stationary RICE >500 HP located at a major source of HAP emissions complying with the requirement to reduce formaldehyde emissions by 76 percent or more (or by 75 percent or more, if applicable) and not using NSCR; or existing, new and reconstructed 4SRB stationary RICE >500 HP located at a major source of HAP emissions complying with the requirement to limit the concentration of formaldehyde in the stationary RICE exhaust to 350 ppbvd or less at 15 percent O_2 and not using NSCR.	Comply with any operating limitations approved by the Administrator.

[1] Sources can petition the Administrator pursuant to the requirements of 40 CFR 63.8(f) for a different temperature range.

■ 30. Table 2b to Subpart ZZZZ of Part 63 is revised to read as follows:

As stated in §§ 63.6600, 63.6601, 63.6603, 63.6630, and 63.6640, you must comply with the following operating limitations for new and reconstructed 2SLB and CI stationary RICE >500 HP located at a major source of HAP emissions; new and reconstructed 4SLB stationary RICE ≥250 HP located at a major source of HAP emissions; and existing CI stationary RICE >500 HP:

TABLE 2b TO SUBPART ZZZZ OF PART 63—OPERATING LIMITATIONS FOR NEW AND RECONSTRUCTED 2SLB AND CI STATIONARY RICE >500 HP LOCATED AT A MAJOR SOURCE OF HAP EMISSIONS, NEW AND RECONSTRUCTED 4SLB STATIONARY RICE ≥250 HP LOCATED AT A MAJOR SOURCE OF HAP EMISSIONS, EXISTING CI STATIONARY RICE >500 HP

For each . . .	You must meet the following operating limitation, except during periods of startup . . .
1. New and reconstructed 2SLB and CI stationary RICE >500 HP located at a major source of HAP emissions and new and reconstructed 4SLB stationary RICE ≥250 HP located at a major source of HAP emissions complying with the requirement to reduce CO emissions and using an oxidation catalyst; and New and reconstructed 2SLB and CI stationary RICE >500 HP located at a major source of HAP emissions and new and reconstructed 4SLB stationary RICE ≥250 HP located at a major source of HAP emissions complying with the requirement to limit the concentration of formaldehyde in the stationary RICE exhaust and using an oxidation catalyst.	a. maintain your catalyst so that the pressure drop across the catalyst does not change by more than 2 inches of water at 100 percent load plus or minus 10 percent from the pressure drop across the catalyst that was measured during the initial performance test; and b. maintain the temperature of your stationary RICE exhaust so that the catalyst inlet temperature is greater than or equal to 450 °F and less than or equal to 1350 °F.[1]
2. Existing CI stationary RICE >500 HP complying with the requirement to limit or reduce the concentration of CO in the stationary RICE exhaust and using an oxidation catalyst.	a. maintain your catalyst so that the pressure drop across the catalyst does not change by more than 2 inches of water from the pressure drop across the catalyst that was measured during the initial performance test; and b. maintain the temperature of your stationary RICE exhaust so that the catalyst inlet temperature is greater than or equal to 450 °F and less than or equal to 1350 °F.[1]
3. New and reconstructed 2SLB and CI stationary RICE >500 HP located at a major source of HAP emissions and new and reconstructed 4SLB stationary RICE ≥250 HP located at a major source of HAP emissions complying with the requirement to reduce CO emissions and not using an oxidation catalyst; and New and reconstructed 2SLB and CI stationary RICE >500 HP located at a major source of HAP emissions and new and reconstructed 4SLB stationary RICE ≥250 HP located at a major source of HAP emissions complying with the requirement to limit the concentration of formaldehyde in the stationary RICE exhaust and not using an oxidation catalyst; and	Comply with any operating limitations approved by the Administrator.

TABLE 2b TO SUBPART ZZZZ OF PART 63—OPERATING LIMITATIONS FOR NEW AND RECONSTRUCTED 2SLB AND CI STATIONARY RICE >500 HP LOCATED AT A MAJOR SOURCE OF HAP EMISSIONS, NEW AND RECONSTRUCTED 4SLB STATIONARY RICE ≥250 HP LOCATED AT A MAJOR SOURCE OF HAP EMISSIONS, EXISTING CI STATIONARY RICE >500 HP—Continued

For each . . .	You must meet the following operating limitation, except during periods of startup . . .
existing CI stationary RICE >500 HP complying with the requirement to limit or reduce the concentration of CO in the stationary RICE exhaust and not using an oxidation catalyst.	

[1] Sources can petition the Administrator pursuant to the requirements of 40 CFR 63.8(f) for a different temperature range.

■ 31. Table 2c to Subpart ZZZZ of Part 63 is revised to read as follows:

As stated in §§ 63.6600, 63.6602, and 63.6640, you must comply with the following requirements for existing compression ignition stationary RICE located at a major source of HAP emissions and existing spark ignition stationary RICE ≤500 HP located at a major source of HAP emissions:

TABLE 2c TO SUBPART ZZZZ OF PART 63—REQUIREMENTS FOR EXISTING COMPRESSION IGNITION STATIONARY RICE LOCATED AT A MAJOR SOURCE OF HAP EMISSIONS AND EXISTING SPARK IGNITION STATIONARY RICE >500 HP LOCATED AT A MAJOR SOURCE OF HAP EMISSIONS

For each . . .	You must meet the following requirement, except during periods of startup . . .	During periods of startup you must . . .
1. Emergency stationary CI RICE and black start stationary CI RICE [1].	a. Change oil and filter every 500 hours of operation or annually, whichever comes first.[2] b. Inspect air cleaner every 1,000 hours of operation or annually, whichever comes first, and replace as necessary; c. Inspect all hoses and belts every 500 hours of operation or annually, whichever comes first, and replace as necessary.[3]	Minimize the engine's time spent at idle and minimize the engine's startup time at startup to a period needed for appropriate and safe loading of the engine, not to exceed 30 minutes, after which time the non-startup emission limitations apply.[3]
2. Non-Emergency, non-black start stationary CI RICE <100 HP.	a. Change oil and filter every 1,000 hours of operation or annually, whichever comes first.[2] b. Inspect air cleaner every 1,000 hours of operation or annually, whichever comes first, and replace as necessary; c. Inspect all hoses and belts every 500 hours of operation or annually, whichever comes first, and replace as necessary.[3]	
3. Non-Emergency, non-black start CI stationary RICE 100≤HP≤300 HP.	Limit concentration of CO in the stationary RICE exhaust to 230 ppmvd or less at 15 percent O_2.	
4. Non-Emergency, non-black start CI stationary RICE 300>HP≤500.	a. Limit concentration of CO in the stationary RICE exhaust to 49 ppmvd or less at 15 percent O_2; or b. Reduce CO emissions by 70 percent or more.	
5. Non-Emergency, non-black start stationary CI RICE >500 HP.	a. Limit concentration of CO in the stationary RICE exhaust to 23 ppmvd or less at 15 percent O_2; or b. Reduce CO emissions by 70 percent or more.	
6. Emergency stationary SI RICE and black start stationary SI RICE.[1]	a. Change oil and filter every 500 hours of operation or annually, whichever comes first;[2] b. Inspect spark plugs every 1,000 hours of operation or annually, whichever comes first, and replace as necessary; c. Inspect all hoses and belts every 500 hours of operation or annually, whichever comes first, and replace as necessary.[3]	
7. Non-Emergency, non-black start stationary SI RICE <100 HP that are not 2SLB stationary RICE.	a. Change oil and filter every 1,440 hours of operation or annually, whichever comes first;[2] b. Inspect spark plugs every 1,440 hours of operation or annually, whichever comes first, and replace as necessary; c. Inspect all hoses and belts every 1,440 hours of operation or annually, whichever comes first, and replace as necessary.[3]	

TABLE 2c TO SUBPART ZZZZ OF PART 63—REQUIREMENTS FOR EXISTING COMPRESSION IGNITION STATIONARY RICE LOCATED AT A MAJOR SOURCE OF HAP EMISSIONS AND EXISTING SPARK IGNITION STATIONARY RICE >500 HP LOCATED AT A MAJOR SOURCE OF HAP EMISSIONS—Continued

For each . . .	You must meet the following requirement, except during periods of startup . . .	During periods of startup you must . . .
8. Non-Emergency, non-black start 2SLB stationary SI RICE <100 HP.	a. Change oil and filter every 4,320 hours of operation or annually, whichever comes first;[2] b. Inspect spark plugs every 4,320 hours of operation or annually, whichever comes first, and replace as necessary; c. Inspect all hoses and belts every 4,320 hours of operation or annually, whichever comes first, and replace as necessary.[3]	
9. Non-emergency, non-black start 2SLB stationary RICE 100≤HP≤500.	Limit concentration of CO in the stationary RICE exhaust to 225 ppmvd or less at 15 percent O_2.	
10. Non-emergency, non-black start 4SLB stationary RICE 100≤HP≤500.	Limit concentration of CO in the stationary RICE exhaust to 47 ppmvd or less at 15 percent O_2.	
11. Non-emergency, non-black start 4SRB stationary RICE 100≤HP≤500.	Limit concentration of formaldehyde in the stationary RICE exhaust to 10.3 ppmvd or less at 15 percent O_2.	
12. Non-emergency, non-black start stationary RICE 100≤HP≤500 which combusts landfill or digester gas equivalent to 10 percent or more of the gross heat input on an annual basis.	Limit concentration of CO in the stationary RICE exhaust to 177 ppmvd or less at 15 percent O_2.	

[1] If an emergency engine is operating during an emergency and it is not possible to shut down the engine in order to perform the work practice requirements on the schedule required in Table 2c of this subpart, or if performing the work practice on the required schedule would otherwise pose an unacceptable risk under federal, state, or local law, the work practice can be delayed until the emergency is over or the unacceptable risk under federal, state, or local law has abated. The work practice should be performed as soon as practicable after the emergency has ended or the unacceptable risk under federal, state, or local law has abated. Sources must report any failure to perform the work practice on the schedule required and the federal, state or local law under which the risk was deemed unacceptable.

[2] Sources have the option to utilize an oil analysis program as described in § 63.6625(i) or (j) in order to extend the specified oil change requirement in Table 2c of this subpart.

[3] Sources can petition the Administrator pursuant to the requirements of 40 CFR 63.6(g) for alternative work practices.

■ 32. Table 2d to Subpart ZZZZ of Part 63 is revised to read as follows:

As stated in §§ 63.6603 and 63.6640, you must comply with the following requirements for existing stationary RICE located at area sources of HAP emissions:

TABLE 2d TO SUBPART ZZZZ OF PART 63—REQUIREMENTS FOR EXISTING STATIONARY RICE LOCATED AT AREA SOURCES OF HAP EMISSIONS

For each . . .	You must meet the following requirement, except during periods of startup . . .	During periods of startup you must . . .
1. Non-Emergency, non-black start CI stationary RICE ≤300 HP.	a. Change oil and filter every 1,000 hours of operation or annually, whichever comes first;[1] b. Inspect air cleaner every 1,000 hours of operation or annually, whichever comes first, and replace as necessary; c. Inspect all hoses and belts every 500 hours of operation or annually, whichever comes first, and replace as necessary.	Minimize the engine's time spent at idle and minimize the engine's startup time at startup to a period needed for appropriate and safe loading of the engine, not to exceed 30 minutes, after which time the non-startup emission limitations apply.
2. Non-Emergency, non-black start CI stationary RICE 300<HP≤500.	a. Limit concentration of CO in the stationary RICE exhaust to 49 ppmvd at 15 percent O_2; or b. Reduce CO emissions by 70 percent or more.	
3. Non-Emergency, non-black start CI stationary RICE >500 HP.	a. Limit concentration of CO in the stationary RICE exhaust to 23 ppmvd at 15 percent O_2; or b. Reduce CO emissions by 70 percent or more.	
4. Emergency stationary CI RICE and black start stationary CI RICE.[2]	a. Change oil and filter every 500 hours of operation or annually, whichever comes first;[1] b. Inspect air cleaner every 1,000 hours of operation or annually, whichever comes first, and replace as necessary; and	

TABLE 2d TO SUBPART ZZZZ OF PART 63—REQUIREMENTS FOR EXISTING STATIONARY RICE LOCATED AT AREA SOURCES OF HAP EMISSIONS—Continued

For each . . .	You must meet the following requirement, except during periods of startup . . .	During periods of startup you must . . .
	c. Inspect all hoses and belts every 500 hours of operation or annually, whichever comes first, and replace as necessary.	
5. Emergency stationary SI RICE; black start stationary SI RICE; non-emergency, non-black start 4SLB stationary RICE >500 HP that operate 24 hours or less per calendar year; non-emergency, non-black start 4SRB stationary RICE >500 HP that operate 24 hours or less per calendar year.[2]	a. Change oil and filter every 500 hours of operation or annually, whichever comes first;[1]; b. Inspect spark plugs every 1,000 hours of operation or annually, whichever comes first, and replace as necessary; and c. Inspect all hoses and belts every 500 hours of operation or annually, whichever comes first, and replace as necessary.	
6. Non-emergency, non-black start 2SLB stationary RICE.	a. Change oil and filter every 4,320 hours of operation or annually, whichever comes first;[1] b. Inspect spark plugs every 4,320 hours of operation or annually, whichever comes first, and replace as necessary; and c. Inspect all hoses and belts every 4,320 hours of operation or annually, whichever comes first, and replace as necessary.	
7. Non-emergency, non-black start 4SLB stationary RICE ≤500 HP.	a. Change oil and filter every 1,440 hours of operation or annually, whichever comes first;[1] b. Inspect spark plugs every 1,440 hours of operation or annually, whichever comes first, and replace as necessary; and c. Inspect all hoses and belts every 1,440 hours of operation or annually, whichever comes first, and replace as necessary.	
8. Non-emergency, non-black start 4SLB remote stationary RICE >500 HP.	a. Change oil and filter every 2,160 hours of operation or annually, whichever comes first;[1] b. Inspect spark plugs every 2,160 hours of operation or annually, whichever comes first, and replace as necessary; and c. Inspect all hoses and belts every 2,160 hours of operation or annually, whichever comes first, and replace as necessary.	
9. Non-emergency, non-black start 4SLB stationary RICE >500 HP that are not remote stationary RICE and that operate more than 24 hours per calendar year.	Install an oxidation catalyst to reduce HAP emissions from the stationary RICE.	
10. Non-emergency, non-black start 4SRB stationary RICE ≤500 HP.	a. Change oil and filter every 1,440 hours of operation or annually, whichever comes first;[1] b. Inspect spark plugs every 1,440 hours of operation or annually, whichever comes first, and replace as necessary; and c. Inspect all hoses and belts every 1,440 hours of operation or annually, whichever comes first, and replace as necessary.	
11. Non-emergency, non-black start 4SRB remote stationary RICE >500 HP.	a. Change oil and filter every 2,160 hours of operation or annually, whichever comes first;[1] b. Inspect spark plugs every 2,160 hours of operation or annually, whichever comes first, and replace as necessary; and c. Inspect all hoses and belts every 2,160 hours of operation or annually, whichever comes first, and replace as necessary.	
12. Non-emergency, non-black start 4SRB stationary RICE >500 HP that are not remote stationary RICE and that operate more than 24 hours per calendar year.	Install NSCR to reduce HAP emissions from the stationary RICE.	

TABLE 2d TO SUBPART ZZZZ OF PART 63—REQUIREMENTS FOR EXISTING STATIONARY RICE LOCATED AT AREA SOURCES OF HAP EMISSIONS—Continued

For each . . .	You must meet the following requirement, except during periods of startup . . .	During periods of startup you must . . .
13. Non-emergency, non-black start stationary RICE which combusts landfill or digester gas equivalent to 10 percent or more of the gross heat input on an annual basis.	a. Change oil and filter every 1,440 hours of operation or annually, whichever comes first;[1] b. Inspect spark plugs every 1,440 hours of operation or annually, whichever comes first, and replace as necessary; and c. Inspect all hoses and belts every 1,440 hours of operation or annually, whichever comes first, and replace as necessary.	

[1] Sources have the option to utilize an oil analysis program as described in § 63.6625(i) or (j) in order to extend the specified oil change requirement in Table 2d of this subpart.

[2] If an emergency engine is operating during an emergency and it is not possible to shut down the engine in order to perform the management practice requirements on the schedule required in Table 2d of this subpart, or if performing the management practice on the required schedule would otherwise pose an unacceptable risk under federal, state, or local law, the management practice can be delayed until the emergency is over or the unacceptable risk under federal, state, or local law has abated. The management practice should be performed as soon as practicable after the emergency has ended or the unacceptable risk under federal, state, or local law has abated. Sources must report any failure to perform the management practice on the schedule required and the federal, state or local law under which the risk was deemed unacceptable.

■ 33. Table 3 to Subpart ZZZZ of Part 63 is revised to read as follows:

As stated in §§ 63.6615 and 63.6620, you must comply with the following subsequent performance test requirements:

TABLE 3 TO SUBPART ZZZZ OF PART 63—SUBSEQUENT PERFORMANCE TESTS

For each . . .	Complying with the requirement to . . .	You must . . .
1. New or reconstructed 2SLB stationary RICE >500 HP located at major sources; new or reconstructed 4SLB stationary RICE ≥250 HP located at major sources; and new or reconstructed CI stationary RICE >500 HP located at major sources.	Reduce CO emissions and not using a CEMS	Conduct subsequent performance tests semiannually.[1]
2. 4SRB stationary RICE ≥5,000 HP located at major sources.	Reduce formaldehyde emissions	Conduct subsequent performance tests semiannually.[1]
3. Stationary RICE >500 HP located at major sources and new or reconstructed 4SLB stationary RICE 250≤HP≤500 located at major sources.	Limit the concentration of formaldehyde in the stationary RICE exhaust.	Conduct subsequent performance tests semiannually.[1]
4. Existing non-emergency, non-black start CI stationary RICE >500 HP that are not limited use stationary RICE.	Limit or reduce CO emissions and not using a CEMS.	Conduct subsequent performance tests every 8,760 hours or 3 years, whichever comes first.
5. Existing non-emergency, non-black start CI stationary RICE >500 HP that are limited use stationary RICE.	Limit or reduce CO emissions and not using a CEMS.	Conduct subsequent performance tests every 8,760 hours or 5 years, whichever comes first.

[1] After you have demonstrated compliance for two consecutive tests, you may reduce the frequency of subsequent performance tests to annually. If the results of any subsequent annual performance test indicate the stationary RICE is not in compliance with the CO or formaldehyde emission limitation, or you deviate from any of your operating limitations, you must resume semiannual performance tests.

■ 34. Table 4 to Subpart ZZZZ of Part 63 is revised to read as follows:

As stated in §§ 63.6610, 63.6611, 63.6612, 63.6620, and 63.6640, you must comply with the following requirements for performance tests for stationary RICE:

TABLE 4 TO SUBPART ZZZZ OF PART 63. REQUIREMENTS FOR PERFORMANCE TESTS

For each . . .	Complying with the requirement to . . .	You must . . .	Using . . .	According to the following requirements . . .
1. 2SLB, 4SLB, and CI stationary RICE.	a. reduce CO emissions.	i. Measure the O_2 at the inlet and outlet of the control device; and	(1) Method 3 or 3A or 3B of 40 CFR part 60, appendix A, or ASTM Method D6522–00 (Reapproved 2005).[a c]	(a) Measurements to determine O_2 must be made at the same time as the measurements for CO concentration.
		ii. Measure the CO at the inlet and the outlet of the control device.	(1) ASTM D6522–00 (Reapproved 2005)[a b c] or Method 10 of 40 CFR part 60, appendix A.	(a) The CO concentration must be at 15 percent O_2, dry basis.

TABLE 4 TO SUBPART ZZZZ OF PART 63. REQUIREMENTS FOR PERFORMANCE TESTS—Continued

For each . . .	Complying with the requirement to . . .	You must . . .	Using . . .	According to the following requirements . . .
2. 4SRB stationary RICE.	a. reduce formaldehyde emissions.	i. Select the sampling port location and the number of traverse points; and	(1) Method 1 or 1A of 40 CFR part 60, appendix A §63.7(d)(1)(i).	(a) sampling sites must be located at the inlet and outlet of the control device.
		ii. Measure O_2 at the inlet and outlet of the control device; and	(1) Method 3 or 3A or 3B of 40 CFR part 60, appendix A, or ASTM Method D6522–00 (Reapproved 2005).[a]	(a) measurements to determine O_2 concentration must be made at the same time as the measurements for formaldehyde or THC concentration.
		iii. Measure moisture content at the inlet and outlet of the control device; and	(1) Method 4 of 40 CFR part 60, appendix A, or Test Method 320 of 40 CFR part 63, appendix A, or ASTM D 6348–03.[a]	(a) measurements to determine moisture content must be made at the same time and location as the measurements for formaldehyde or THC concentration.
		iv. If demonstrating compliance with the formaldehyde percent reduction requirement, measure formaldehyde at the inlet and the outlet of the control device.	(1) Method 320 or 323 of 40 CFR part 63, appendix A; or ASTM D6348–03,[a] provided in ASTM D6348–03 Annex A5 (Analyte Spiking Technique), the percent R must be greater than or equal to 70 and less than or equal to 130.	(a) formaldehyde concentration must be at 15 percent O_2, dry basis. Results of this test consist of the average of the three 1-hour or longer runs.
		v. If demonstrating compliance with the THC percent reduction requirement, measure THC at the inlet and the outlet of the control device.	(1) Method 25A, reported as propane, of 40 CFR part 60, appendix A.	(a) THC concentration must be at 15 percent O_2, dry basis. Results of this test consist of the average of the three 1-hour or longer runs.
3. Stationary RICE.	a. limit the concentration of formaldehyde or CO in the stationary RICE exhaust.	i. Select the sampling port location and the number of traverse points; and	(1) Method 1 or 1A of 40 CFR part 60, appendix A §63.7(d)(1)(i).	(a) if using a control device, the sampling site must be located at the outlet of the control device.
		ii. Determine the O_2 concentration of the stationary RICE exhaust at the sampling port location; and	(1) Method 3 or 3A or 3B of 40 CFR part 60, appendix A, or ASTM Method D6522–00 (Reapproved 2005).[a]	(a) measurements to determine O_2 concentration must be made at the same time and location as the measurements for formaldehyde or CO concentration.
		iii. Measure moisture content of the stationary RICE exhaust at the sampling port location; and	(1) Method 4 of 40 CFR part 60, appendix A, or Test Method 320 of 40 CFR part 63, appendix A, or ASTM D 6348–03.[a]	(a) measurements to determine moisture content must be made at the same time and location as the measurements for formaldehyde or CO concentration.
		iv. Measure formaldehyde at the exhaust of the stationary RICE; or	(1) Method 320 or 323 of 40 CFR part 63, appendix A; or ASTM D6348–03,[a] provided in ASTM D6348–03 Annex A5 (Analyte Spiking Technique), the percent R must be greater than or equal to 70 and less than or equal to 130.	(a) Formaldehyde concentration must be at 15 percent O_2, dry basis. Results of this test consist of the average of the three 1-hour or longer runs.
		v. measure CO at the exhaust of the stationary RICE.	(1) Method 10 of 40 CFR part 60, appendix A, ASTM Method D6522–00 (2005),[a c] Method 320 of 40 CFR part 63, appendix A, or ASTM D6348–03.[a]	(a) CO concentration must be at 15 percent O_2, dry basis. Results of this test consist of the average of the three 1-hour or longer runs.

[a] Incorporated by reference, see 40 CFR 63.14. You may also obtain copies from University Microfilms International, 300 North Zeeb Road, Ann Arbor, MI 48106.
[b] You may also use Method 320 of 40 CFR part 63, appendix A, or ASTM D6348–03.
[c] ASTM–D6522–00 (2005) may be used to test both CI and SI stationary RICE.

■ 35. Table 5 to Subpart ZZZZ of Part 63 is revised to read as follows:

As stated in §§ 63.6612, 63.6625 and 63.6630, you must initially comply with the emission and operating limitations as required by the following:

TABLE 5 TO SUBPART ZZZZ OF PART 63—INITIAL COMPLIANCE WITH EMISSION LIMITATIONS, OPERATING LIMITATIONS, AND OTHER REQUIREMENTS

For each . . .	Complying with the requirement to . . .	You have demonstrated initial compliance if . . .
1. New or reconstructed non-emergency 2SLB stationary RICE >500 HP located at a major source of HAP, new or reconstructed non-emergency 4SLB stationary RICE ≥250 HP located at a major source of HAP, non-emergency stationary CI RICE >500 HP located at a major source of HAP, and existing non-emergency stationary CI RICE >500 HP located at an area source of HAP.	a. Reduce CO emissions and using oxidation catalyst, and using a CPMS.	i. The average reduction of emissions of CO determined from the initial performance test achieves the required CO percent reduction; and ii. You have installed a CPMS to continuously monitor catalyst inlet temperature according to the requirements in § 63.6625(b); and iii. You have recorded the catalyst pressure drop and catalyst inlet temperature during the initial performance test.
2. Non-emergency stationary CI RICE >500 HP located at a major source of HAP, and existing non-emergency stationary CI RICE >500 HP located at an area source of HAP.	a. Limit the concentration of CO, using oxidation catalyst, and using a CPMS.	i. The average CO concentration determined from the initial performance test is less than or equal to the CO emission limitation; and ii. You have installed a CPMS to continuously monitor catalyst inlet temperature according to the requirements in § 63.6625(b); and iii. You have recorded the catalyst pressure drop and catalyst inlet temperature during the initial performance test.
3. New or reconstructed non-emergency 2SLB stationary RICE >500 HP located at a major source of HAP, new or reconstructed non-emergency 4SLB stationary RICE ≥250 HP located at a major source of HAP, non-emergency stationary CI RICE >500 HP located at a major source of HAP, and existing non-emergency stationary CI RICE >500 HP located at an area source of HAP.	a. Reduce CO emissions and not using oxidation catalyst.	i. The average reduction of emissions of CO determined from the initial performance test achieves the required CO percent reduction; and ii. You have installed a CPMS to continuously monitor operating parameters approved by the Administrator (if any) according to the requirements in § 63.6625(b); and iii. You have recorded the approved operating parameters (if any) during the initial performance test.
4. Non-emergency stationary CI RICE >500 HP located at a major source of HAP, and existing non-emergency stationary CI RICE >500 HP located at an area source of HAP.	a. Limit the concentration of CO, and not using oxidation catalyst.	i. The average CO concentration determined from the initial performance test is less than or equal to the CO emission limitation; and ii. You have installed a CPMS to continuously monitor operating parameters approved by the Administrator (if any) according to the requirements in § 63.6625(b); and iii. You have recorded the approved operating parameters (if any) during the initial performance test.
5. New or reconstructed non-emergency 2SLB stationary RICE >500 HP located at a major source of HAP, new or reconstructed non-emergency 4SLB stationary RICE ≥250 HP located at a major source of HAP, non-emergency stationary CI RICE >500 HP located at a major source of HAP, and existing non-emergency stationary CI RICE >500 HP located at an area source of HAP.	a. Reduce CO emissions, and using a CEMS	i. You have installed a CEMS to continuously monitor CO and either O_2 or CO_2 at both the inlet and outlet of the oxidation catalyst according to the requirements in § 63.6625(a); and ii. You have conducted a performance evaluation of your CEMS using PS 3 and 4A of 40 CFR part 60, appendix B; and iii. The average reduction of CO calculated using § 63.6620 equals or exceeds the required percent reduction. The initial test comprises the first 4-hour period after successful validation of the CEMS. Compliance is based on the average percent reduction achieved during the 4-hour period.
6. Non-emergency stationary CI RICE >500 HP located at a major source of HAP, and existing non-emergency stationary CI RICE >500 HP located at an area source of HAP.	a. Limit the concentration of CO, and using a CEMS.	i. You have installed a CEMS to continuously monitor CO and either O_2 or CO_2 at the outlet of the oxidation catalyst according to the requirements in § 63.6625(a); and ii. You have conducted a performance evaluation of your CEMS using PS 3 and 4A of 40 CFR part 60, appendix B; and

TABLE 5 TO SUBPART ZZZZ OF PART 63—INITIAL COMPLIANCE WITH EMISSION LIMITATIONS, OPERATING LIMITATIONS, AND OTHER REQUIREMENTS—Continued

For each . . .	Complying with the requirement to . . .	You have demonstrated initial compliance if . . .
		iii. The average concentration of CO calculated using § 63.6620 is less than or equal to the CO emission limitation. The initial test comprises the first 4-hour period after successful validation of the CEMS. Compliance is based on the average concentration measured during the 4-hour period.
7. Non-emergency 4SRB stationary RICE >500 HP located at a major source of HAP.	a. Reduce formaldehyde emissions and using NSCR.	i. The average reduction of emissions of formaldehyde determined from the initial performance test is equal to or greater than the required formaldehyde percent reduction, or the average reduction of emissions of THC determined from the initial performance test is equal to or greater than 30 percent; and ii. You have installed a CPMS to continuously monitor catalyst inlet temperature according to the requirements in § 63.6625(b); and iii. You have recorded the catalyst pressure drop and catalyst inlet temperature during the initial performance test.
8. Non-emergency 4SRB stationary RICE >500 HP located at a major source of HAP.	a. Reduce formaldehyde emissions and not using NSCR.	i. The average reduction of emissions of formaldehyde determined from the initial performance test is equal to or greater than the required formaldehyde percent reduction or the average reduction of emissions of THC determined from the initial performance test is equal to or greater than 30 percent; and ii. You have installed a CPMS to continuously monitor operating parameters approved by the Administrator (if any) according to the requirements in § 63.6625(b); and iii. You have recorded the approved operating parameters (if any) during the initial performance test.
9. New or reconstructed non-emergency stationary RICE >500 HP located at a major source of HAP, new or reconstructed non-emergency 4SLB stationary RICE 250≤HP≤500 located at a major source of HAP, and existing non-emergency 4SRB stationary RICE >500 HP located at a major source of HAP.	a. Limit the concentration of formaldehyde in the stationary RICE exhaust and using oxidation catalyst or NSCR.	i. The average formaldehyde concentration, corrected to 15 percent O_2, dry basis, from the three test runs is less than or equal to the formaldehyde emission limitation; and ii. You have installed a CPMS to continuously monitor catalyst inlet temperature according to the requirements in § 63.6625(b); and iii. You have recorded the catalyst pressure drop and catalyst inlet temperature during the initial performance test.
10. New or reconstructed non-emergency stationary RICE >500 HP located at a major source of HAP, new or reconstructed non-emergency 4SLB stationary RICE 250≤HP≤500 located at a major source of HAP, and existing non-emergency 4SRB stationary RICE >500 HP located at a major source of HAP.	a. Limit the concentration of formaldehyde in the stationary RICE exhaust and not using oxidation catalyst or NSCR.	i. The average formaldehyde concentration, corrected to 15 percent O_2, dry basis, from the three test runs is less than or equal to the formaldehyde emission limitation; and ii. You have installed a CPMS to continuously monitor operating parameters approved by the Administrator (if any) according to the requirements in § 63.6625(b); and iii. You have recorded the approved operating parameters (if any) during the initial performance test.
11. Existing non-emergency stationary RICE 100≤HP≤500 located at a major source of HAP, and existing non-emergency stationary CI RICE 300<HP≤500 located at an area source of HAP.	a. Reduce CO emissions	i. The average reduction of emissions of CO or formaldehyde, as applicable determined from the initial performance test is equal to or greater than the required CO or formaldehyde, as applicable, percent reduction.

TABLE 5 TO SUBPART ZZZZ OF PART 63—INITIAL COMPLIANCE WITH EMISSION LIMITATIONS, OPERATING LIMITATIONS, AND OTHER REQUIREMENTS—Continued

For each . . .	Complying with the requirement to . . .	You have demonstrated initial compliance if . . .
12. Existing non-emergency stationary RICE 100≤HP≤500 located at a major source of HAP, and existing non-emergency stationary CI RICE 300<HP≤500 located at an area source of HAP.	a. Limit the concentration of formaldehyde or CO in the stationary RICE exhaust.	i. The average formaldehyde or CO concentration, as applicable, corrected to 15 percent O_2, dry basis, from the three test runs is less than or equal to the formaldehyde or CO emission limitation, as applicable.
13. Existing non-emergency 4SLB stationary RICE >500 HP located at an area source of HAP that are not remote stationary RICE and that are operated more than 24 hours per calendar year.	a. Install an oxidation catalyst	i. You have conducted an initial compliance demonstration as specified in § 63.6630(e) to show that the average reduction of emissions of CO is 93 percent or more, or the average CO concentration is less than or equal to 47 ppmvd at 15 percent O_2; ii. You have installed a CPMS to continuously monitor catalyst inlet temperature according to the requirements in § 63.6625(b), or you have installed equipment to automatically shut down the engine if the catalyst inlet temperature exceeds 1350 °F.
14. Existing non-emergency 4SRB stationary RICE >500 HP located at an area source of HAP that are not remote stationary RICE and that are operated more than 24 hours per calendar year.	a. Install NSCR	i. You have conducted an initial compliance demonstration as specified in § 63.6630(e) to show that the average reduction of emissions of CO is 75 percent or more, the average CO concentration is less than or equal to 270 ppmvd at 15 percent O_2, or the average reduction of emissions of THC is 30 percent or more; ii. You have installed a CPMS to continuously monitor catalyst inlet temperature according to the requirements in § 63.6625(b), or you have installed equipment to automatically shut down the engine if the catalyst inlet temperature exceeds 1250 °F.

■ 36. Table 6 to Subpart ZZZZ of Part 63 is revised to read as follows:

As stated in § 63.6640, you must continuously comply with the emissions and operating limitations and work or management practices as required by the following:

TABLE 6 TO SUBPART ZZZZ OF PART 63—CONTINUOUS COMPLIANCE WITH EMISSION LIMITATIONS, AND OTHER REQUIREMENTS

For each . . .	Complying with the requirement to . . .	You must demonstrate continuous compliance by . . .
1. New or reconstructed non-emergency 2SLB stationary RICE >500 HP located at a major source of HAP, new or reconstructed non-emergency 4SLB stationary RICE ≥250 HP located at a major source of HAP, and new or reconstructed non-emergency CI stationary RICE >500 HP located at a major source of HAP.	a. Reduce CO emissions and using an oxidation catalyst, and using a CPMS.	i. Conducting semiannual performance tests for CO to demonstrate that the required CO percent reduction is achieved [a]; and ii. Collecting the catalyst inlet temperature data according to § 63.6625(b); and iii. Reducing these data to 4-hour rolling averages; and iv. Maintaining the 4-hour rolling averages within the operating limitations for the catalyst inlet temperature; and v. Measuring the pressure drop across the catalyst once per month and demonstrating that the pressure drop across the catalyst is within the operating limitation established during the performance test.
2. New or reconstructed non-emergency 2SLB stationary RICE >500 HP located at a major source of HAP, new or reconstructed non-emergency 4SLB stationary RICE ≥250 HP located at a major source of HAP, and new or reconstructed non-emergency CI stationary RICE >500 HP located at a major source of HAP.	a. Reduce CO emissions and not using an oxidation catalyst, and using a CPMS.	i. Conducting semiannual performance tests for CO to demonstrate that the required CO percent reduction is achieved [a]; and ii. Collecting the approved operating parameter (if any) data according to § 63.6625(b); and iii. Reducing these data to 4-hour rolling averages; and

TABLE 6 TO SUBPART ZZZZ OF PART 63—CONTINUOUS COMPLIANCE WITH EMISSION LIMITATIONS, AND OTHER REQUIREMENTS—Continued

For each . . .	Complying with the requirement to . . .	You must demonstrate continuous compliance by . . .
		iv. Maintaining the 4-hour rolling averages within the operating limitations for the operating parameters established during the performance test.
3. New or reconstructed non-emergency 2SLB stationary RICE >500 HP located at a major source of HAP, new or reconstructed non-emergency 4SLB stationary RICE ≥250 HP located at a major source of HAP, new or reconstructed non-emergency stationary CI RICE >500 HP located at a major source of HAP, and existing non-emergency stationary CI RICE >500 HP.	a. Reduce CO emissions or limit the concentration of CO in the stationary RICE exhaust, and using a CEMS.	i. Collecting the monitoring data according to § 63.6625(a), reducing the measurements to 1-hour averages, calculating the percent reduction or concentration of CO emissions according to § 63.6620; and ii. Demonstrating that the catalyst achieves the required percent reduction of CO emissions over the 4-hour averaging period, or that the emission remain at or below the CO concentration limit; and iii. Conducting an annual RATA of your CEMS using PS 3 and 4A of 40 CFR part 60, appendix B, as well as daily and periodic data quality checks in accordance with 40 CFR part 60, appendix F, procedure 1.
4. Non-emergency 4SRB stationary RICE >500 HP located at a major source of HAP.	a. Reduce formaldehyde emissions and using NSCR.	i. Collecting the catalyst inlet temperature data according to § 63.6625(b); and ii. Reducing these data to 4-hour rolling averages; and iii. Maintaining the 4-hour rolling averages within the operating limitations for the catalyst inlet temperature; and iv. Measuring the pressure drop across the catalyst once per month and demonstrating that the pressure drop across the catalyst is within the operating limitation established during the performance test.
5. Non-emergency 4SRB stationary RICE >500 HP located at a major source of HAP.	a. Reduce formaldehyde emissions and not using NSCR.	i. Collecting the approved operating parameter (if any) data according to § 63.6625(b); and ii. Reducing these data to 4-hour rolling averages; and iii. Maintaining the 4-hour rolling averages within the operating limitations for the operating parameters established during the performance test.
6. Non-emergency 4SRB stationary RICE with a brake HP ≥5,000 located at a major source of HAP.	a. Reduce formaldehyde emissions	Conducting semiannual performance tests for formaldehyde to demonstrate that the required formaldehyde percent reduction is achieved, or to demonstrate that the average reduction of emissions of THC determined from the performance test is equal to or greater than 30 percent.[a]
7. New or reconstructed non-emergency stationary RICE >500 HP located at a major source of HAP and new or reconstructed non-emergency 4SLB stationary RICE 250≤HP≤500 located at a major source of HAP.	a. Limit the concentration of formaldehyde in the stationary RICE exhaust and using oxidation catalyst or NSCR.	i. Conducting semiannual performance tests for formaldehyde to demonstrate that your emissions remain at or below the formaldehyde concentration limit[a]; and ii. Collecting the catalyst inlet temperature data according to § 63.6625(b); and iii. Reducing these data to 4-hour rolling averages; and iv. Maintaining the 4-hour rolling averages within the operating limitations for the catalyst inlet temperature; and v. Measuring the pressure drop across the catalyst once per month and demonstrating that the pressure drop across the catalyst is within the operating limitation established during the performance test.

TABLE 6 TO SUBPART ZZZZ OF PART 63—CONTINUOUS COMPLIANCE WITH EMISSION LIMITATIONS, AND OTHER REQUIREMENTS—Continued

For each . . .	Complying with the requirement to . . .	You must demonstrate continuous compliance by . . .
8. New or reconstructed non-emergency stationary RICE >500 HP located at a major source of HAP and new or reconstructed non-emergency 4SLB stationary RICE 250≤HP≤500 located at a major source of HAP.	a. Limit the concentration of formaldehyde in the stationary RICE exhaust and not using oxidation catalyst or NSCR.	i. Conducting semiannual performance tests for formaldehyde to demonstrate that your emissions remain at or below the formaldehyde concentration limit [a]; and ii. Collecting the approved operating parameter (if any) data according to § 63.6625(b); and iii. Reducing these data to 4-hour rolling averages; and iv. Maintaining the 4-hour rolling averages within the operating limitations for the operating parameters established during the performance test.
9. Existing emergency and black start stationary RICE ≤500 HP located at a major source of HAP, existing non-emergency stationary RICE <100 HP located at a major source of HAP, existing emergency and black start stationary RICE located at an area source of HAP, existing non-emergency stationary CI RICE ≤300 HP located at an area source of HAP, existing non-emergency 2SLB stationary RICE located at an area source of HAP, existing non-emergency stationary SI RICE located at an area source of HAP which combusts landfill or digester gas equivalent to 10 percent or more of the gross heat input on an annual basis, existing non-emergency 4SLB and 4SRB stationary RICE ≤500 HP located at an area source of HAP, existing non-emergency 4SLB and 4SRB stationary RICE >500 HP located at an area source of HAP that operate 24 hours or less per calendar year, and existing non-emergency 4SLB and 4SRB stationary RICE >500 HP located at an area source of HAP that are remote stationary RICE.	a. Work or Management practices	i. Operating and maintaining the stationary RICE according to the manufacturer's emission-related operation and maintenance instructions; or ii. Develop and follow your own maintenance plan which must provide to the extent practicable for the maintenance and operation of the engine in a manner consistent with good air pollution control practice for minimizing emissions.
10. Existing stationary CI RICE >500 HP that are not limited use stationary RICE.	a. Reduce CO emissions, or limit the concentration of CO in the stationary RICE exhaust, and using oxidation catalyst.	i. Conducting performance tests every 8,760 hours or 3 years, whichever comes first, for CO or formaldehyde, as appropriate, to demonstrate that the required CO or formaldehyde, as appropriate, percent reduction is achieved or that your emissions remain at or below the CO or formaldehyde concentration limit; and ii. Collecting the catalyst inlet temperature data according to § 63.6625(b); and iii. Reducing these data to 4-hour rolling averages; and iv. Maintaining the 4-hour rolling averages within the operating limitations for the catalyst inlet temperature; and v. Measuring the pressure drop across the catalyst once per month and demonstrating that the pressure drop across the catalyst is within the operating limitation established during the performance test.
11. Existing stationary CI RICE >500 HP that are not limited use stationary RICE.	a. Reduce CO emissions, or limit the concentration of CO in the stationary RICE exhaust, and not using oxidation catalyst.	i. Conducting performance tests every 8,760 hours or 3 years, whichever comes first, for CO or formaldehyde, as appropriate, to demonstrate that the required CO or formaldehyde, as appropriate, percent reduction is achieved or that your emissions remain at or below the CO or formaldehyde concentration limit; and ii. Collecting the approved operating parameter (if any) data according to § 63.6625(b); and

TABLE 6 TO SUBPART ZZZZ OF PART 63—CONTINUOUS COMPLIANCE WITH EMISSION LIMITATIONS, AND OTHER REQUIREMENTS—Continued

For each . . .	Complying with the requirement to . . .	You must demonstrate continuous compliance by . . .
		iii. Reducing these data to 4-hour rolling averages; and iv. Maintaining the 4-hour rolling averages within the operating limitations for the operating parameters established during the performance test.
12. Existing limited use CI stationary RICE >500 HP.	a. Reduce CO emissions or limit the concentration of CO in the stationary RICE exhaust, and using an oxidation catalyst.	i. Conducting performance tests every 8,760 hours or 5 years, whichever comes first, for CO or formaldehyde, as appropriate, to demonstrate that the required CO or formaldehyde, as appropriate, percent reduction is achieved or that your emissions remain at or below the CO or formaldehyde concentration limit; and ii. Collecting the catalyst inlet temperature data according to § 63.6625(b); and iii. Reducing these data to 4-hour rolling averages; and iv. Maintaining the 4-hour rolling averages within the operating limitations for the catalyst inlet temperature; and v. Measuring the pressure drop across the catalyst once per month and demonstrating that the pressure drop across the catalyst is within the operating limitation established during the performance test.
13. Existing limited use CI stationary RICE >500 HP.	a. Reduce CO emissions or limit the concentration of CO in the stationary RICE exhaust, and not using an oxidation catalyst.	i. Conducting performance tests every 8,760 hours or 5 years, whichever comes first, for CO or formaldehyde, as appropriate, to demonstrate that the required CO or formaldehyde, as appropriate, percent reduction is achieved or that your emissions remain at or below the CO or formaldehyde concentration limit; and ii. Collecting the approved operating parameter (if any) data according to § 63.6625(b); and iii. Reducing these data to 4-hour rolling averages; and iv. Maintaining the 4-hour rolling averages within the operating limitations for the operating parameters established during the performance test.
14. Existing non-emergency 4SLB stationary RICE >500 HP located at an area source of HAP that are not remote stationary RICE and that are operated more than 24 hours per calendar year.	a. Install an oxidation catalyst	i. Conducting annual compliance demonstrations as specified in § 63.6640(c) to show that the average reduction of emissions of CO is 93 percent or more, or the average CO concentration is less than or equal to 47 ppmvd at 15 percent O_2; and either ii. Collecting the catalyst inlet temperature data according to § 63.6625(b), reducing these data to 4-hour rolling averages; and maintaining the 4-hour rolling averages within the limitation of greater than 450 °F and less than or equal to 1350 °F for the catalyst inlet temperature; or iii. Immediately shutting down the engine if the catalyst inlet temperature exceeds 1350 °F.

TABLE 6 TO SUBPART ZZZZ OF PART 63—CONTINUOUS COMPLIANCE WITH EMISSION LIMITATIONS, AND OTHER REQUIREMENTS—Continued

For each . . .	Complying with the requirement to . . .	You must demonstrate continuous compliance by . . .
15. Existing non-emergency 4SRB stationary RICE >500 HP located at an area source of HAP that are not remote stationary RICE and that are operated more than 24 hours per calendar year.	a. Install NSCR	i. Conducting annual compliance demonstrations as specified in § 63.6640(c) to show that the average reduction of emissions of CO is 75 percent or more, the average CO concentration is less than or equal to 270 ppmvd at 15 percent O_2, or the average reduction of emissions of THC is 30 percent or more; and either ii. Collecting the catalyst inlet temperature data according to § 63.6625(b), reducing these data to 4-hour rolling averages; and maintaining the 4-hour rolling averages within the limitation of greater than or equal to 750 °F and less than or equal to 1250 °F for the catalyst inlet temperature; or iii. Immediately shutting down the engine if the catalyst inlet temperature exceeds 1250 °F.

[a] After you have demonstrated compliance for two consecutive tests, you may reduce the frequency of subsequent performance tests to annually. If the results of any subsequent annual performance test indicate the stationary RICE is not in compliance with the CO or formaldehyde emission limitation, or you deviate from any of your operating limitations, you must resume semiannual performance tests.

■ 37. Table 7 to Subpart ZZZZ of Part 63 is revised to read as follows:

As stated in § 63.6650, you must comply with the following requirements for reports:

TABLE 7 TO SUBPART ZZZZ OF PART 63—REQUIREMENTS FOR REPORTS

For each . . .	You must submit a . . .	The report must contain . . .	You must submit the report . . .
1. Existing non-emergency, non-black start stationary RICE 100≤HP≤500 located at a major source of HAP; existing non-emergency, non-black start stationary CI RICE >500 HP located at a major source of HAP; existing non-emergency 4SRB stationary RICE >500 HP located at a major source of HAP; existing non-emergency, non-black start stationary CI RICE >300 HP located at an area source of HAP; new or reconstructed non-emergency stationary RICE >500 HP located at a major source of HAP; and new or reconstructed non-emergency 4SLB stationary RICE 250≤HP≤500 located at a major source of HAP.	Compliance report	a. If there are no deviations from any emission limitations or operating limitations that apply to you, a statement that there were no deviations from the emission limitations or operating limitations during the reporting period. If there were no periods during which the CMS, including CEMS and CPMS, was out-of-control, as specified in § 63.8(c)(7), a statement that there were not periods during which the CMS was out-of-control during the reporting period; or	i. Semiannually according to the requirements in § 63.6650(b)(1)–(5) for engines that are not limited use stationary RICE subject to numerical emission limitations; and ii. Annually according to the requirements in § 63.6650(b)(6)–(9) for engines that are limited use stationary RICE subject to numerical emission limitations.
		b. If you had a deviation from any emission limitation or operating limitation during the reporting period, the information in § 63.6650(d). If there were periods during which the CMS, including CEMS and CPMS, was out-of-control, as specified in § 63.8(c)(7), the information in § 63.6650(e); or	i. Semiannually according to the requirements in § 63.6650(b).
		c. If you had a malfunction during the reporting period, the information in § 63.6650(c)(4).	i. Semiannually according to the requirements in § 63.6650(b).

TABLE 7 TO SUBPART ZZZZ OF PART 63—REQUIREMENTS FOR REPORTS—Continued

For each . . .	You must submit a . . .	The report must contain . . .	You must submit the report . . .
2. New or reconstructed non-emergency stationary RICE that combusts landfill gas or digester gas equivalent to 10 percent or more of the gross heat input on an annual basis.	Report	a. The fuel flow rate of each fuel and the heating values that were used in your calculations, and you must demonstrate that the percentage of heat input provided by landfill gas or digester gas, is equivalent to 10 percent or more of the gross heat input on an annual basis; and	i. Annually, according to the requirements in § 63.6650.
		b. The operating limits provided in your federally enforceable permit, and any deviations from these limits; and	i. See item 2.a.i.
		c. Any problems or errors suspected with the meters.	i. See item 2.a.i.
3. Existing non-emergency, non-black start 4SLB and 4SRB stationary RICE >500 HP located at an area source of HAP that are not remote stationary RICE and that operate more than 24 hours per calendar year.	Compliance report	a. The results of the annual compliance demonstration, if conducted during the reporting period.	i. Semiannually according to the requirements in § 63.6650(b)(1)–(5).
4. Emergency stationary RICE that operate or are contractually obligated to be available for more than 15 hours per year for the purposes specified in § 63.6640(f)(2)(ii) and (iii) or that operate for the purposes specified in § 63.6640(f)(4)(ii).	Report	a. The information in § 63.6650(h)(1).	i. annually according to the requirements in § 63.6650(h)(2)–(3).

■ 38. Table 8 to Subpart ZZZZ of Part 63 is amended by:

■ a. Revising the entry for § 63.8(c)(1)(i);

■ b. Revising the entry for § 63.8(c)(1)(iii); and

■ c. Revising the entry for § 63.10(b)(1) to read as follows:

As stated in § 63.6665, you must comply with the following applicable general provisions.

TABLE 8 TO SUBPART ZZZZ OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART ZZZZ

General Provisions Citation	Subject of Citation	Applies to Subpart	Explanation
* * *	* *	* *	* *
§ 63.8(c)(1)(i)	Routine and predictable SSM	No	
* * *	* *	* *	* *
§ 63.8(c)(1)(iii)	Compliance with operation and maintenance requirements.	No	
* * *	* *	* *	* *
§ 63.10(b)(1)	Record retention	Yes	Except that the most recent 2 years of data do not have to be retained on site.
* * *	* *	* *	* *

■ 39. Appendix A to Subpart ZZZZ of Part 63 is added to read as follows:

Appendix A—Protocol for Using an Electrochemical Analyzer to Determine Oxygen and Carbon Monoxide Concentrations From Certain Engines

1.0 Scope and Application. What is this Protocol?

This protocol is a procedure for using portable electrochemical (EC) cells for measuring carbon monoxide (CO) and oxygen (O_2) concentrations in controlled and uncontrolled emissions from existing stationary 4-stroke lean burn and 4-stroke rich burn reciprocating internal combustion engines as specified in the applicable rule.

1.1 Analytes. What does this protocol determine?

This protocol measures the engine exhaust gas concentrations of carbon monoxide (CO) and oxygen (O_2).

Analyte	CAS No.	Sensitivity
Carbon monoxide (CO)	630–08–0	Minimum detectable limit should be 2 percent of the nominal range or 1 ppm, whichever is less restrictive.
Oxygen (O_2)	*7782–44–7*	

1.2 Applicability. When is this protocol acceptable?

This protocol is applicable to 40 CFR part 63, subpart ZZZZ. Because of inherent cross sensitivities of EC cells, you must not apply this protocol to other emissions sources without specific instruction to that effect.

1.3 Data Quality Objectives. How good must my collected data be?

Refer to Section 13 to verify and document acceptable analyzer performance.

1.4 Range. What is the targeted analytical range for this protocol?

The measurement system and EC cell design(s) conforming to this protocol will determine the analytical range for each gas component. The nominal ranges are defined by choosing up-scale calibration gas concentrations near the maximum anticipated flue gas concentrations for CO and O_2, or no more than twice the permitted CO level.

1.5 Sensitivity. What minimum detectable limit will this protocol yield for a particular gas component?

The minimum detectable limit depends on the nominal range and resolution of the specific EC cell used, and the signal to noise ratio of the measurement system. The minimum detectable limit should be 2 percent of the nominal range or 1 ppm, whichever is less restrictive.

2.0 Summary of Protocol

In this protocol, a gas sample is extracted from an engine exhaust system and then conveyed to a portable EC analyzer for measurement of CO and O_2 gas concentrations. This method provides measurement system performance specifications and sampling protocols to ensure reliable data. You may use additions to, or modifications of vendor supplied measurement systems (e.g., heated or unheated sample lines, thermocouples, flow meters, selective gas scrubbers, etc.) to meet the design specifications of this protocol. Do not make changes to the measurement system from the as-verified configuration (Section 3.12).

3.0 Definitions

3.1 Measurement System. The total equipment required for the measurement of CO and O_2 concentrations. The measurement system consists of the following major subsystems:

3.1.1 Data Recorder. A strip chart recorder, computer or digital recorder for logging measurement data from the analyzer output. You may record measurement data from the digital data display manually or electronically.

3.1.2 Electrochemical (EC) Cell. A device, similar to a fuel cell, used to sense the presence of a specific analyte and generate an electrical current output proportional to the analyte concentration.

3.1.3 Interference Gas Scrubber. A device used to remove or neutralize chemical compounds that may interfere with the selective operation of an EC cell.

3.1.4 Moisture Removal System. Any device used to reduce the concentration of moisture in the sample stream so as to protect the EC cells from the damaging effects of condensation and to minimize errors in measurements caused by the scrubbing of soluble gases.

3.1.5 Sample Interface. The portion of the system used for one or more of the following: sample acquisition; sample transport; sample conditioning or protection of the EC cell from any degrading effects of the engine exhaust effluent; removal of particulate matter and condensed moisture.

3.2 Nominal Range. The range of analyte concentrations over which each EC cell is operated (normally 25 percent to 150 percent of up-scale calibration gas value). Several nominal ranges can be used for any given cell so long as the calibration and repeatability checks for that range remain within specifications.

3.3 Calibration Gas. A vendor certified concentration of a specific analyte in an appropriate balance gas.

3.4 Zero Calibration Error. The analyte concentration output exhibited by the EC cell in response to zero-level calibration gas.

3.5 Up-Scale Calibration Error. The mean of the difference between the analyte concentration exhibited by the EC cell and the certified concentration of the up-scale calibration gas.

3.6 Interference Check. A procedure for quantifying analytical interference from components in the engine exhaust gas other than the targeted analytes.

3.7 Repeatability Check. A protocol for demonstrating that an EC cell operated over a given nominal analyte concentration range provides a stable and consistent response and is not significantly affected by repeated exposure to that gas.

3.8 Sample Flow Rate. The flow rate of the gas sample as it passes through the EC cell. In some situations, EC cells can experience drift with changes in flow rate. The flow rate must be monitored and documented during all phases of a sampling run.

3.9 Sampling Run. A timed three-phase event whereby an EC cell's response rises and plateaus in a sample conditioning phase, remains relatively constant during a measurement data phase, then declines during a refresh phase. The sample conditioning phase exposes the EC cell to the gas sample for a length of time sufficient to reach a constant response. The measurement data phase is the time interval during which gas sample measurements can be made that meet the acceptance criteria of this protocol. The refresh phase then purges the EC cells with CO-free air. The refresh phase replenishes requisite O_2 and moisture in the electrolyte reserve and provides a mechanism to de-gas or desorb any interference gas scrubbers or filters so as to enable a stable CO EC cell response. There are four primary types of sampling runs: pre- sampling calibrations; stack gas sampling; post-sampling calibration checks; and measurement system repeatability checks. Stack gas sampling runs can be chained together for extended evaluations, providing all other procedural specifications are met.

3.10 Sampling Day. A time not to exceed twelve hours from the time of the pre-sampling calibration to the post-sampling calibration check. During this time, stack gas sampling runs can be repeated without repeated recalibrations, providing all other sampling specifications have been met.

3.11 Pre-Sampling Calibration/Post-Sampling Calibration Check. The protocols executed at the beginning and end of each sampling day to bracket measurement readings with controlled performance checks.

3.12 Performance-Established Configuration. The EC cell and sampling system configuration that existed at the time that it initially met the performance requirements of this protocol.

4.0 Interferences.

When present in sufficient concentrations, NO and NO_2 are two gas species that have been reported to interfere with CO concentration measurements. In the likelihood of this occurrence, it is the protocol user's responsibility to employ and properly maintain an appropriate CO EC cell filter or scrubber for removal of these gases, as described in Section 6.2.12.

5.0 Safety. [Reserved]

6.0 Equipment and Supplies.

6.1 What equipment do I need for the measurement system?

The system must maintain the gas sample at conditions that will prevent moisture condensation in the sample transport lines, both before and as the sample gas contacts the EC cells. The essential components of the measurement system are described below.

6.2 Measurement System Components.

6.2.1 Sample Probe. A single extraction-point probe constructed of glass, stainless steel or other non-reactive material, and of length sufficient to reach any designated sampling point. The sample probe must be designed to prevent plugging due to condensation or particulate matter.

6.2.2 Sample Line. Non-reactive tubing to transport the effluent from the sample probe to the EC cell.

6.2.3 Calibration Assembly (optional). A three-way valve assembly or equivalent to introduce calibration gases at ambient pressure at the exit end of the sample probe during calibration checks. The assembly must be designed such that only stack gas or calibration gas flows in the sample line and all gases flow through any gas path filters.

6.2.4 Particulate Filter (optional). Filters before the inlet of the EC cell to prevent accumulation of particulate material in the measurement system and extend the useful life of the components. All filters must be fabricated of materials that are non-reactive to the gas mixtures being sampled.

6.2.5 Sample Pump. A leak-free pump to provide undiluted sample gas to the system at a flow rate sufficient to minimize the response time of the measurement system. If located upstream of the EC cells, the pump must be constructed of a material that is non-reactive to the gas mixtures being sampled.

6.2.8 Sample Flow Rate Monitoring. An adjustable rotameter or equivalent device used to adjust and maintain the sample flow rate through the analyzer as prescribed.

6.2.9 Sample Gas Manifold (optional). A manifold to divert a portion of the sample gas stream to the analyzer and the remainder to a by-pass discharge vent. The sample gas manifold may also include provisions for introducing calibration gases directly to the analyzer. The manifold must be constructed of a material that is non-reactive to the gas mixtures being sampled.

6.2.10 EC cell. A device containing one or more EC cells to determine the CO and O_2 concentrations in the sample gas stream. The EC cell(s) must meet the applicable performance specifications of Section 13 of this protocol.

6.2.11 Data Recorder. A strip chart recorder, computer or digital recorder to make a record of analyzer output data. The data recorder resolution (i.e., readability) must be no greater than 1 ppm for CO; 0.1 percent for O_2; and one degree (either °C or °F) for temperature. Alternatively, you may use a digital or analog meter having the same resolution to observe and manually record the analyzer responses.

6.2.12 Interference Gas Filter or Scrubber. A device to remove interfering compounds upstream of the CO EC cell. Specific interference gas filters or scrubbers used in the performance-established configuration of the analyzer must continue to be used. Such a filter or scrubber must have a means to determine when the removal agent is exhausted. Periodically replace or replenish it in accordance with the manufacturer's recommendations.

7.0 Reagents and Standards. What calibration gases are needed?

7.1 Calibration Gases. CO calibration gases for the EC cell must be CO in nitrogen or CO in a mixture of nitrogen and O_2. Use CO calibration gases with labeled concentration values certified by the manufacturer to be within ± 5 percent of the label value. Dry ambient air (20.9 percent O_2) is acceptable for calibration of the O_2 cell. If needed, any lower percentage O_2 calibration gas must be a mixture of O_2 in nitrogen.

7.1.1 Up-Scale CO Calibration Gas Concentration. Choose one or more up-scale gas concentrations such that the average of the stack gas measurements for each stack gas sampling run are between 25 and 150 percent of those concentrations. Alternatively, choose an up-scale gas that does not exceed twice the concentration of the applicable outlet standard. If a measured gas value exceeds 150 percent of the up-scale CO calibration gas value at any time during the stack gas sampling run, the run must be discarded and repeated.

7.1.2 Up-Scale O_2 Calibration Gas Concentration.

Select an O_2 gas concentration such that the difference between the gas concentration and the average stack gas measurement or reading for each sample run is less than 15 percent O_2. When the average exhaust gas O_2 readings are above 6 percent, you may use dry ambient air (20.9 percent O_2) for the up-scale O_2 calibration gas.

7.1.3 Zero Gas. Use an inert gas that contains less than 0.25 percent of the up-scale CO calibration gas concentration. You may use dry air that is free from ambient CO and other combustion gas products (e.g., CO_2).

8.0 Sample Collection and Analysis

8.1 Selection of Sampling Sites.

8.1.1 Control Device Inlet. Select a sampling site sufficiently downstream of the engine so that the combustion gases should be well mixed. Use a single sampling extraction point near the center of the duct (e.g., within the 10 percent centroidal area), unless instructed otherwise.

8.1.2 Exhaust Gas Outlet. Select a sampling site located at least two stack diameters downstream of any disturbance (e.g., turbocharger exhaust, crossover junction or recirculation take-off) and at least one-half stack diameter upstream of the gas discharge to the atmosphere. Use a single sampling extraction point near the center of the duct (e.g., within the 10 percent centroidal area), unless instructed otherwise.

8.2 Stack Gas Collection and Analysis. Prior to the first stack gas sampling run, conduct that the pre-sampling calibration in accordance with Section 10.1. Use Figure 1 to record all data. Zero the analyzer with zero gas. Confirm and record that the scrubber media color is correct and not exhausted. Then position the probe at the sampling point and begin the sampling run at the same flow rate used during the up-scale calibration. Record the start time. Record all EC cell output responses and the flow rate during the ''sample conditioning phase'' once per minute until constant readings are obtained. Then begin the ''measurement data phase'' and record readings every 15 seconds for at least two minutes (or eight readings), or as otherwise required to achieve two continuous minutes of data that meet the specification given in Section 13.1. Finally, perform the ''refresh phase'' by introducing dry air, free from CO and other combustion gases, until several minute-to-minute readings of consistent value have been obtained. For each run use the ''measurement data phase'' readings to calculate the average stack gas CO and O_2 concentrations.

8.3 EC Cell Rate. Maintain the EC cell sample flow rate so that it does not vary by more than ± 10 percent throughout the pre-sampling calibration, stack gas sampling and post-sampling calibration check. Alternatively, the EC cell sample flow rate can be maintained within a tolerance range that does not affect the gas concentration readings by more than ± 3 percent, as instructed by the EC cell manufacturer.

9.0 Quality Control (Reserved)

10.0 Calibration and Standardization

10.1 Pre-Sampling Calibration. Conduct the following protocol once for each nominal range to be used on each EC cell before performing a stack gas sampling run on each field sampling day. Repeat the calibration if you replace an EC cell before completing all of the sampling runs. There is no prescribed order for calibration of the EC cells; however, each cell must complete the measurement data phase during calibration. Assemble the measurement system by following the manufacturer's recommended protocols including for preparing and preconditioning the EC cell. Assure the measurement system has no leaks and verify the gas scrubbing agent is not depleted. Use Figure 1 to record all data.

10.1.1 Zero Calibration. For both the O_2 and CO cells, introduce zero gas to the measurement system (e.g., at the calibration assembly) and record the concentration reading every minute until readings are constant for at least two consecutive minutes. Include the time and sample flow rate. Repeat the steps in this section at least once to verify the zero calibration for each component gas.

10.1.2 Zero Calibration Tolerance. For each zero gas introduction, the zero level output must be less than or equal to ± 3 percent of the up-scale gas value or ± 1 ppm, whichever is less restrictive, for the CO channel and less than or equal to ± 0.3 percent O_2 for the O_2 channel.

10.1.3 Up-Scale Calibration. Individually introduce each calibration gas to the measurement system (e.g., at the calibration assembly) and record the start time. Record all EC cell output responses and the flow rate during this ''sample conditioning phase'' once per minute until readings are constant for at least two minutes. Then begin the ''measurement data phase'' and record readings every 15 seconds for a total of two minutes, or as otherwise required. Finally, perform the ''refresh phase'' by introducing dry air, free from CO and other combustion gases, until readings are constant for at least two consecutive minutes. Then repeat the steps in this section at least once to verify the calibration for each component gas. Introduce all gases to flow through the entire sample handling system (i.e., at the exit end of the sampling probe or the calibration assembly).

10.1.4 Up-Scale Calibration Error. The mean of the difference of the ''measurement data phase'' readings from the reported standard gas value must be less than or equal to ± 5 percent or ± 1 ppm for CO or ± 0.5 percent O_2, whichever is less restrictive, respectively. The maximum allowable deviation from the mean measured value of any single ''measurement data phase'' reading must be less than or equal to ± 2 percent or ± 1 ppm for CO or ± 0.5 percent O_2, whichever is less restrictive, respectively.

10.2 Post-Sampling Calibration Check. Conduct a stack gas post-sampling calibration check after the stack gas sampling run or set of runs and within 12 hours of the initial calibration. Conduct up-scale and zero calibration checks using the protocol in Section 10.1. Make no changes to the sampling system or EC cell calibration until all post-sampling calibration checks have been recorded. If either the zero or up-scale calibration error exceeds the respective specification in Sections 10.1.2 and 10.1.4 then all measurement data collected since the previous successful calibrations are invalid and re-calibration and re-sampling are required. If the sampling system is disassembled or the EC cell calibration is adjusted, repeat the calibration check before conducting the next analyzer sampling run.

11.0 Analytical Procedure

The analytical procedure is fully discussed in Section 8.

12.0 Calculations and Data Analysis

Determine the CO and O_2 concentrations for each stack gas sampling run by calculating the mean gas concentrations of the data recorded during the ''measurement data phase''.

13.0 Protocol Performance

Use the following protocols to verify consistent analyzer performance during each field sampling day.

13.1 Measurement Data Phase Performance Check. Calculate the mean of the readings from the ''measurement data phase''. The maximum allowable deviation from the mean for each of the individual readings is ± 2 percent, or ± 1 ppm, whichever is less restrictive. Record the mean value and maximum deviation for each gas monitored. Data must conform to Section 10.1.4. The EC cell flow rate must conform to the specification in Section 8.3.

Example: A measurement data phase is invalid if the maximum deviation of any single reading comprising that mean is greater than ± 2 percent *or ± 1 ppm (the default criteria). For example, if the mean = 30 ppm, single readings of below 29 ppm and above 31 ppm are disallowed*).

13.2 Interference Check. Before the initial use of the EC cell and interference gas scrubber in the field, and semi-annually thereafter, challenge the interference gas scrubber with NO and NO_2 gas standards that are generally recognized as representative of diesel-fueled engine NO and NO_2 emission values. Record the responses displayed by the CO EC cell and other pertinent data on Figure 1 or a similar form.

13.2.1 Interference Response. The combined NO and NO_2 interference response should be less than or equal to ± 5 percent of the up-scale CO calibration gas concentration.

13.3 Repeatability Check. Conduct the following check once for each nominal range that is to be used on the CO EC cell within 5 days prior to each field sampling program. If a field sampling program lasts longer than 5 days, repeat this check every 5 days. Immediately repeat the check if the EC cell is replaced or if the EC cell is exposed to gas concentrations greater than 150 percent of the highest up-scale gas concentration.

13.3.1 Repeatability Check Procedure. Perform a complete EC cell sampling run (all three phases) by introducing the CO calibration gas to the measurement system and record the response. Follow Section 10.1.3. Use Figure 1 to record all data. Repeat the run three times for a total of four complete runs. During the four repeatability check runs, do not adjust the system except where necessary to achieve the correct calibration gas flow rate at the analyzer.

13.3.2 Repeatability Check Calculations. Determine the highest and lowest average ''measurement data phase'' CO concentrations from the four repeatability check runs and record the results on Figure 1 or a similar form. The absolute value of the difference between the maximum and minimum average values recorded must not vary more than ± 3 percent or ± 1 ppm of the up-scale gas value, whichever is less restrictive.

14.0 Pollution Prevention (Reserved)

15.0 Waste Management (Reserved)

16.0 Alternative Procedures (Reserved)

17.0 References

(1) ''Development of an Electrochemical Cell Emission Analyzer Test Protocol'', Topical Report, Phil Juneau, Emission Monitoring, Inc., July 1997.

(2) ''Determination of Nitrogen Oxides, Carbon Monoxide, and Oxygen Emissions from Natural Gas-Fired Engines, Boilers, and Process Heaters Using Portable Analyzers'', EMC Conditional Test Protocol 30 (CTM–30), Gas Research Institute Protocol GRI–96/0008, Revision 7, October 13, 1997.

(3) ''ICAC Test Protocol for Periodic Monitoring'', EMC Conditional Test Protocol 34 (CTM–034), The Institute of Clean Air Companies, September 8, 1999.

(4) ''Code of Federal Regulations'', Protection of Environment, 40 CFR, Part 60, Appendix A, Methods 1–4; 10.

TABLE 1: APPENDIX A—SAMPLING RUN DATA.

Facility__________ Engine I.D.__________ Date________

Run Type: .... (__) Pre-Sample Calibration (__) Stack Gas Sample (__) Post-Sample Cal. Check (__) Repeatability Check

(X) ....

Run # .... Gas	1 O_2	1 CO	2 O_2	2 CO	3 O_2	3 CO	4 O_2	4 CO	Time	Scrub. OK	Flow- Rate
									....	....	....
....	....	....	....	....	....	....	....	....	....	....	....
Sample Cond. Phase	....	....	....	....	....	....	....	....	....	....	....
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H.R. 41/P.L. 113–1

To temporarily increase the borrowing authority of the Federal Emergency Management Agency for carrying out the National Flood Insurance Program. (Jan. 6, 2013; 127 Stat. 3)

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